TOWARDS EFFECTIVE COMMISSIONS OF INQUIRY IN KENYA:

A REVIEW OF THE COMMISSIONS OF INQUIRY ACT IN LIGHT OF THE CONSTITUTION OF KENYA 2010

UNIVERSITY OF NAIROBI

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A Research Project submitted to the University of Nairobi Law School in partial fulfilment of the requirements for the Master of Laws (LL.M) Degree Program.

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DECLARATION

I, **KAGURU JOSEPH MACHARIA**, declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of a diploma, degree or post-graduate qualifications.

Signature…… Date…….

KAGURU JOSEPH MACHARIA

This project has been presented for examination with my authority as the university supervisor.

DR. NKATHA KABIRA

Signature…… Date…….

DEDICATION

I dedicate this work to my mother; a soft-spoken woman with excellent persuasion skills. From her, I have learnt how to listen, argue calmly, assertively and above all to win fairly. It has always worked in this profession except that I am often mistaken for being timid.

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Finally, should anyone open an inquiry into revealing the many other forces behind this work, I admit in advance that for want of space, I have named only a few. In the end, any error in this work is all mine, the above-mentioned persons did their part.

LIST OF CASES

Biwott Kiprono v *In the Matter of the Report by the Judicial Commission of Inquiry into Tribal Clashes in Kenya* [2002] eKLR

Canada (Attorney General) v *Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440, 151 D.L.R

Eric Cheruiyot Kotut v *S.E.O. Bosire & 2 Others* [2008] eKLR

In the Matter of an Application by David Wright for Judicial Review of a Decision of the Secretary of State for Northern Ireland [2006] NIQB 90

In the matter of the report by Judicial Commission of Inquiry into Tribunal Clashes in Kenya H. C. Misc. Appl No. 1269 of 2002

Independent Electoral and Boundaries Commission (IEBC) v *National Super Alliance (NASA) Kenya* & 6 others [2017] eKLR

Jacqueline Okuta & another v *Attorney General & 2 others* [2017] eKLR

James Gacheru Kariuki & 22 others v *Kiambu County Assembly & 3 others* [2017]

John Jackson Mwalulu & 8 others v *Judicial Commission of Inquiry into the Goldenberg Affairs & 3 Others* **[**2004] eKLR

Johnson Evan Gicheru v *Andrew Morton & another* [2005] eKLR

Joyce Nelly Ochogo Okal vs *Attorney General & 2 others* [2013] eKLR

Kennedy v The Charity Commission [2014] UKSC 20

Keyu and others v *Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69

Minister of Police & 6 Others v *Premier of Western Cape & 8 Others* CCT 13/13 [2013] ZACC 33

Moraa Gesicho v *Attorney General* [2012] eKLR

Mureithi v *Attorney General& 4 others* KLR (E & L) 707

R v *Attorney General ex -parte BW* 1 [2002] 1 KLR 668

Raila Odinga & 5 *Others* v *Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR

Republic v *Attorney-General Ex Parte Biwott Kiprono* [2002] eKLR

Republic v *County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR

Republic v J*udicial Commission of Inquiry into The Goldenberg Affair & 2 Others Ex-Parte George Saitoti* [2006] eKLR

Republic v *Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah* [2015] eKLR

Republic v *Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-Parte George Saitoti* [2006] eKLR

Speaker of the Senate & another v *Attorney-General & 4 others* [2013] eKLR

Stephen Mwai Gachiengo & another v *Republic* [2000] eKLR

The Queen v *Secretary of State for the Home Department* [2014] EWHC 194

Wilfred Karuga Koinange vs *Commission of Inquiry into Golden Berg Commission* [2006] eKLR

LIST OF STATUTES

Commissions of Inquiry Act Chapter 102 Laws of Kenya

Commissions of Inquiry Ordinance No. 28 of 1912

County Government Act, No. 17 of 2012

Crown Lands (Amendment) Ordinance, No. 23 of 1938

Fair Administrative Action Act, No. 4 of 2015

Inquiries Act 2005 Chapter 12, Laws of United Kingdom

Inquiries Act, R.S.C. 1985, Laws of Canada

Law Reform Act Chapter 26 Laws of Kenya

Leadership and Integrity Act, No. 19 of 2012

Local Government (Municipalities) Ordinance No. 16 of 1928

National Services Coroners Act No. 18 of 2017

Native Lands Trust (Amendment) Ordinance, No. 23 of 1934

Native Lands Trust Ordinance, No. 24 1938

Penal Code Chapter 63 Laws of Kenya

Public Inquiries Act, S.O. 2009 Laws of Canada

Public Officer Ethics Act, 2003

Revised Edition of Laws, 1921, No 30 of 192

The Statute Law (Miscellaneous Amendments) Act 1966 No. 21 of 1966

Tribunals of Inquiry (Evidence) Act 1921

INTERNATIONAL TREATIES

African Charter on Human and People's Right, 1982 Treaty No. 26363

East Africa Community Treaty, EAC XIV 1999

International Covenant on Civil and Political Rights, 1966 Treaty No. 14668

International Convention on Economic, Social and Cultural Rights Treaty No. 14531

Universal Declaration of Human Rights, 217A (III) 1948, UN General Assembly

LIST OF ABBREVIATIONS

AfriCOG	Africa Centre for Open Governance
BBC	British Broadcasting Corporation
CBK	Central Bank of Kenya
CIs	Commissions of Inquiry
CKRC	Constitution of Kenya Review Commission
ICCPR	International Covenant on Civil and Political Rights, 1966 Treaty No.14668
ICESCR	International Convention on Economic, Social and Cultural Rights, 1966 Treaty No. 14531
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KNHRC	Kenya National Human Rights Commission
LegCo	Legislative Council
NARC	National Rainbow Coalition
ODM	Orange Democratic Movement
PNU	Party of National Unity
SDGs	Sustainable Development Goals
ToRs-	Terms of Reference

UN	United Nations
UDHR	Universal Declaration of Human Rights 217A (III) 1948, UN General Assembly

ABSTRACT

Although the Constitution of Kenya 2010 ("Constitution") sought to overhaul the governance structures in Kenya, the Commissions of Inquiry Act, 1962 has remained unreviewed reflecting the old constitutional order and greatly contradicting the spirit and letter of the Constitution. This creates a challenge to the utilisation of inquiries in Kenya. The primary objective of this research is to examine the incongruencies between the Commissions of Inquiries Act and the Constitution aiming at providing recommendations for review of the Act to align it to the Constitution and in the review process adopt best practices on the structuring of CIs from the United Kingdom.

The study argues that the Commissions of Inquiry Act is inconsistent with constitutional provisions on devolution, public participation, independent commissions and offices, national values and principles, affirmative action and leadership and integrity principles. It also argues that Kenya can learn several lessons from the United Kingdom's inquiry as it contains provisions that allow the use of inquiries in devolved units, guarantee objective and independent inquiries with significant accountability and transparency mechanisms. The study demonstrates these arguments by utilizing historical, comparative and doctrinal research methodologies.

This study reveals that the Commissions of Inquiry Act contradicts the constitutional provisions on devolution, independence of constitutional commissions and independent offices, national values, and principles of governance and leadership and integrity provisions. It also demonstrates that Kenya can learn from the UK system of the structuring of inquiries including devolution, independence of the inquiries, purposeful formation and accountability and transparency mechanisms. The study concludes that there is a need to rethink, review and ultimately align the Act with the Constitution; fill the loopholes previously misused and in the end make CIs true institutions of accountability and transparency

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CHAPTER ONE: INTRODUCTION

1.0 Introduction

The promulgation of the Constitution of Kenya, 2010 on 28th August 2010 marked the end of one of the longest journey in Kenya's history[1] ushering in a new political, economic and social dispensation and rebirth of Second Republic.[2] The Constitution radically restructured governance structures and introduced ethos, values and contains arguably, one of the most comprehensive Bills of Rights.[3] It establishes a people-centered, open, accountable and transparent mode of governance.[4] Undoubtedly, all actions, laws, and policies must be redirected towards this new direction.

The Constitution asserts its supremacy over any other law, subjecting all rules, policies and actions to its dictates and declares inconsistent laws null and void.[5] Importantly, it contains a comprehensive preamble, national values and principles transcending across valleys, laws and policies, capturing the people's aspirations and requires any law to fulfil these aspirations.[6]

The Constitution requires a review of laws to align them with the constitutional provisions. Consequently, legislations in post-2010 have largely reflected the constitutional aspirations and

[1]Sihanya, Bernard, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' [2012] Nairobi: Friedrich-Ebert-Stiftung

[2]ibid 1

[3]Muthu H.M, 'Kenya's Bill of Rights and its Implications on Kenya's Ability to Apply the International Bill of Rights' (MA thesis, University of Nairobi 2013)

[4]This framework may be contrasted with the old constitutional dispensation that lacked proper public participation, strong accountability and transparency provisions and mechanisms. Scholars, for instance, Mbitha Mwenza attribute this state to the imperial presidency, see Ezekiel M. Mwenzwa, 'Transparency and Accountability in Kenya: A Review of the Institutional Framework for Public Service Delivery' (2015) <https://karuspace.karu.ac.ke/bitstream/handle/20.500.12092/1909/transparency%20and%20accountability%20in%20kenya%20a%20review%20of%20the%20institutional%20framework%20for%20public%20service%20delivery.pdf?sequence=1&isallowed=y> accessed 28 August 2018

[5]Constitution of Kenya, 2010 Ar. 2

[6]Ibid Ar. 10, see also the rationale for the principles and preamble in the Constitution of Kenya Review Commission (CKRC) Report, 2005 page 85

courts have been instrumental in ensuring that laws adhere to the Constitution.[7] However, a number of laws continue to reflect the pre-2010 dispensation. Their implementation impedes the achievement of constitutional values and principles.

One such law is the Commissions of Inquiry Act. Anchored on article 10, inquiries are aimed at achieving accountability, transparency and integrity in governance and remains important tools of investigation and policymaking.[8] Unfortunately, the Act is incomprehensive, fundamentally inconsistent with the Constitution and as framed cannot guarantee achievement of real intentions of inquiries as accountability and transparency tools.

The cardinal aim of forming CIs is to quench the thirst for accountability, transparency and good governance in general on the part of the government.[9] However, governments may employ them for political expediencies, legitimacy seeking and shelving of "hot potatoes"[10] including in Kenya.[11] Roderick observes that governments in such circumstances act in the pretence of their commitment to solving the mysteries for which the Commissions of Inquiry (CIs) investigates.[12] However, as Chiloba notes they may be well-choreographed schemes to postpone the problems

[7]Ben Sihanya, 'The role of the Judiciary in the accountability and governance of the devolved Government structure' (Presentation to the Institute of Certified Public Accountants of Kenya (ICPAK) 20th Economic Symposium at the Hilton Hotel, Nairobi, 2012)
[8]*Moraa Gesicho* v *Attorney General [2012] eKLR*
[9] Gomery, J.H., 'The Pros and Cons of Commissions of Inquiry'(2005) 51 McGill LJ, 783
[10]Jacktone Ambuka, 'I Oppose Commission of Inquiry into Westgate Massacre' *Diaspora Messenger* (Nairobi, 2 October 2013) <http://diasporamessenger.com/2013/10/i-oppose-commission-of-inquiry-into-westgate-massacre/> accessed on 20 February 2018, Roderick Macleod, 'Parking a hot potato: Are commissions of inquiry (in) effective?' *ENCA* (Capetown 16 August 2013) <http://www.enca.com/opinion/parking-hot-potato-are-commissions-inquiry-ineffective> accessed 4 December 2017; Joshua Toulmin Smith, *'Government by Commissions Illegal and Pernicious: The Nature and Effects of All Commissions of Inquiry and Other Crown-appointed Commissions. The Constitutional Principles of Taxation; and the Rights, Duties, and Importance of Local Self-government* (1st Edn, London, S. Sweet, 1849)
[11]Mbote, Patricia Kameri, and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa 2011)
[12]Roderick Alexander Macdonald, 'An Analysis of the Forms and Functions of Independent Commissions of Inquiry (Royal Commission) in Canada' (2011) McGill Faculty of Law Montreal, Quebec July 1

while at the same time "seemingly doing something".[13] On the same note, critics question the timing of their commissioning some reading political witch-hunt.[14] In Kenya, implementations of recommendations of such commissions are rare, and largely no means of holding the executive accountable for their implementation exist.[15]

CIs do not inspire confidence amongst the majority of the Kenyan public.[16] For instance, after the Westgate attack, an urban shopping mall in Kenya's capital that left sixty-seven people dead,[17] President Kenyatta in a press briefing announced that he would form a CI to investigate the lapse in security response.[18] Reacting to the announcement, several opinion writers expressed their misgivings about the proposed CI.[19] Undoubtedly, this mistrust of CIs is not unfounded. Past experiences with CIs have led to more disgruntlement than solutions.[20]

Unlike the first three post-independence governments, the fourth post-independence government, six years since reigning into power, has shied away from the utilisation of Commissions of

[13]Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008)
[14]ibid p.30
[15]Kenya National Human Rights Commission(KNHRC), 'Lest We Forget: The faces of Impunity in Kenya' (2011) Kenya Human Rights Commission 1
[16]Vuguvugu 'Commissions of Inquiry in Kenya is a waste of time' *Vuguvugu Online* (Nairobi 25 February, 2018) <https://www.vuguvuguonline.com/commission-inquiries-kenya-waste-public-resources/> accessed 29 August 2018
[17]New York City Police Department, Analysis of Al-Shabaab's Attack at the Westgate Mall in Nairobi, Kenya (New York Police Department November 1, 2013) http://allafrica.com/download/resource/main/main/idatcs/00071990:38c422c2c9053c64f0874e4f6d2c55c1.pdf accessed 24 February 2018
[18] Anon., 'Commission of inquiry that never was' *Daily Nation* (Nairobi 20 September 2014) <https://www.nation.co.ke/news/Commission-of-inquiry-that-never-was/1056-2460374-4rowhx/index.html> accessed July 31, 2018
[19]Ababu Namwamba, 'Westgate inquiry is a waste of time…everything is obvious'<https://www.standardmedia.co.ke/article/2000094979/westgate-inquiry-is-a-waste-of-time-everything-is-obvious> *Standard* (Nairobi 6 October 2013) accessed on 20 February 2018, Citizen TV 'Commission of inquiry into Westgate Attack'(2013) <https://www.youtube.com/watch?v=jmgkwwxzmg4&t=82s> accessed on 20 February 2018
[20]Pravin Bowry 'An inquiry into commissions of inquiry' *Standard Digital* (Nairobi, 13 January 2010) <https://www.standardmedia.co.ke/article/2000000823/an-inquiry-into-commissions-of-inquiry> accessed 24 February 2018

Inquiry (CIs) in Kenya.[21] Instead and curiously, Uhuru Kenyatta's Presidency love affair with taskforces has reached legendary levels with unmatched recommendations lying in shelves but with miniature implementation rate.[22] Additionally, Parliament has increasingly used its committees (with overwhelming political party loyalty) to investigate various issues but with little tangible outcome.[23] On the other hand, the relationship between constitutional commissions and the executive has been acrimonious with the later thwarting the former's operations and often displaying them as outsiders.[24] This greatly affects executive accountability and good governance.

Since the promulgation of the Constitution of Kenya, 2010 (the Constitution), only two CIs have been formed.[25] Calls for the formation of CIs[26] since 2013 have been vehemently opposed with opponents tabling a long, shameful list of CIs painting their ugly but an accurate history. But just when we thought CIs are dead, legislations in the recent past demonstrate their resilience and unwillingness to die. The County Government Act, for instance, refers to the use of the Commissions of Inquiry Act (the Act) in suspension of county governments[27] and in 2015;

[21]The first three post-independence governments led by Presidents Jomo Kenyatta, Moi and Kibaki had formed a total of 25 five commissions of inquiry. This commissions will be discussed in details in chapter two of this research

[22]For a clearer synthesis of the taskforces see Citizen Tv 'Questions Abound over Need for Special Task Forces' (2018) <https://www.youtube.com/watch?v=ntzb2u8qmcs> accessed 26 July 2018

[23]Parliamentary committees have largely been accused of playing party politics in the investigation of issues. For instance, in the recent contaminated sugar report, the Parliamentary Committee on Agriculture was accused of receiving bribes to shield powerful individuals in government

[24]Ben Sihanya, 'Constitutional Commissions in Kenya Experiences, Challenges, and Lessons' (Conference on State Implementation of the Constitution since 2010 Laico Regency, November 20, 2013)

[25]These two commissions of inquiry were established by President Mwai Kibaki between 2012 and 2013. These two are the Commission of Inquiry into the Accident involving Aircraft Registration 5Y-CDT Type AS 350 B3e was appointed on the 29th day of June 2012 by Gazette Notices No. 9043 and No. 9044 and Judicial Commission of Inquiry into the Ethnic Violence in Tana River, Tana North and Tana Delta Districts on 12th September 2012 vide Gazette notice 13554.

[26]Michael C., 'Form commission of inquiry into sugar saga, Mudavadi tells Uhuru' *Standard* (Nairobi 2018) <https://www.standardmedia.co.ke/article/2001285344/form-commission-of-inquiry-into-sugar-saga-mudavadi-tells-uhuru> accessed July 31, 2018; Ano. 'Ombudsman asks Uhuru to form a commission of inquiry to address extrajudicial killings' *Hivi Sasa* (Nairobi 2016) <https://hivisasa.com/posts/ombudsman-asks-uhuru-to-form-commission-of-inquiry-to-address-extrajudicial-killings> accessed July 31, 2018

[27] County Governments Act, No. 17 of 2012 s. 123

President Uhuru Kenyatta invoked the Act in the constitution of the Makueni County government Suspension Commission.[28] In 2017, a new dawn for inquests set in with the enactment of the National Coroners Service Act.[29] However, the CIs have once again defied extinction with coroner services under this Act being subject to the existence of CIs.

The history of CIs in Kenya is of untold horrors as will be demonstrated in chapter two. Their defiance from extinction sustained calls for their formation, the unrelenting opposition of their operation and their reluctance in formation points us to one direction: a need to relook at the legal framework, filing loopholes that have led to their misuse and aligning the legal structure to the new constitutional order. Just who knows, they might be a darling to coming governments, and if they were to operate in the current legal order, it would be ridiculous to expect much.

Against this background, this research investigates the incongruences between the Act and the Constitution by arguing that the inconsistencies present a challenge to CIs utilisation. Accordingly, there is a need to align the Act with the Constitution. To achieve this, the research gives a synthesis of the history of commissions seeking to characterise their effectiveness. To bring out the incongruences, the study using doctrinal research method analyses the legal, policy and institutional framework on commissions and contrasts it with the constitutional provisions. While remaining faithful to the constitutional provisions, the research comparatively studies the legal framework on inquiries in the UK which has registered significant success with inquiries aiming at learning lessons on how to structure and operate commissions to ensure they remain effective tools of governance.

[28]President Uhuru Kenyatta appointed the Commission of Inquiry into the Petition to Suspend Makueni County via Gazette Notice Number 1557 of 2015 pursuant to Article 192 of the Constitution
[29]National Services Coroners Act No. 18. of 2017 s 5(2)

This chapter contains the background to the problem, research questions, literature review, theoretical and conceptual framework, justification of the study and methodology applied in carrying out this study.

1.1Historical background

CIs operate in political scenes and hence their close relationship with political economy existing at their time of formation.[30] To understand and appreciate the motive, structure, operation and implementation of their recommendations in Kenya, a historical study of CIs alongside political economy in Kenya is inevitable. Additionally, the majority of CIs in Kenya operated in old constitutional order, and it's therefore important to see how the CIs reflected the constitutional dispensation in their operation. This will help us appreciate the changes the Constitution introduced and hence the need for a review of the Act. To achieve the objective, the research will comprehensively study the contextual and historical background history of CIs in Kenya in chapter two.

1.2 Problem statement

Although the Constitution of Kenya, 2010 sought to overhaul the governance structures in Kenya, the Commissions of Inquiry Act, 1962 has remained unreviewed reflecting the old constitutional order and greatly contradicting the spirit and letter of the Constitution. This creates a challenge to the utilisation of inquiries in Kenya. This study examines the incongruencies between the Commissions of Inquiries Act and the Constitution aiming at providing recommendations for review of the Act to align it to the Constitution and in the review process, adopt best practices on the structuring of CIs from the United Kingdom.

[30]Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008) p. 4

The inconsistencies examined by this study are four. Firstly, the Act empowers the President to appoint a commission to inquire into the conduct of any public body and public officer bringing within its ambits county governments and their officers. In the post-2010 regime, this would amount to the subordination of county governments. Secondly, The Act fails to provide for qualifications of commissioners when the Constitution spells out the minimum qualifications of public officers. Thirdly, the Act lacks accountability and transparency mechanisms in exercising of the power concentrated in the Presidency. The powers have been and are bound to be misused.

Fourth, the Act does not adhere to principles and values of governance under the Constitution such as equality and affirmative action. Cumulatively, these omissions and inconsistencies present a challenge on effective utilisation of CIs in Kenya in the post 2010 legal regime.

1.3 Justification

The Constitution overhauled and re-engineered systems of governance. However, the Act has remained unchanged and in various ways reflects the pre-2010 constitutional order hence contradicting the Constitution. There have not been substantial efforts to bring the Act into terms with the Constitution. Additionally, the continued resilience of CIs as evident in National Service Coroners Act points toward an urgent need to align the Act with the Constitution. This study makes significant recommendations to align the Act with the Constitution and to restructure CIs for effective inquiries in Kenya.

1.4 Objectives

The main objective of this study is to demonstrate the incongruences between the Act and the Constitution of Kenya, 2010 aiming at providing recommendations for review of the Act and in the review process, adopt best practices on the structuring of CIs from the United Kingdom.

To achieve this overall objective, the study seeks to situate various CIs in their contextual and historical background in Kenya. In this regard, chapter two discusses comprehensively various commissions, their shortfalls and the fate of their work. It also seeks to analyse the legal, institutional and policy framework governing CIs in Kenya by among other things substantively discussing the provisions of the Act as applied and interpreted by various court decisions. Additionally, the research aims at demonstrating how the provisions of the Act contradict the constitutional provisions both in spirit and letter. Moreover, the study targets to bring out the lessons that Kenya could learn from the UK in reviewing her CIs legal framework to achieve the constitutional provisions on good governance. Finally, based on the outcome of the preceding objectives, the study aims at offering recommendations on aligning the Act with the Constitution and how to achieve effective CIs framework in Kenya within the constitutional four corners.

1.5 Research Questions

a) What is the genesis, historical and contextual background of CIs in Kenya?

b) What is the legal, institutional and policy framework governing CIs and how has the framework been applied and interpreted by courts in Kenya?

c) How and to what extent has the Commissions of Inquiry Act derogated from the Constitution of Kenya, 2010?

d) What is the legal, institutional and policy framework governing inquiries in the United Kingdom and lessons that Kenya can learn on structuring of its legal framework governing CIs?

e) What recommendations can this research offer to align the Act with the Constitution and generally enhance the effectiveness of CIs in Kenya?

1.6 Hypotheses

This study hypothesises that although Commissions of Inquiry Act governs inquiries in Kenya; it greatly contradicts the Constitution and goes against the letter and the spirit of the Constitution. This is because:-

1. The Act empowers the President to appoint a commission to inquire into the conduct of any public body and public officer bringing within its ambits county governments and their officers. In the post-2010 regime, this would amount to the subordination of county governments.
2. The Act fails to provide for qualifications of commissioners while the Constitution spells out the minimum qualifications of public officers.
3. The Act concentrates the powers in the Presidency and lacks accountability mechanism to check the exercise of these powers under the Act contrary to the constitutional requirements.
4. The Act's structure offends the values and principles of governance.

The study also hypothesizes that UK's legal regime guarantees independence of inquiries, embodies accountability and transparency mechanism. This is because it elevates the position of the chair of inquiry and requires constant consultations by the appointing authorities with the chairperson of the inquiry on any action taken concerning inquiries. Additionally, the legal regime provides for publication of inquiries reports. Accordingly, there are several lessons Kenya can learn from UK in structuring its legal regime.

1.7 Theoretical Framework

This study relies on two main theories. Firstly, it uses the rational theory of institutions that helps argue that how an institution is structured invariably determines the outcome of such an institution. The manner in which the Act structures CIs in Kenya has a loophole that has often seen interference of CIs shackling them from achieving good governance principles such as accountability and transparency per the constitutional provisions.

Secondly, the research uses the critical legal studies theory. This theory calls for deconstruction, debunking and critical analysis of law to reveal the inconsistencies, power-ridden structures and political connotations of the law. Using this approach, the research critically examines the legal, institutional and policy framework of CIs unearthing the power hidden and political structures advancing the argument for reform of the law to dismantle these structures by aligning the Act with the Constitution.

1.7.0 Rational Theory of Institutions

The Rational theory of institutions by proponents such as Gary Becker, Kathleen Thelen, and Mancur Olson argues that the policy-making of an institution consists of related incidences whose members must decide on when considering various issues.[31] Members of an institution have preferences and interests to protect which might differ (and often they do) with that of the organisation.[32] Any decision by any member consists of rational actions given by the actors' environment including the principal appointees, politics, professional conduct, expectations and other predetermined rules. The designer of an institutional structure can predetermine the

[31]Peter A. and Rosemary T., 'Political Science and the Three New Institutionalisms' (1996) XLIV Political Studies, 936

[32]Calvert, R.L., 'The Rational Choice Theory of Institutions: Implications for Design' [1995] *43* Institutional design, 63

outcome through the setup rules.[33] The designer can, therefore, increase the payoffs and transactional costs of possible behaviours of the actors.[34]

Amos Tversky and Daniel Kahneman criticise this theory for oversimplification and abstraction.[35] They opine that in using deductive reasoning to explain the outcome of the practical world issues is an oversimplification of human motivation and interaction.

This theory is particularly critical in this work in arguing that the structural foundation and the design of the CIs from the appointment, selection of commissioners, termination and financing are almost determinative of the actions or behaviours of the commissioners. The Act lacks independence provisions on the commission. This structure easily determines the outcome of exonerating figures close to their survival. We, therefore, need to seal these loopholes by having a strong structural foundation of the CIs.

1.7.1 Critical Legal Studies

Successor of the American realism, the Critical Legal Studies (CLS) movement aims at debunking, deconstructing, delegitimizing and trashing the assumed neutrality, determinacy and objectivity of the law through legal formalism and legal reasoning.[36] Led by Duncan Kennedy, they reject the liberal thinking opining that law is a conflict ridden-structure which outwardly conceals the political considerations and powers structures.[37] The movement further demystifies the rationality and coherence, and instead, they see the law as contingent, arbitrary and profoundly unjust. In law, they see social and man realities that manifest themselves in legal

[33] Ibid p. 68
[34]Ostrom, E., 'A behavioural approach to the rational choice theory of collective action: Presidential address, American Political Science Association, 1997' (1998) *92*(1) American political science review, 1
[35]Kahneman, D. and Tversky, A., 'Prospect theory: An analysis of Declion under risk' (1979) Vol. 47, No. 2. Econometrica, 263
[36]A. Thomson, 'Critical approaches to law: who needs legal theory?', in I. Grigg-Spall, and E Ireland (eds) The Critical Lawyers' Handbook (London: Pluto Press, 1992)
[37]Oetken, J. Paul. "Form and Substance in Critical Legal Studies" (1991) 100, no. 7 The Yale Law Journal 2209

discourses. In the application of the law, people apply it in the context of their ethical values and ideals.

On formalism, they contend that it's ridiculous to believe that decisions follow principles and procedures absent economic and political contexts, social values and goals.[38] As such, they destroy the simple deductive reasoning of laws couched by formalism and advise that law must be seen in larger political actions. Robert Unger, a respected intellectual pioneer of the movement, opines that to dismantle the hierarchical power structure hidden in the law, it must be revolutionised to address the power of hidden structures.[39]

To address the legal inadequacies with formalism, Unger suggests the entrenchment of "certain underlying theoretical approaches'. The approaches allow a wide range of issues to be considered yet remaining to the guiding synthesis. In his deviationist doctrine,[40] Unger postulates that everything is up for grab. He points out that using this expanded view, one can take an ideal from an area it has taken root to areas previously excluded.

Further, he argues that using this theory, one can transform society through an institutional programme that contains transformations on social relations, empowered democracy, restrain for government and recognition of new rights. CLS has not gone without criticism. First, they lack an interdisciplinary thrust, and the writings are separated from everyday life.[41]

This research heavily borrows from this movement in arguing that the legal framework on CIs is seemingly neutral and objective but hides in it power structures, indeterminacies and allows the

[38]D. Kennedy, *"Cost-reduction theory as legitimation"* (1981) 90 Yale LJ 1275
[39] Unger, R. Mangabeira "The Critical Legal Studies Movement" (1983) 96, no 3 Harvard Law Review 561
[40]Unger, Roberto Mangabeira. "The Critical Legal Studies Movement" (1983) 96, no. 3 Harvard Law Review 561
[41]Milovanovic Dragan, 'Review Essay: Critical Legal Studies and the Assault on the Bastion' (1988) no. 1 (31) 15 Social Justice 161

use of personal whims. As such, the outcomes must be understood in this context. Further, in adopting Unger's view, there is a need to set underlying philosophies about CIs so that any action is measured against the directive principles.

1.8 Conceptual Framework

1.8.0 Governance and good governance

World Bank defines governance as the mode of exercise of power in the management of a state's economic and social resources.[42] In exercise of this power, the political regime, the process of exercising authority and capacity of the governor to couch, implement and discharge functions remains the three critical aspects of governance.[43] Given that in many democracies power belongs to the people, whatever governance structure a country adopts, the interests of the people are of utmost paramount. The balancing of the various competing people's interests is at the heart of governance.[44]

In the delegation of power, however, the citizens do not deprive themselves of power. As such, citizens and government interact at all levels. The government in protecting people's interests must consult them. Due to this trust-delegated power scenario, there requires attributes which the governor must adhere to keep in line with people's aspirations while exercising the delegated authority. The presence of values and attributes in governance ensures that there is a proper

[42]Graham, John, Timothy Wynne Plumptre, and Bruce Amos, *Principles for good governance in the 21st Century* (Ottawa: Institute on governance, 2003)
[43]Ibid p. 34
[44]J. Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' (LL.M, University of Nairobi, 2015)

exercise of power.[45] A government that adheres to such values is a good government, and it exercises good governance.

The Constitution of Kenya bestows sovereign power on the people which may be exercised directly or indirectly.[46] Indirectly, the power is delegated to legislature both at the county and national level, the executive both at the county and national level and the Judiciary. The Constitution divides the functions between the national and county governments with respect to executive and legislative functions but retains the Judiciary in the national government. However, through public participation, the Constitution envisages continuous consultations between the public and governors.

Good governance as a concept hasn't received a consensus definition. However, scholars generally agree that it is a normative formulation of fundamental principles that guide governance.[47] As the definition is not settled, different institutions, particularly international organisations, enumerate indicators of good governance. Among these principles are the rule of law, transparency, accountability, predictability, responsiveness, equity and efficiency. Governance devoid of these principles is termed as bad governance.

The Constitution of Kenya enumerates good governance as an underlying principle of governance.[48] In this regard, the Constitution calls for accountability and transparency, rule of law, inclusiveness and public participation. The Constitution obligates all persons to promote good governance and puts mechanism to ensure the achievement of different elements of good

[45]Clauser Monica *et al*. (eds), *Good Governance in Multiethnic Communities: Conditions, instruments, best practices, ways to achieve and measure good governance at the local level* (Ethnocultural Diversity Resource Center and the King Baudouin Foundation 2007)
[46]Constitution of Kenya,2010 Ar. 1
[47]Kirya, Monica T, 'Performing "good governance: commissions of inquiry and the fight against corruption in Uganda' (PhD thesis, University of Warwick 2011)
[48]Constitution of Kenya,2010 Ar. 1

governance. Such provisions include right to information petitions, impeachment and right to recall processes among others. [49]

For purposes of this study, governance is the exercise of public power by government in political, social and economic affairs at all levels of government. Further good governance is understood as governance that adheres to accountability, transparency, responsiveness among others within the broader constitutional context.

1.8.1 Accountability and Transparency as principles of good governance

Accountability refers to taking responsibility for one's actions, policies, decisions and implementation.[50] Locke opines that when there is a transfer of power from the citizen to the government, accountability remains the most important virtue.[51] Bentham perhaps offers the best rationale for accountability by stating that people are better behaved when watched.[52] Accountability as such attracts agency relationship, assigned responsibilities, an institution to account to and the right for the agent to give the rationale for his actions and the principal to sanction unaccounted responsibility. Accountability therefore in governance ensures that the governors exercise power responsibly, justifiably and in the interest of the people.

Despite the recognised importance of transparency in governance, there is no settled definition. However this research adopts a comprehensive definition by Monika Bauhr and Marcia Grimes as the "availability of, and feasibility for actors both internal and external to state operations to

[49]Ibid Ar. 34, 37, 104,119
[50]Supra n 45 p. 40
[51]Lindberg I. Staffan 'Accountability: the core concept and its subtypes' (2009) Africa Power and Politics Programme Working Paper 1
[52]Ibid p.39

access and disseminate information relevant to evaluating institutions, both in terms of rules, operations as well as outcomes."[53]

Accountability and transparency are among the principles and values of governance under the Constitution.[54] The Constitution requires all persons to adhere to these principles while exercising power. The Constitution also puts in mechanisms to ensure accountability and transparency through right to access to information, separation of powers, checks and balances and creation of strong independent institutions to check the exercise of powers delegated to each other.[55]

For purposes of this research accountability means the justification and taking of responsibility of governor actions. To achieve accountability, this research defines accountability to include presence of accountability mechanisms such as public involvement and ability of institutions to question the decision of governors. This research also takes transparency to involve openness in governance. Accordingly access to accurate, relevant and timely information is important to achieving transparency.

1.8.2 Commissions of Inquiry as tools of accountability and governance

CIs are official ad hoc institutions established by the government to make inquiries and advice on any matter of general public interest.[56] Although the primordial and prepotent

[53]Bauhr, Monika, and Marcia Grimes. "What is government transparency?" (2012) 16 *QoG Working Paper Series* 16
[54]Constitution Ar. 10
[55]Ibid Ar. 96,169, 248
[56]Rowe, M and McAllister, L. 'The Role of Commissions of Commissions of Inquiry in the Policy Process' (2006) 21(4) Public Policy and Administration 99

conceptualisation of CIs was and remains executive appointed agencies, the contemporary understanding subsumes judicial inquiries, independent commission,[57] and royal commissions.[58]

A CI is commissioned in the wake of public dreads, scepticism, adversities or disgruntlement about critical national issues whose circumstances of occurrence are mysterious.[59] These commissions are "ventures into the unknown" [60] and parturitate information from their fact-finding missions which certitudes are utilised to chart future policy paths and remedial statutes or actions.[61] To uncover the truths, governments commission CIs with wide-ranging investigatory powers[62] on their terms of reference (ToRs).[63] The CIs usually determine what materials, people and which sites to gather evidence from or who to appear before them.[64] Notably, CIs are inquisitive in nature as opposed to the adversarial system in the carrying out of their mandate.[65] The inquisitorial nature of the proceedings advantages their work over the inherent contradictions and limitations of the adversarial system.[66]

[57]However, in the Kenyan context, the Constitution of Kenya, 2010 in Chapter 15 establishes independent commissions. In this regard, independent commissions are not commissions of inquiry

[58]Ashforth, A., 'Reckoning schemes of legitimation: On Commissions of Inquiry as Power/Knowledge Forms' (1990) 3(1) Journal of Historical Sociology 1

[59]*Minister of Police & 6 Others v Premier of Western Cape & 8 Others* CCT 13/13 [2013] ZACC 33, Canada, *(Attorney General)* v *Canada (Commission of Inquiry on the Blood System)* [1997] 3 S.C.R. 440, 151 D.L. at para 29 [Blood System (SCC) cited to S.C.R]

[60]Marx and F.M, 'Commissions of Inquiry in Germany' (1936) 30(6) The American Political Science Review 1134

[61]Aucoin, Peter. 'Contributions of commissions of inquiry to policy analysis: An evaluation.' (1989) 197 Dalhousie LJ 12

[62]Sarkar, J.S., 'Commissions of Inquiry: Practice and Principle with up to Date Case Laws and Commentaries' [1990] APH Publishing

[63]William H. Moore, "Executive Commissions of Inquiry" (1913) Vol. 13, No. 6 Columbia Law Review, 500

[64]Inwood, Gregory J., and Carolyn M. Johns, (eds) *Commissions of inquiry and policy change: A comparative analysis* (University of Toronto Press, 2014)

[65]Government of Kenya, Judicial Commission of Inquiry into the Goldenberg Affair, (2005) <http://kenyalaw.org/kl/index.php?id=5697> accessed 4 December 2017

[66]Nagorcka, F., Stanton, M. and Wilson, M., 'Stranded between Partisanship and the Truth-A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 Melb. UL Rev.,448

It is a phenomenal step towards accountability and transparency that a government opens an inquiry to grill itself against misconduct of its officials. [67] It is equally extraordinary for the government to provide potentially blemish information about the government for examination by the CIs the outcome of which may delegitimise or diminish public confidence.[68] The commissioning of CIs usually after the mysterious conduct(s) provides a rare opportunity to interrogate the incongruences and conflicts between transparency, accountability, on the one hand, and political legitimacy and survival on the other hand.[69] With the culture of secrecy in most of the African countries and indeed world all over,[70] it requires an extraordinary government to form, support and embrace such commissions.

Although many institutions may be similar to CIs, this study limits its investigation to CIs in Kenya commissioned under the Act. Other institutions such as task forces, select or joint committees, Presidential commissions are not commissions for purposes of this research. In the UK, however, a general term for inquiries includes both statutory and non-statutory inquiries.

1.9 Literature Review

Having reviewed various sets of literature, this research broadly divides the literature into two main categories: Kenyan literature on commissions and international literature on commissions.

Kenyan scholars writing about commissions have focused on reviewing specific commissions as well as reviewing the legal framework of commissions in Kenya. For instance Chiloba and AfriCOG review the Bosire Commission while Mbote and Migai and KHRC review the legal

[67]Gomery, J.H., 'The Pros and Cons of Commissions of Inquiry' (2005) 51 McGill LJ, 783
[68] ibid p.786
[69]Sulitzeanu-Kenan, R, 'Reflection in the Shadow of Blame: When do Politicians Appoint Commissions of Inquiry?' (2010) 40(3) British Journal of Political Science 613
[70]Roberts, A., *Blacked Out: Government Secrecy in the Information Age* (1st edn Cambridge University Press 2006), Chvasta, Marcy R, 'A Culture of Secrecy: The Government Versus the People's Right to Know' (1999) No. 2 Rhetoric & Public Affairs 361

framework. In this respect the study reveals that there is a gap in so far as evaluating the CIs and the legal framework in light of the Constitution of Kenya 2010.

In the international setting, although the literature is generally insightful on various issues on inquiries, first being international, they don't consider the Constitution of Kenya, 2010 which this research does. Secondly, the literature does not discuss how to entrench inquiries in devolved systems which exists in Kenya. This research, therefore, studies the UK's inquiries framework which has a devolution framework.

1.9.0 Kenyan perspective

1.9.1Appraisal of specific CI in Kenya

Chiloba[71] flawlessly presents and offers evidence of misuse of the CIs for political expediency. The research explores some of the prerequisites for efficient working of commissions of inquiry including independence and impartiality of the commissioners.

Chiloba's work focuses on the effectiveness of policy-based commissions. Using the Bosire Commission of Inquiry[72], he develops and gauges the commission's work against the seven staged criterion of rationale, purpose, process, quality of findings, recommendations implementation and value addition.[73] The study was conducted in the pre-2010 era and lacks the post-2010 constitutional analysis.

[71]Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008)
[72]Government of Kenya, 'The Judicial Commission of Inquiry into the Goldenberg Affair' [2005] <http://kenyalaw.org/kl/index.php?id=5697> 4 December 2017 was headed by Justice Elikana Bosire hence named Bosire Commission.
[73]Supra n 71 p. 42

AfriCOG[74]scrutinises the report of the Bosire Commission. It observes that some tasks contained in the ToRs were unachievable. AfriCOG concludes that the CI did not deal comprehensively with ToRs due to their ambiguous drafting. Just like Chiloba's work, this work does not analyse the commission in the post-2010 constitutional dispensation.

1.9.2 Review of the Legal Framework

AfriCOG authoritatively presents a more specific case for reform of the CI's works in Kenya.[75] In its report, AfriCOG identifies the various accountability issues within the framework of the CIs law and does a comparative framework with Australia and England to propose the changes. It, for instance, suggests the involvement of the Parliament in the establishment of CI. Further, it recommends the ineligibility of the sitting judges as members of CIs.

In addition to the study not analysing the legal framework in light of the Constitution of Kenya, 2010 which is the primary entry point of this work, this research also recommends ways of ensuring there is a maximum implementation of the recommendations. Further, the England law that AfriCOG used in its comparative study has since been repealed and this research analyses the new legal framework.

The *Kenya Human Rights Commission* (the Commission) befittingly presents an abridgement of many CIs in Kenya.[76] The Commission enumerates failure to make CIs' reports known to the public or releasing the reports many years after the CIs complete their work. Further, the report observes that the commissions have been used for political expediency, political legitimacy-seeking, and postponement of government ills in the overly forgetful Kenyan society.

[74]Africa Centre for Open Governance (AfriCOG) 'All that glitters? An appraisal of the Goldenberg Report' (2011) AfriCOG
[75]Ibid p. 6
[76]Kenya National Human Rights Commission, 'Lest We Forget: The faces of Impunity in Kenya'(2011) Kenya Human Rights Commission

In addition to not considering the Constitution of Kenya, 2010, the work also limits itself to limited human rights violations. Importantly, the Commission offers recommendations that leave out the legal framework and surmise that the political goodwill is all the CIs require for efficacy and effectiveness.

Kameri Mbote and *Migai Akech*[77] observe that indeed the provisions of the Act are similar to many Commonwealth jurisdictions' legislation. Kenyan successive governments, they opine, have used the CIs for political expediency and their recommendations are rarely implemented. Further, the appointment of sitting judges draws them to political controversies. In passing, they make a recommendation that there is a need for the exclusion of sitting judges and enhancement of independence and accountability of the CIs. One critical argument made by these authors is that CIs should only be formed if the existing legal framework does not offer solutions to the incident. The research, however, does not consider the Constitution of Kenya, 2010 aspects such as devolution, leadership and integrity provisions, national values and principles.

1.9.2 International study Commissions of Inquiry

Sven Siefken [78] argues that greater parliamentary regulation has not necessarily led to a decrease in the commissions due to greater scrutiny. This research adopts this view in suggesting various checks to the executive in exercise of various powers in CIs and indeed devolves them to ministry levels in the spirit of devolution of power. A more rigorous check on the executive results in more accountability and not necessarily reduction or extinction of the CIs.

[77]Mbote, Patricia Kameri, and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa 2011) p. 10

[78]Sven T. Siefken *et. al* 'The Governance of Policy Advice: Regulation of Advisory Commissions and Councils in Germany and The Netherlands' (1st International Conference on Public Policy 'Comparing Policy Advisory Systems' France June 26 – 28, 2013)

Mckeachie, Jessica[79] argues that obscuring the public nature of inquiries through the increased use of juridified processes limits inquiries social and policy impacts. This work cautions this research to avoid juridification of CIs in its recommendations so as not to limit their influence in Kenya. In this respect, this work argues that inquiries should not involve parliamentary approval and recommends involvement of the legislature as a check of the powers by the commissions.

Ashforth[80] argues that we have for long, wrongly so, thought CIs as investigatory tools, as such, we have developed a legal framework in line with this investigatory role whereas in reality, these institutions are "legitimizing government agenda tools". As such, we need to redesign the legal framework to caution the government against misuse of CIs. To do this, this research seeks to have a legal framework that has enough accountability mechanisms than currently provided.

George Winterton[81] provides precise and comprehensive arguments why sitting judges shouldn't be commissioners. Commissions, they argue, are involved in political questions, and hence political actors have a direct influence on the commission. Judges, therefore, are drawn into an unnecessary political quagmire which affects the image of the judiciary. This research appreciates this challenge and endeavours to demonstrate how judges are strategically placed in the CIs to legitimise the reports. In the spirit of the Constitution on the independence of judges and separation of powers, this research adopts the view that sitting judges shouldn't be involved in such inquiries at all.

[79]Mckeachie, Jessica, 'Recovering the Promise of Public Truth: Juridification and the Loss of Purpose in Public Inquiries' (LL.M York University 2014)
[80]Ashforth, A., 'Reckoning schemes of legitimation: On Commissions of Inquiry as Power/Knowledge Forms' (1990) 3(1) Journal of Historical Sociology 1
[81]Winterton, George 'Judges as Royal Commissioners' (1987) 10 UNSWLJ 108

Roderick Alexander Macdonald provides an excellent examination of CIs in Canada where commissions are popular tools of good governance and accountability.[82] Assiduously, he appraises the value of the commissions and endeavours to document the impediments of the ideal working of such commissions. It appears that reluctant or zero implementation of these "ventures into the unknown" is ubiquitous. To contextualise this trend, Macdonald recognises the non-binding character of reports and sets to examine the implementation incentives available to governments faced with impact political quandaries. Fortunately, in Canada, he rightly observes there is the sanctified independence of CI with minimal intrusions upon appointment. Macdonald's work is undeniably informative in modelling not only an ideal commission of inquiry but also the execution of its legal edict.Macdonald, however, does not propose mechanisms of improving implementation or holding accountable the executive once such a report is made public which this study proposes.

Kirya, Monica[83] examines the role of CIs in fighting corruption in Uganda. She argues that *"Ad hoc commissions of inquiry chaired by judges, which facilitate a highly publicised inquisitorial truth-finding process, therefore emerge as the ideal way of tackling corruption because they facilitate ―a trial in which no-one is sent to jail."* This observation reflects the desperation of CIs work, as they only uncover the corruption deals, what becomes of their recommendations remains unsolved. This research makes an argument however that CIs should not be used to attribute liability on persons. This limits the government from using them as political expediency tools.

[82]Roderick Macleod, 'Parking a hot potato: Are commissions of inquiry (in) effective?' *ENCA* (Capetown 16 August 2013)<http://www.enca.com/opinion/parking-hot-potato-are-commissions-inquiry-ineffective> accessed 4 December 2017

[83]Kirya, Monica T, 'Performing "good governance: commissions of inquiry and the fight against corruption in Uganda' (PhD thesis, University of Warwick 2011) p. 1

Yehouda Shenhav and *Nadav Gabay*[84] argue that CIs, when used by the government for an inquiry into public political issues, are inherently limited as they function within a realm of legal, managerial, and rational discourse. Consequently, political conflicts turn out to be functional problems which might not require technical solutions. This work tries to cure this by trying to delimit the instances that CIs may be formed to avoid the use of non-fitting instances.

Woodhouse Diana and *Matrix Churchill*[85] argue that the success of the commissions depends on the extent to which political actors want to be held accountable. In line with this argument, this research proposes comprehensive measures that would ensure that CIs work regardless of the political will in the event there is inadequate political will.

Elena Marchetti [86] demonstrates how the process adopted by a commission and the procedural constraints imposed upon it by governments affects the degree to which certain information is included and excluded, as well as the types of recommendations that are made. This study argues that by subjecting the appointment process, ToRs formulation to more than one person, the CIs achieve independence and there is a likelihood of more comprehensive outcomes.

1.10 Research Methodology

This research generally uses the qualitative research methodology with historical, doctrinal and comparative research methodologies. Generally, doctrinal research refers to studying a legal proposition or position and involves analysing legal provisions using the reasoning power.[87] Essentially, it is concerned with the analytical approach to legal issues and provisions. This

[84]Shenhav, Y. A. and Gabay, N., "Managing Political Conflicts: The Sociology of State Commissions of Inquiry in Israel." Israel Studies, (2001) vol. 6 no. 1, Project MUSE 126

[85]Woodhouse, Diana, Matrix Churchill, 'A Case Study in Judicial Inquiries' (1995) 48 no. 1 Parliamentary Affairs 24

[86]Machetti, Elena, "Critical Reflections upon Australia's Royal Commission into Aboriginal Deaths in Custody" (2005) 103 Macquarie LJ 5

[87]Salim I. Ali et al., "Legal Research of Doctrinal and Non-Doctrinal " (2017) Volume 4(1) International Journal of Trend in Research and Development

method has been useful in analysing the legal, policy and institutional framework in Kenya by analysing the provisions, their source and implications. The method is also useful in unearthing the contradictions between the Act and the Constitution. Comparative research methodology, on the other hand, is a type of research method that aims at comparing different countries.[88] The method is particularly useful in identifying, analysing and explaining the differences. In this regard, this research uses this method in studying the UK's legal regime and her experience with inquiries aiming at picking several lessons as discussed in chapter five. Historical research methodology involves the systematic study of events in a contextual background to appreciate the contexts within which events operate.[89] In this research, this method is used in chapter two in studying the historical and contextual background of commissions and various provisions of the Constitution.

This research uses primary and secondary data sources including journal articles, books, newspaper articles, Constitution, statutes, court decisions, commission reports and parliamentary reports.

1.11 Chapter Breakdown

Chapter 1 is the introduction to the research. It contains the background, research questions, justification of the study, the research problem, theoretical and conceptual framework, literature review and research methodology.

Chapter 2 gives the historical and contextual background of the CIs in Kenya

[88]Frank Esser et al., "Comparative Research Methods" (2017) the International Encyclopedia of Communication Research Methods

[89]Johnson, R. et al., "Toward a definition of mixed methods research" (2007) 1, no. 2 Journal of mixed methods research 112-133

Chapter 3 examines the current legal, institutional and policy framework on CIs in Kenya.

Chapter 4 discusses how and to what extent to which the Act derogates from the Constitutions provisions.

Chapter 5 compares CIs in Kenya with CIs in the United Kingdom

Chapter 6 contains conclusions and recommendations

1.12 Conclusion

This introductory chapter has set out the general outlook of the study. There exists no literature that examines the legal framework on CIs in Kenya in the context of the Constitution of Kenya, 2010. In the next chapter, this research discusses various commissions in their historical contexts up to 2018

CHAPTER TWO: HISTORICAL BACKGROUND OF COMMISSIONS OF INQUIRY IN KENYA

2.0 Introduction

The previous chapter has highlighted the research problem and shaped the direction of the research. This chapter locates the CIs in Kenya in their historical context. The central argument in this chapter is that historically, every CI formation, inquiry process, and outcome resonates with the political and legal context at their time of formation. Consequently, there is no better way of capturing the old constitutional order as applied to commissions than by studying the works of various commissions.

The chapter is divided into four sections, colonial period, Jomo Kenyatta, Arap Moi, Mwai Kibaki and Uhuru Kenyatta presidencies and discusses various CIs in each section. This chapter analyzes some of the CI's purposes, appointment, termination, regulation and implementation of their findings.

2.1 Colonial Period

Until the taking over the administration of the Kenyan territory by the British government on 1st July 1895,[1] the present day Kenya was a conglomeration of communities each with its governance structure.[2] The colonization saw the establishment of complex, centralized governing structures with the Crown as the sovereign.[3] Consequently, the government required institutions

[1]Charles O. Omondi, 'Towards Constitutional Legitimacy : A Study of The Principles and Processes of Constitutional Development and Constitution Making in Kenya from Colonial Times to 2010' (PhD thesis University Of Nairobi 2013)
[2]Godfrey Gitahi Kariuki, Lancaster Constitutional Negotiation Process and its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970' (PhD thesis University of Nairobi 2015)
[3]ibid p. 45

to assist in administration and policy-making process particularly in coming up with the Ordinances.[4]

2.1.0 Commissions of Inquiry Ordinance, 1912

With the experience of CIs in Britain, the colonial government found CIs very useful and in 1912, the government enacted the Commissions of Inquiry Ordinance of 1912.[5] Under the Ordinance, the Governor, could if of the opinion that any matter was of public importance (read colonialism) issue a commission.[6] The Ordinance bestowed the appointment, constitution, recipient of the report and implementation of recommendations powers on the Governor. Additionally, the Governor was allowed to choose whomever he desired and could revoke the commission without reasons or being accountable to any institution.[7] The Governor was also empowered to prescribe the timeframe within which a commission would report back to him with findings and the recommendations. There were no provisions for the implementation of its findings.

Although the Ordinance concentrated all powers in the Governor, annually, Governors were required to account to England the events and general administration of colonies and protectorates.[8] As such the commissioning, operation, and reports disclosure and implementation process would be noted in the annual reports.

[4]Home, Robert. "Colonial township laws and urban governance in Kenya" (2012) 56, no. 2 Journal of African Law 175
[5]Annual Report of the Colonies, East Africa Protectorate, Kenya, 1912-13
[6]Commissions of Inquiry Ordinance, 1912, s 3
[7] ibid s 4
[8]See generally British Online Archives 'Kenya under Colonial Rule, in Government Reports, 1907-1964' <https://microform.digital/boa/collections/72/kenya-under-colonial-rule-in-government-reports-1907-1964> accessed 29 August

2.1.1 Era of Commissions of Inquiry

This section discusses several CIs formed during the colonial period. A study of the selected CIs reveals that the government used inquiries majorly for entrenching colonialism. Secondly as will be demonstrated by the Feetham's and Carothers' commissions, the government has always been very keen in the impanelling the inquiries to fulfil predetermined outcomes. Notably, the current legal framework has remained substantially the same since 1912, and it's within this framework that these colonial commissions operated. However, the government readily availed the reports and recommendations were often implemented.

2.12 From the 1912's Native Commission of Inquiry

By 1912, due to the increase in the settler population and acquisition of land,[9] there was high demand for labor.[10] However, the climatic conditions, could not allow the whites to do long manual jobs[11] and the natives were the most appropriate source.[12] Unfortunately, the native population was low, was sparsely distributed[13] and was disinterested in waged labor.[14] Indians, who had provided labor for the railway had the capital to acquire land and were supported by the Indian government hence disinterested in settlements labour.[15]

In response to settler's demand for labor,[16] the government adopted the "voluntary labor of inhabitants" policy but which failed terribly. The settlers pushed for forced native labour. "*We have got to come to legalize the methods and force natives to work; I hope we can rely on the*

[9]Commissions of Inquiry Ordinance, 1912, s 4
[10]Okia, Opolot. *Communal Labor in Colonial Kenya: The Legitimization of Coercion, 1912–1930* (Springer, 2012)
[11]Dilley, Marjorie Ruth. *British policy in Kenya colony*, (Psychology Press, 1966)
[12]ibid p. 56
[13]Maxon, Robert M., *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (1993 Fairleigh Dickinson Univ Press)
[14]Government of Kenya, The Native Labor Commission Report, 1913
[15]Okia, Opolot. *Communal Labor in Colonial Kenya: The Legitimization of Coercion, 1912–1930* (Springer, 2012) P. 15
[16]ibid 16, see also Ano., 'Land of the Kikuyu', *African Magazine* (Nairobi 2008) <http://www.theeastafrican.co.ke/magazine/434746-484122-dbhllp/index.html> accessed on 26 March 2018.

Government to meet the case.[17] To solve this problem, the government appointed the Native Labor Commission to inquire into the labour problem and suggest ways of inducing the natives to work. The report ended up posing more questions than answers.[18] The report of the commission formed the bases for forced labor while concluding that the natives were unwilling to work due to poor conditions.[19] The composition and operation of the commission were smooth and the challenges were easily dealt with and in any case, this was a colonial entrenchment, both the government and whites supported it fully. Its implementation in the later years had, however, the most far-reaching consequences.

2.1.3 Renaming of the Commissions of Inquiry Ordinance

In 1920,[20] Kenya's LegCo enacted the Revised Edition of Laws, 1921.[21] Under the Ordinance, the Chief Justice and the Attorney General could prepare revised Ordinances of the Colony by 31st December 1921 in the process, the Commissions of Inquiry Ordinance, 1912 was renamed Chapter 25 Laws of the Kenya colony.[22]

2.1.4 Local Government Commission of 1926

By 1926, many settlers had engaged in gainful economic activities and had started developing the respective settled areas. Settlements had emerged in areas other than Nairobi and Mombasa; the only townships then.[23] There was, therefore, need to establish governance structures within

[17] Dilley, Marjorie Ruth. *British policy in Kenya colony*, (Psychology Press, 1966)
[18] Ibid p. 217
[19] Ibid p. 217
[20] In 1920, Kenya became a colony and was engaged in maasive enactment of legislations, approximately one per week. See the Annual Report of the Colonies, Kenya, 1920-21 accessed 19 September 2018
[21] Revised Edition of Laws, 1921, No 30 of 1921
[22] Government of Kenya, Annual Report of the Colonies, Kenya, 1923
[23] Government of Kenya, Local Government Commission Report (1927) Volume II

these new emergent towns.[24] To address this development, the Governor appointed the Local Government Commission of 1926 to inquire into and make recommendations as to the establishment or extension of local government for Nairobi, Mombasa, and their environs, and for such settled areas.

Unfortunately, this commission restricted its inquiry into "settled (i.e., white settled) areas, although its recommendations could be introduced to native areas at a later date when the Africans proved themselves fit for more power."[25] Evidence shows that Feetham, the chairperson, did not carry out a serious inquiry. In his appointment as the chair, England had raised queries about his suitability[26] as he had been a South Africa Judge for several years and he could have been corrupted by African views. The whites feared he could make recommend Africans into leadership positions in town governance[27] which was not the intention of the government.[28] The opposition to his appointment demonstrates that the selection of members of an inquiry appointment was intentionally made to affect some of the possible the outcomes. Such partial composition of inquiries affects their impartiality and legitimacy of their outcomes. The report of the Commission marked the beginning of local governance in Kenya and its report formed the basis of Local Government (Municipalities) Ordinance 1928.[29]

[24]Home, Robert. "Colonial township laws and urban governance in Kenya"(2012) 56, no. 2 Journal of African Law 175
[25]Letter from Governor Grigg to Colonial Secretary Amery, 23 July 1926
[26]Maxon, Robert M., *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (1993 Fairleigh Dickinson Univ Press) p. 184
[27]Ibid p. 179
[28]Ibid p.179
[29] Maxon, Robert M., *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (1993 Fairleigh Dickinson Univ Press) p. 179

2.1.5 Kenya Land Commission of 1933

The period between 1920 and 1930 witnessed massive revolts against land alienation by natives who by this time were "tenants of the crown."[30] Further, natives, especially Kikuyus and Kavirondo were the primary source of labor.[31] In 1921, Kikuyu had protested against the reduction of wages.[32] The protests were raising the insecurity of land rights within the colony. The findings of the Devonshire White Paper[33], Hill Young Commission[34] and the protests by natives had to be addressed.

To address land alienation, the Governor commissioned the Kenya Land Commission in September 1933. Essentially, the commission was tasked to discuss the native land rights.[35] The Commission recommended the expansion of the existing reserves and the Crown land in future could be set aside for purposes of settling natives.[36] These recommendations were a significant boost to native's land rights. It led to the enactment of the Native Lands Trust (Amendment) Ordinance, 1934, Native Lands Trust Ordinance, 1938 and Crown Lands (Amendment) Ordinance, 1938. These recommendations, however, were meant to cool Africans from protests but chiefly to secure of land rights. Once again, the purpose of the commission was predetermined, recommended tokenism to Africans and ensured land security rights for whites.[37]

[30]Okoth-Ogendo, H. W. O, *Tenants of the Crown* (ACTS Press, African Centre for Technology Studies 1991)
[31]Maxon, Robert M. *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (Fairleigh Dickinson Univ Press, 1993)
[32]Hornsby, Charles, *Kenya: A history since independence* (IB Tauris, 2013)
[33] Morgan, W. T. W., 'The'white highlands' of Kenya." (1963) 129, no. 2, the Geographical Journal: 140
[34]*Hilton Young Commission* on Closer Union of the Dependencies of *East* and Central *Africa,* was a *Commission* of Inquiry appointed in late *1927*
[35]Coray, M. Simon, 'The Kenya Land Commission 1932-34 and the Kikuyu' (PhD Thesis, University of California 1973)
[36]Government of Kenya, Kenya Land Commission Report, 1933
[37]Ann P. Munro, 'The Land Tenure Revolution in Kenya, 1951- 1959: Legal and political Implications' (MA University of Nairobi 1959)

2.1.6 Carothers' Commission

In 1950's Mau Mau, a notorious pro-independence native group carried out violent attacks on the settlers in the quest for independence and land rights for natives.[38] In response, the government declared a state of emergency on 21st October 1952. Carothers, a psychiatric, in 1954 was appointed to inquire into the Mau Mau rebellion which according to the government was not a story of historical subjugation but a mental problem. The commission was to legitimize this view.

The findings of the commission as contained in *The Psychology of Mau Mau* validated the government's mental problem argument.[39] It displays African mental struggles in transitioning to modern cultures. To Carothers, rebels were psychopathic criminals, and even if screened carefully, Kikuyus could never be trusted. Establishment of light industries in the villages could create employment and help keep young men in at home keeping them close to women. The separation, Carothers believed led to rebellion. Women, Carothers recommended, required necessary family management skills and teaching of morals to little children to raise a generation of responsible young ones. This commission shows how commissions composition (a psychologist), and predetermined outcomes, and recommendations can be easily used to form an inquiry and legitimize government actions.

2.1.7 Repeal of Commissions of Inquiry Ordinance Chapter 40 Laws of Kenya[40]

All along, the Ordinance did not contain any evidence taking rules and often was thought to infringe on respondent's rights. The consensus of Universal Declarations of Human Rights (UDHR) breathed new dawn to human rights and relevantly the right to fair hearing. The

[38] McCulloch, Jock, *Colonial Psychiatry and the African Mind* (Cambridge University Press, 1995)
[39] J.C. Carothers, *The Psychology of Mau Mau* (Government Printer 1954)
[40] In 1948, through the *Revised* Edition of the *Laws Ordinance 1948, Chapter 25 was named Chapter 40*

Evidence adversely affecting the reputation of a person, opportunity to be heard or cross-examine such witness, hearsay and opinion evidence was not expressly prohibited.[41] The Ordinance was repealed by the Act in 1962 to reflect these new human rights requirements and to introduce the ministerial power of making regulations under the Act.

2.1.8 Concluding Remarks

This section selected few commissions and the sampled ones prove that CIs, at least in this era were tools used to advance colonialism resonating with the time and government policy then. In order to achieve government agenda, the Governors' appointment of commissions, composition, purposes, and state of recommendations were all to achieve this agenda. It's important to understand commissions in this period as being colonial tools and foreigners were the single-most important persons. The interest groups (foreigners) and government were on the same script.

2.2 Jomo Kenyatta's Presidency

2.2.0 General Context, Constitutional Amendments, and Impacts on the Act

Negotiations leading to Kenya's self-rule on 1st June 1963 were dominated by two widely supported but contrasting governance structure ideologies. KADU advocated for *"Majimbo*" system while KANU wanted a unitary state system. KADU had managed to have their *Majimbo* ideology in Kenya's self-rule Constitution.[42] A win by either party in the May 1963, shortly before internal independence, was a salvage or savior of *majimboism*.

To Kenyatta and KANU in general, *majimboism* was a tribal chauvinistic approach. In his acceptance speech as the Prime Minister,(KANU won in the 1963 election) stated that

[41]The Commissions of Inquiry Bill, 1962's Memorandum

[42]Anony 'KADU, *KADU Election Policy 1963: Uhuru Na Majimbo Sasa!'* (Nairobi: Kenya African Democratic Union 1963) , KANU, *What a KANU Government Offers You* (Nairobi: Kenya African National Union, 1963)

"*Independence will give KANU the opportunity to work unfettered for the creation of a democratic African Socialist Kenya."*[43] Kenyatta, armed with this ideology, would oversee significant constitutional changes towards centralization of power. This ideology explains why the 1963 Constitution was fundamentally amended between 1963 and 1969 to concentrate powers to one institution: the Presidency. Commissions in this section must be understood in this context because majority endeavor to fulfill this purpose.

Before 1963, the powers to commission a CI under the Act were vested in the Governor. Under Section 16, the Governor could direct Commissioner of Police to detail police offices to attend upon a commissioner, to preserve order and to serve summons upon witnesses or perform other authorized functions.[44] The 1963 Constitution renamed the Governor post to Governor General while Inspector-General replaced Commissioner of Police. As a result, the Act was amended on April 24, 1964, to replace the term Governor with the Governor General and Commissioner of Police with Inspector-General.[45] However, the title of the Commissioner of Police was reintroduced in 1966 which led the amendment of Act in section 16 on 12th July 1966.[46] Upon attaining full independence in 12th December 1964, the post of Governor as the head of the colony was replaced with that of the President.

2.2.1 Era of Commissions

This section examines the CIs formed by President Kenyatta. The CIs under this section apart from two commissions Marriage and Succession commissions were used to perpetuate the power

[43]Charles O. Omondi, 'Towards Constitutional Legitimacy : A Study of The Principles and Processes of Constitutional Development and Constitution Making in Kenya from Colonial Times to 2010' (PhD thesis University Of Nairobi 2013) p. 153
[44]Commissions of Inquiries Act, 1962 s 16
[45]This amendment was deemed to have been effective from 12th December 1963 when the Kenya's self-Rule Constitution become effective.
[46]The Statute Law (Miscellaneous Amendments) Act 1966 No. 21 Of 1966

centralization agenda and served political interest. The government rarely implemented the recommendations and as will be demonstrated in Lutta and Local Government Commission, any commission whose recommendations deviated from government's expectation were attacked and recommendations never implemented.

2.2.2 The Lutta Commission

In 1959 in preparation for the independent Kenya colonial government commissioned the building of a radio and television station.[47] Cognizant of irreversible upcoming Kenya's independence, the contractors named the station the Kenya Broadcasting Corporation (KBC) and had set it up akin to British Broadcasting Corporation (BBC) but few months into operation it reported over $ 1Million loss.[48] A CI: the Lutta Commission of Inquiry into the Financial Position and Administration of the Kenya Broadcasting Commission was commissioned in 1964 to look into financial matters and efficiency of KBC. Lutta Commission recommended radical private reorganization of KBC.

Kenyatta government was desirous of controlling the media.[49] It ignored the recommendations and placed the media in the hands of government making it a trusted partner of the government.[50] The government controlled information relayed.[51] At least it understood centralization could hardly be achieved with the media in the hands of private individuals. This commission served the government and once again proves that due to unaccountability of implementation of recommendations, the President could radically change the recommendations.

[47]Newcomb, Horace, (ed) *Encyclopedia of television(* Routledge, 2014)
[48]ibid p. 176
[49]Supra n 47 p.178
[50]Parliament of Kenya, Deb 24 June 1964, Vol III, 543
[51]Mak'Ochieng, Murej 'The African and Kenyan Media as the Political Public Sphere' (1996) Volume 22 Issue 2 South African Journal for Communication Theory and Research, 23

2.2.3 The Maize Inquiry of 1965

After independence, Paul Ngei: one of Kapenguria six detainee was appointed the Minister for Cooperatives and the Chair of Maize Marketing Board of Kenya. Maize production has a peculiar history and the Food Shortage Commission[52] had cautioned against maize exportation policy which had partly led to the food shortage in 1943. In 1965, there was once again an acute shortage of maize. To investigate the causes, the President in the same year gave in to pressure and formed the *Maize Commission* of Inquiry to inquire into the "purported" shortage of the maize crop in Kenya on 19th November 1965.[53] In July 1966, the commission released its report attributing the shortage to poor statistics and record keeping, exportation of maize before satisfying local demand and heavy influence and conflict of interests by Paul Ngei. Ngei, the commission found, was associated with one of the companies "Uhuru Millers" allegedly responsible for the shortage and had appointed his wife as the secretary to the chairman's Board otherwise the husband at a salary of $660.The wife was a majority shareholder in Uhuru Millers. The commission recommended against the appointment of politicians into parastatals. Surprisingly, Ngei was reinstated in Cabinet after intervention by London and was also appointed the leader of Deputy Leader of Government.[54]

This commission points out two important shortfalls, first, the President formed the commission out of public pressure pointing out the lax in investigating the matter, secondly, although Ngei was found culpable of the shortage he was in fact promoted and no serious actions were taken to

[52]This commission was appointed by the colonial administration in 1943 to inquire into the causes of Maize and Food shortage in Kenya. It attributed maize growing export policy as the main cause of the shortage. It recommended abolishing of that policy.
[53]Government of Kenya, Kenya Maize Commission Report 1966 , Government Printer
[54]Eman Omari, Ngei Suspended over Maize Scam, *Nation Media* (Nairobi Sunday July 21 2013) <https://www.nation.co.ke/lifestyle/dn2/ngei-suspended-over-maize-scam/957860-1922204-f7io0tz/index.html > accessed on 26 March 2018

hold him accountable of his actions. All these issues are possible if all powers to take actions are in one institution.

2.2.4 Local Government Commission of 1966: Reversing the gains of Local Government Commission of 1926

The Local Government Commission of 1926 recommendations outlined the structure of local governance. Unfortunately, the coming into power of KANU in 1963 marked the end of *majimboism* and retained local governments which were equally powerful. Determined to further muzzle local governments, Kenyatta on 18th March 1966 appointed the Local Government Commission of Inquiry 1966.[55] The Commission's main task was to recommend on effective local governments and permissible control of the local governments by the central government.[56] The President, by now, a known lover of power aimed at the further tight grip of power.

In his work, *Decent from Cherang'any Hills: Memoirs of a Reluctant Academic*,[57] Benjamin Kipkoris discusses the intrigues that surrounded the commission's work. Going by the ToRs, the commissioners thought (wrongly though) that the government was committed to democracy and local development through local governance. The commission's recommendations were in good faith providing more local government responsibility while reducing central government control[58] particularly the Provincial Administration which Kenyatta in 1964 had transferred to his office.[59] The recommendations met the wrath of Kenyatta; he angrily disregarded the commission's report and proceeded to implement his intentions of further centralization of local

[55] Government of Kenya, Gazette Notice No 100 of 22nd March 1966
[56] Government of Kenya, Local Government Commission 1966 Report
[57] Ben E. Kipkorir "Descent from Cherang'any Hills: Memoirs of A Reluctant Academic" (2010) 2 Journal of Colonialism & Colonial History 11
[58] ibid p. 200
[59] Supra n 57 p.201

governments.[60] Once again, the intention had been expected to legitimize his intentions but failed and because there were no other players in the business, he implemented his intentions anyway.

2.2.5 Marriage and Succession Commissions

Colonialism led to the introduction of the English legal system in the already existing African traditions. The introduction resulted in a pluralistic legal system particularly in personal matters such as marriage and succession.[61] In order to harmonize the legal framework, President Kenyatta in 1967 formed the CI into Marriage and Divorce and CI into Succession Laws. The former was to inquire into marriage matters for all persons in Kenya and recommend a single law to regulate marriage while the former was to inquire into succession laws possible consolidation. The commission on Marriage produced the Marriage Bill, 1967 that never saw the light of the day.[62] This faced opposition for allegedly "uplifting women."[63]

The Succession commission drafted the Law of Succession Bill, 1967. The Bill faced similar opposition to the Marriage Bill. First, a woman could inherit property whether married or not especially under dependency provisions and on intestate instances. Secondly, Muslims felt cheated as the Bill provided that it would also govern them.[64] In 1963, they had negotiated for retaining of Muslim law to govern the personal law. The Bill, for instance, allowed someone to will all his property, a concept that contradicts Muslim law where only a third of his property could be subject to a will. This resistance led to the shelving of the Bill and only became a

[60] Supra n 57 p 201
[61] Government of Kenya, 1897 Native Courts Regulations
[62] Recently in 2014 Kenya passed a uniform legal system for all types of marriages through the Marriage Act, 2014
[63] Musyoka, William, *Law of succession* (African Books Collective, 2006)
[64] ibid p. 12

decade later. However, the Muslims continued to oppose the Act until 1991 when the Act was amended to exclude its application to Muslims intestate situations.[65]

This commission work was excellent and made far-reaching recommendations that reformed the marriage and succession history. Although the recommendations faced opposition, the work was a milestone in eliminating the unfair treatment of women in a marriage institution. It could be that because the matter was not purely political, the governments' hand in the inquiry was far-fetched.

2.2.6 Concluding Remarks

Under this section, the various commissions demonstrate the effect of imperial Presidency. This is evident in the President's opposition to recommendations of Lutta Commission and promotion of Paul Ngei despite the findings of the Maize commission that he had been involved in creating maize shortage in the country. As noted by Kipkorir the Local Government Commission recommendations was treated with contempt by the President.[66] However, one commendable outcome of this section is that the reports of the various CIs were promptly released.

2.3 DANIEL MOI'S PRESIDENCY

2.3.0 General Context

Moi was a trusted confidant of Kenyatta and the Vice President of the Republic of Kenya at the demise of Jomo Kenyatta.[67] Moi had led the "KANU and Kenyatta popularity" in 1964 when

[65] Supra n. 63 p. 13
[66]Ben E. Kipkorir "Descent from Cherang'any Hills: Memoirs of A Reluctant Academic" (2010) 2 Journal of Colonialism & Colonial History 11, p.13
[67]Adar, Korwa G., Isaac M. Munya, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978' (2001) 5, no. 1 African Studies Quarterly 1

KADU joined the government.[68] Moi at one time had regarded Kenyatta as "my teacher, my father, and my leader."[69] Upon Jomo Kenyatta's demise, amidst opposition by 'Kiambu Mafia", Moi assumed the Presidency in 1978.[70] His ascend to power saw a continuation of Kenyatta ideologies.

2.3.1 Commissions under the Moi's Presidency

This section examines the CIs commissioned by President Moi and seeks to characterize their efficiencies in their historical context. Generally, the analysis reveals a secretive regime that rarely made public inquiries' reports. Additionally, it is under this regime that commissions were largely misused some like the Njonjo and Akuwimi Commissions seen as political moves. It will also be evident that CIs under this era were greatly compromised with the Koech commission suffering the same fate as Local Government Commission, 1966 in the previous section. However, two notable commissions: the Planning Commission and Land System Commission stand out for having contributed to the general public welfare.

2.3.2 Njonjo Commission of Inquiry

Charles Mugane Njonjo, popularly "Duke of Kabeteshire" and the first Attorney General of the Republic of Kenya, is said to have prevailed upon Kenyatta to appoint Moi as the Vice President.[71] Njonjo, it was alleged, had always wanted to succeed Kenyatta but faced opposition from Kiambu Mafia (appearing as GEMA).[72] To dismantle GEMA an association he had

[68]Throup, David, Charles Hornsby, *Multi-party politics in Kenya: the Kenyatta & Moi states & the triumph of the system in the 1992 election* (Ohio University Press, 1998)
[69]Emman Omari, 'How Daniel arap Moi outwitted rivals to become VP and President' *Daily Nation* (Nairobi Monday September 1 2014) <https://www.nation.co.ke/news/Daniel-arap-Moi-Jomo-Kenyatta-Presidency-Kanu/1056-2437934-8bub3r/index.html> accessed March 26, 2018
[70]ibid par. 3
[71]Joe Khamisi, *Looters and Grabbers 54 Years of Corruption and Plunder by the Elite, 1963-2017* (Jodey Book Publishers 2018)
[72]ibid p.129

sponsored, he charged Kimani Kihika and Njenga Karume with treason.[73] Moi, Njonjo thought, was weak and could be dislodged from the presidency with ease.[74] Njonjo controlled masses and Moi saw Njonjo rise fast. Morton, one time Moi biographer, in his book, *Moi: The making of an African Statesman observes "Njonjo represented a stumbling block if Moi was ever to be recognized as an effective head of state both at home and abroad. A parting of ways became inevitable."*[75]

After the 1982 attempted *coup de tat* Moi hunted for his "enemies."[76] Moi suspended Njonjo, a suspect of the *coup*, from his ministerial position and on the 26th July 1983 Moi appointed the CI into allegations involving Charles Mugane Njonjo led by the then Chief Justice, Miller.[77] The commission was to inquire into whether Njonjo had conducted himself in to prejudice state's security, head of state and a constitutional government. This commission is largely seen as political. Ochuka another suspect of *coup de tat* was successfully tried and convicted by a court of law[78] while Njonjo was preferred for inquiry despite the existence of provisions on the Penal Code that could effectively deal with the allegations. It was not an information gathering tool but an indictment campaign.[79] The commission found Njonjo culpable of the allegations and instead of proceeding to charge him in court, Moi pardoned Njonjo for his outstanding long public

[73]Admin "The Rise and Fall of sir Charles Njonjo" *Diaspora Messager* (Nairobi Jan 23, 2013) <https://diasporamessenger.com/2013/01/the-rise-and-fall-of-sir-charles-njonjo/> accessed 29 August 2018
[74]Tamarkin, Mordechai. 'From Kenyatta to Moi: the anatomy of a peaceful transition of power' (1979) no. 3: 26 Africa Today 21
[75] Morton Andrew, *Moi: The making of an African statesman* (Michael O'Mara Books, 1998)
[76]Tamarkin, Mordechai. "Recent developments in Kenyan politics: The fall of Charles Njonjo." (1983) 3, no. 1-2: Journal of Contemporary African Studies 59
[77]Government of Kenya, Gazette Notice No. 2749 of 1983
[78]Government of Kenya, Gazette Notice No. 2749 of 1983
[79]Mbote & Migai opine that the commission was not warranted as there existed enough criminal laws under which Njonjo could have been tried, see n 11

service.[80] He managed to contain Njonjo, a man that threatened his Presidency. Inadequate checks on the exercise of powers under the Act points to serious legal loopholes.

2.3.3 Ouko and Gitari Commissions

In 1990, Dr. Robert Ouko, the then Minister for Foreign Affairs shortly after his return together with President Moi and a huge delegation from Washington D.C, went missing.[81] As an astute and articulate politician, he had done relatively well, his fame traversing continents.[82] He had allegedly on several occasions outsmarted his boss.[83]

The President was later to announce the demise of Robert Ouko in mid-February same year. The first report issued suggested suicide. Dissatisfied with the report, the country witnessed civil disturbances. Moi invited Scotland Yard detectives led by John H. B. Troon to investigate the killing. The team handed over its report to the A.G in September 1990 after a prolonged standoff over the proprieties of transmittal. There were other four investigations including one led by Criminal Investigation Department (CID).The story of the Robert Ouko especially after the handling of the report to the A.G dominated the media headlines.[84] The government never published the report of the investigation and October 2, 1990, President appointed the Judicial Commission of Inquiry into Murder of Dr. Robert Ouko without explanations of the outcome of Troon's report. The commission worked smoothly until Troon "the star witness" began to testify. In a drastic turn of events, 26th November 1991, Moi in the exercise of powers under section 3 of the Act revoked the commission mid-way its work. Surprisingly, the President called for

[80]Government of Kenya, Gazette Notice No. 2749 of 1983
[81]Cohen, David William, ES A. Odhiambo, *The risks of knowledge: investigations into the death of the Hon. Minister John Robert Ouko in Kenya, 1990* (Ohio University Press, 2004)
[82]ibid p. 47
[83]ibid p.67
[84]Cohen, David William, ES A. Odhiambo, *The risks of knowledge: investigations into the death of the Hon. Minister John Robert Ouko in Kenya, 1990* (Ohio University Press, 2004) p 67

intensive police investigations which had failed to establish the cause of death in early investigations.[85] The revocation was followed by the arrest of the Ouko family's counsel, prosecution of John Anguka, Hezekiah Oyugi and Biwott who the court later exonerated of any wrongdoing. The revocation of the commission left the country in the dark about the murder. The commission was sent in limbo and it was the end of the matter.

Closely related to Njonjo political misuse of the CI was the appointment of the *Commission of Inquiry into* the 1992 Raid *on* Bishop Gitari's house.[86] Gitari had been a vocal preacher and a staunch believer in democracy. He spoke against election rigging in 1989 when the single-party state was almost coming to an end. In 1989, heavily armed "thugs" raided his home. Bowing to pressure for answers, Moi appointed a CI to investigate the raid. Two hours into the commissioning of the CI, police raided Gitari's house in "pretense to investigate". The victim thirteen years after the report had not known its outcome.[87] One may contrast this with the speed at which Njonjo's inquiry report was released. It is believed that the raid was meant to silence the Bishop against his calls for fair elections.[88]

2.3.4 The Devil Worship Commission

The period 1990-2000 witnessed increased student protests both in frequency and intensity. In the 1980's the protests had taken a new twist of massive property destruction unlike previously where boycotts had dominated schools.[89] In 1985, the government had introduced the 8-4-4

[85] ibid p. 67
[86]Kings, Graham. "Proverbial, Intrinsic, and Dynamic Authorities: A Case Study on Scripture and Mission in the Dioceses of Mount Kenya East and Kirinyaga" (1996) 24, no. 4 Missiology 493
[87] Parliament of Kenya Deb, 5 Dec 1996, 456
[88]Gitari, David M, *Troubled But Not Destroyed: Autobiography of Dr. David M. Gitari, Retired Archbishop of the Anglican Church of Kenya* (Isaac publishing 2014)
[89]Malenya, Francis Likoye 'Students, Violent Protests and the Process of Self-Realization in Kenyan Secondary Schools' Journal of International Cooperation in Education 18, No. 2 (2016) 67

system amidst resistance that saw a change of education system.[90] There was increased pressure for the need to investigate the causes and provide a lasting solution. Led by the Anglican Church, people introduced another new dimension to the unrests. Secondary schools, they claimed, had become hubs for devil-worshiping which was connected to the violence by students.[91] The Minister for Education had issued a directive that schools should expel all devil worshipping students. In response, President Moi appointed the Devil Worship Commission on 20th October 1994. However, its findings remained secretive Moi indicating that it contained "sensitive" information.[92] This commission was a case of government failure to manage schools and proper school governance. Critics of this commission argue that it was a waste of time.[93]

2.3.5 The Planning Commission of 1996

On 13th May 1996, the building housing Sunbeam Supermarket in Nairobi's Moi Avenue collapsed after a torrential downpour claiming sixteen lives.[94] The government appointed a committee to investigate the cause of the collapse. The Committee found that the collapse was due to technical hitches primarily because of inadequate developmental control and inadequacy of planning laws in Kenya. Following these findings, Moi on 19th December 1996 appointed the CI to examine the Building Laws, By-Laws, and Regulations existing to inquire into the legal framework on planning and developmental control with a view of preventing another Sunbeam incidence.[95] The commission observed that there was inadequate developmental control. Additionally, there were uncoordinated, outdated and inadequate laws which lacked an

[90]ibid p. 78
[91]Supra n. 89 p. 75
[92]Supra n. 89 p.76
[93]Hassan Galana "Views and news on peace, justice and reconciliation in Africa" *Africa News* (Nairobi August 1999) available <http://web.peacelink.it/afrinews/41_issue/p1.html> accessed 28 August 2018
[94]Government of Kenya, Commission of Inquiry to Examine the Building Laws, By-Laws and Regulations Existing Report, 1996
[95]ibid p. iii

enforcement mechanism.[96]The commission drafted the Physical Planning Bill that culminated in the Physical Planning Act, 1996 still in force today. For once in a long time, a commission had resulted to serious policy transformation.

2.3.6 Education Commission of Inquiry

Since the introduction of the 8-4-4 system, it had faced much resistance from Kenyan elites arguing that it was more a political move.[97] In the run-up to the 1997 general elections, KANU the ruling party promised a review of the 8-4-4 education system.[98] 8-4-4 reform had become a campaign tool. On assuming power in the disputed 1997 election, the President appointed the CI into the Education System of Kenya on 14th May 1998.[99] The appointment of the David Koech, from the Presidents backyard, was seen as a move to curtail radicalism in the education sector.[100] These claims were similar to the Feetham Commission's mistrusts.

The commission made a comprehensive investigation making a total of 583 recommendations. The commission suggested the timeline within which the recommendations would be implemented. It also recommended that basic education ought to have included both the primary and secondary education. It also recommended consolidation of the regulatory framework governing education. The recommendations of the Koech Report turned out to be antithetical to what the government had envisaged. The ruling party led by Moi, angered by the recommendations, embarked on a campaign to discredit the report terming it as impractical and

[96]ibid p.84
[97]Caleb Mackatiani et al, "Development of Education in Kenya: Influence of the Political Factor Beyond 2015 MDGs" (2016) Vol.7, No.11, Journal of Education and Practice 55
[98]Owate N. Wambayi , 'Ministry of Education Science and Technology National Council For Science and Technology, Unit Cost Of Basic Education – Kenya'
<https://oris.nacosti.go.ke/modules/library/publications/research_reports/nacosti-dl-rr-1051.pdf> accessed July 31, 2018
[99]Ibid p. 36
[100]ibid p.34

short of funds to implement it.[101] However, a team 29 prominent economists and educationists refuted the cost allegation.[102] Once again, a commission had disappointed the appointing authority and its recommendations had to face the wrath of the master.

2.3.7 Akuwumi Commission

In 1991, Kenya witnessed an adamantine brawl for multiparty through the Constitution of Kenya (Amendment) No.2 of 1991 repealing section 2A of the Constitution. The opposition parties quickly folded through tribal lines as evident in the results of the 1992 general election.[103] In the ensuing 1992 and 1997 general elections, Kenya witnessed electoral ethnic violence. On 1st July 1998, the President appointed the CI into tribal clashes that had occurred since 1991.*[104]* The commission was to recommend prosecutions to people involved, find the causes of the clashes and the level of preparedness of law enforcement agencies to respond to clashes.

In between the inquiry, John Naygah Gacivih, the commission's "aggressive prosecutor" was replaced by Bernard Chunga, who was a "more pro-government" prosecutor.[105] This change witnessed less vigor in pursuing witnesses to testify before the commission.[106] By the time the commission handled its report, there had been a lot of speculation from the public on whether the report could provide any truth.[107] The commission handed the report to the President in 1999, but it was not made public until the High Court issued orders for its production. Nicolas Biwot, one of the persons recommended for prosecution moved to court seeking to quash the

[101]ibid p.29
[102]ibid p. 29
[103]Shilaho W. Kwatemba, 'Ethnicity And Political Pluralism n Kenya'Conflict Resolution in Kenya: Taking Stock of a Political Crisis' (PhD University of the Witwatersrand, Johannesburg, on 18 July 2008)
[104]Government of Kenya Gazette Notices 3312 and 3313 of 1998
[105]Refworld Kenya, 'Status of Akiwumi Report' <http://www.refworld.org/docid/3ae6ad65a4.html> accessed July 31, 2018
[106]ibid par. 5
[107]ibid par. 6

recommendations on his prosecution. Interestingly, the commission had not mentioned his name but recommended his prosecution. The High Court without difficulties quashed the findings of the reports regarding the Biwott.[108] Mbote and Migai have argued the appointment of this commission was a misuse of appointing powers under the Act because the existing laws could cater for such a scenario.[109]

2.3.8 The Land Systems Commission

Kenya's constitutional making process including the first liberation and the second liberation had land central to the struggle. With increased calls for a new constitutional by the late 1990s, it was essential to review land policies and laws. There was no coordination and principles of land and the first two governments had overseen irregular and illegal land allocations. At this time the World Bank was pushing for reforms as a condition for aid in African countries. On 17th November 1999, Moi commissioned the Commission of Inquiry into the Land Law System on Principles of a National Land Policy Framework, Constitutional Position on Land and New Institutional Framework for Land Administration led by Charles Njonjo the one-time victim of a commission of inquiry. The government also suspended transactions on the public land.[110]

Among the notable recommendations include the need for a national land policy, principles of land including equitable distribution and access, efficiency and transparency land management systems. Further, it contained specific actions to alleviate the squatter problem in the coastal region. The commission observed that the Ministry of Lands had been responsible for illegal and irregular public land alienation and thus ought to be either checked by an independent body or

[108] *Biwott Kiprono* Vs *In the Matter of the Report by the Judicial Commission of Inquiry into Tribal Clashes in Kenya* [2002] eKLR

[109] Mbote, Patricia Kameri, and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa 2011) p. 64

[110] Commission of Inquiry into the Land Law System of Kenya Report, 1999

scrapped altogether from the land transactions.[111] It had been responsible for the dispossession of Kenyans and the illegal and irregular alienation of public land. These recommendations were a milestone in solving the land problem in Kenya and most of its recommendations are contained in the current land laws.

2.3.9 Concluding Remarks

The commissions appointed under Moi's era commissions were largely unwarranted and were coupled with interference, selective implementation, and political expediency. Although President Moi exercised powers within the legal framework, in revoking the Ouko Commission, the appointment of Njonjo, Akuwumi and the secrecy of the reports of other commission swere clearly against the public interest. The shortcomings of the Act aided by the imperial presidency under the Constitution led to misuse of commissions in this era. However, the Marriage and Succession, Planning and Land Laws commissions were important tools in modeling the current laws and policies.

2.4 MWAI KIBAKI PRESIDENCY

2.4.0 General Context

In the 2002 general elections, NARC campaigned on reforms platforms against ills witnessed in the first two governments and most importantly, the promise of a new constitution. This platform gave them a win both in Presidency and majority parliamentary seats.[112] Mwai Kibaki, the

[111]Klopp, Jacqueline M., and Odenda Lumumba, 'Reform and counter-reform in Kenya's land governance'(2017) 44, no. 154 Review of African Political Economy 577

[112]Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008) p. 20

NARC presidential candidate, defeated the KANU's Uhuru Kenyatta by a considerable margin. Kenyans were the most optimistic people in the world.[113]

2.4.1 Commissions in Kibaki's era

The first two CIs' under this regime demonstrate an effort on the part of the government to fight corruption but the Bosire commission did not sail smoothly as did the Ndungu Commission. The regime also witnessed secrecy of the report with the Artur Brothers, Grand Regency, and Tana River Commissions never made public. Implementations of the recommendations under this regime are relatively high as evident in Ndungu, Bosire, Kligler and Waki Commissions. However, these four commissions must be seen in their political contexts. It is also in this regime that witnessed the amendments to the Act in 2010 seeking to ensure publicity of the reports but this has been hardly implemented in the context of Tana River Commission.

2.4.2 Ndungu and Bosire Commission

On assuming office, the NARC government established the Kenya Anti-Corruption Committee, a tribunal to investigate into the judges' misconduct "radical judicial surgery."[114] Kibaki also appointed two CIs: CI into the Goldenberg Affair led by Justice Bosire (Bosire Commission) and CI into the Illegal/Irregular Allocation of Public Land led by Paul Ndungu (Ndungu Commission).[115]

[113]Murunga, Godwin R., Shadrack W. Nasong'o, 'Bent on self-destruction: The Kibaki regime in Kenya' (2006) 24, no. 1: Journal of Contemporary African Studies 1

[114]Klopp, Jacqueline M., and Odenda Lumumba, „Reform and counter-reform in Kenya's land governance" (2017) 44, no. 154 Review of African Political Economy 577, p.580

[115]Gazette Notice 1237 and 1238 of 2003, Southall, Roger, 'The Ndungu report: land & graft in Kenya' Review of African Political Economy 32, no. 103 (2005): 142-151.

It had been observed that the highest percentage of public land alienation was the around 1992, 1997 and 2002 elections constituting 98% of all illegal grants since 1962.[116] Political power meant power to grab public land.[117] Ndungu Commission was therefore commissioned to unearth these irregular and illegal land alienations. The commission found an abuse of presidential discretion, usurpation of powers by Commissioner of Lands and corporations used for massive land grabbing among others. The commission developed a long list of public land illegally and irregularly acquired, making recommendations on each parcel of land. Importantly, the commission was fast enough to finish its work and enjoyed political support.

Although the bulk of its recommendations form significant provisions of the National Land Policy, 2009 and the current constitutional dispensation, the repossession of grabbed land is still ongoing. To this end, courts have stated that there are no obligations to implement CIs recommendations.[118]

The Bosire commission[119] was a test of the government's commitment to eradicating the corruption. In the early 1990s, James Kanyotu, the then chief spy and a director of First American Bank and Kamlesh Pattni a twenty-five-year-old man incorporated Golden Berg International and Exchange Bank Ltd. A son of gold dealer, Pattni conceived monopoly gold and diamond exportation for foreign exchange earnings for Kenya, a country little known for diamonds and insignificant gold for commercial exportation. Golden Berg was to act as the vehicle. Interestingly, Kanyotu, a promoter, director, and the shareholder described himself at

[116]Government of Kenya, Commission of Inquiry into the Illegal/Irregular Allocation of Public Land Report, 2003 led by Paul Ndungu (Ndungu Commission)
[117]Joe Khamisi, Looters and Grabbers 54 Years of Corruption and Plunder by the Elite, 1963-2017 (Jodey Book Publishers 2018)p.160
[118]*Mureithi* v *Attorney General& 4 Others,* KLR (E & L) 707
[119]For a detailed particulars of the scandal see the Report Judicial Commission of Inquiry into the Goldenberg Affair

incorporation as a farmer.[120] Saitoti then Minister for Finance in the same years' country's budget put forward measures that the government was to use to save the already dwindling economy. Chief among them was "*Export Compensation Scheme."*[121]

Having incorporated these two companies, curiously at the time the government wanted to promote export sales, the two applied to the Ministry of Finance and the Central Bank's approval to engage in the export of gold business and receive export compensation for the foreign exchange earned from the export.[122] Following the approval, CBK transferred money to the tune of Kenya Shillings 27 Billion million (approximately) for the alleged gold exportation. Two junior officers at CBK raised the alarm over the scam. PAC was invited to investigate but cleared the deal. In the meantime, CBK fired the whistleblowers.[123]

The criminal cases that had commenced on the scandal were still in progress at the time the commission was set up. The Attorney General entered a *nolle prosecute* to avoid *sub judice* rule.[124] The discontinuance of the cases was the beginning of many court injunctions. Kilach one of the suspects obtained an injunction from the High Court against the commission's work which was overturned by Court of Appeal. The government also seized Pattni's passport.[125] He blamed the Commission and moved to High Court for reinstatement of his passport. However, he withdrew this application for undisclosed reasons.[126] In the meantime, Anganyanya the Vice Chair of the Commission was found culpable by the radical surgery tribunal and left. Nzamba

[120]Commission of Inquiry into the Illegal/Irregular Allocation of Public Land Report, 2005 p. 15
[121] ibid p. 44
[122] Supra n 120 p.52
[123]Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008) p.21
[124] Judicial Commission of Inquiry into the Goldenberg Affair Report, 2003
[125]Ibid p. 277
[126]ibid p. 15

Kitonga replaced the Judge.[127] Kamau Kuria one of the assisting counsels to the commission alleged interference from the commissioners and applied for their disqualification or censure of interference but the commission dismissed his application.[128]

All along, the chair of the commission, Justice Bosire was a Judge of Appeal. All the High Court orders came from his "juniors." Debates have emerged as to whether a tribunal led a by an appeal judge could be subjected to a High Court for Judicial Review.[129]

Even before the commission handled its work, the government had already initiated reforms that later emerged as CI's recommendations.[130] Could it be that the government was using the commission to legitimize its actions? Moi's interference was also not ruled out. From sentiments made after the release of the report recommending Moi's further investigation, it was apparent Moi would be exonerated.[131]

Chiloba disputes the timing of this commission reading political motives.[132] By the time it was released, the NARC coalition was disintegrating. Although the commission finally handled in the report, it took six months to be publicized. Most of the recommendations seemed to have been implemented before the release of the reports. However, those mentioned in the report moved to

[127]ibid p.1
[128]ibid p.1
[129]ibid p. 23
[130]Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008) p. 44
[131]ibid 56, some of the political statements were '*Can you imagine what would happen in this country if the government decides to humiliate Mr. Moi in court, like a common criminal? …There will be chaos. People will die to protect Mr. Moi's dignity'*
[132]Supra n 130 p. 43

courts to have the report quashed. The George Saitoti case dealt a blow the whole inquiry process.[133]

This commission demonstrates several issues, first Justice Bosire faced perhaps one of his most difficult times. He was ridiculed and lost confidence in the eyes of the public for the alleged unsatisfactory inquiry. Secondly, politics cannot be ruled out of the inquiry process and therefore there is a need to caution the commission's independence.[134] Third, the government had implemented several recommendations long before the commission concluded its work raising the issue of whether the commission was to legitimize government actions.

2.4.3 Artur Brothers Commission

On the 2nd March 2006, a group of hooded men raided (later identified as police) the Standard Group premises damaging property and harassing journalist.[135] The raid was a shock given that Kibaki's government that had been elected on democratic principles reforms. The Minister of Internal Security stated that the raid was in the interest of national security. Surprisingly, the raiders were allegedly led by foreign Armenian brothers, ("Artur Brothers").[136] It was not clear who the Arturs' Brothers were and their mission in Kenya. The public was eager to get exact fine details of the mission of the Arturs'. In the same year, on 8th June, Arturs' Brothers caused a security breach in JKIA when they drew guns on police officers and immigration officials.[137] They were arrested and deported the next day. On 13th June 2006, Mwai Kibaki appointed a

[133]*Republic* v *Judicial Commission OF Inquiry into The Goldenberg Affair & 2 Others Ex-Parte George Saitoti* [2006] eKLR
[134]Supra n. 130 p. 43
[135]For detailed facts see Report on the Investigation of into the "Conduct of Artul Brothers" and their Associates 2007
[136]Kipchumba Some, "Artur brother claims Kibaki knew about 'the Standard' raid" *Standard Digital* (Nairobi 27 November 2010) <https://www.standardmedia.co.ke/business/article/2000023383/artur-brother-claims-kibaki-knew-about-the-standard-raid> accessed 28 August 28, 2018
[137]David Ochami 'Deportation of Arturs was a conspiracy' *Standard Digital* (Nairobi March 2 2009) <https://www.standardmedia.co.ke/business/article/1144007879/deportation-of-arturs-was-a-conspiracy> accessed 28 August 2018

commission to inquire into the Artur brothers and their intention in Kenya. The report has never been made public.[138]

2.4.4 Krigler and Waki Commissions

By 2005, it was clear that the NARC government had not delivered most of its promises and disagreements about power-sharing had seen a political divorce.[139] Raila, Kalonzo, William Ruto and Uhuru Kenyatta (opposition leader) ganged up and opposed the constitution draft in 2005 defeating Mwai Kibaki who was a pro-constitution draft in 2005. Raila led the opposition group and would run against Kibaki in the 2007 elections.

The aftermath of the 2007 general election was one of the darkest moments for Kenya.[140] A disputed election ensued with Mwai Kibaki being declared the winner. Raila Odinga believed to have been rigged, rejected the results and called for mass actions. Tribal clashes ensued resulting in deaths and displacement of people. The international community intervened and brooked a coalition government which ended the tribal clashes.[141]

Two issues dominated the negotiations for coalition government: election malpractice and tribal clashes. The coalition agreement agreed on the formation of two commissions: Commission to into The Post-Election Violence experienced in Kenya after the General Elections held on 27th December 2007 (Waki Commission) and Independent Review Commission **(**Kligler, commission) to inquire into post-election violence and the election malpractice respectively.

[138]Parliament of Kenya Deb, 25 Nov 2010, Vol P, Col 8
[139]Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008) p.21
[140]Klopp, Jacqueline M., and Odenda Lumumba, 'Reform and counter-reform in Kenya's land governance' (2017) 44, no. 154 Review of African Political Economy 577, p 587
[141]For a detailed chronology of events in the 2007-2008 post -election violence and reconciliation process the Kligler and Waki reports.

On 14th March 2008, Kibaki commissioned the Independent Review Commission "to examine the December 2007 Kenyan elections from various perspectives".[142] The working of the commission was smooth and can be attributed to several reasons. First, the background leading to its appointment had shocked the country to the core and people were determined to put to an end election malpractice. Secondly, it did not seek to apportion blame but rather to identify and recommend improvement of the election governance in Kenya. Further, constitutional change calls had rekindled. The international community also monitored Kenya's events closely. The recommendations of this commission were largely captured in the drafting of the draft Constitution that was later subjected to a referendum.[143] The recommendations had far-reaching consequences on election governance in the country. Majority of its recommendations were implemented.

On its part, the Waki commission inquired into the post-election violence. It had both international and national backing. One significant invention of this commission is that it did not disclose those individuals whom it recommended for prosecution for election violence. The work of this commission led to the ICC cases. However, whether the ultimate justice for the victims was achieved remains a mystery to date. Although it led to ICC cases, the majority of the "minor" suspects were not conclusively prosecuted.

2.4.5 Amendment of the Act

By 2009, it was now clear that the government was never going to release the various CIs reports. In Parliament, members lobbied for the release of the reports but were frustrated on the 29th July 2009. In a lengthy ruling, the then Speaker ruled out the possibility of compelling the

[142]Konrad-Adenauer-Stiftung , 'Kriegler and Waki Reports Summarized Version Revised Edition' (2009) Primark Ventures

[143]A quick glance at the report and the Constitution's provisions on elections clearly shows a similarity between them

President to release the reports as the Act did not provide for such compulsion.[144] On the 8th June 2010, Hon Olago moved the Commissions of Inquiry (Amendment) Bill[145] whose main aim was to compel future commissions to submit their reports to the President and National Assembly. The amendment was passed and assented to on 13th August 2010 which came into force on 30th August 2010. The amendment was meant to cure the secretive manner in which reports had been handled by the previous governments. Around this time the Constitution of Kenya, 2010 was voted in and became effective on the 28th August 2010. Chief among the innovations of 2010 were accountability, transparency, access to information and a robust bill of rights. However, the Act has remained unreviewed to conform to the Constitution of Kenya, 2010

2.4.6 Saitoti Commission

In the runup to the 2012 general election, George Saitoti one of the eying successors of Mwai Kibaki and the then Minister for Internal Security together others perished in a helicopter crash in Kibiku area Ngong forest on 10th June 2012.[146] On the 18th June 2012, the Minister for Transport[147] appointed a team led by Kalpana Rawal, a Court of Appeal judge to hold a public inquiry into the accident. However, this did not stop the public emotions and interest in the matter. On the 29th day of June 2012, the President appointed the same persons under the Act to inquire into the Accident.

Surrounded by awful events, the commission did not go without interference claims mainly from the late Saitoti's family.[148] Eurocopter, the aircraft manufacturer, at some point sent to the commission a report of their accident assessment a move that prejudiced the work of the

[144]Parliament of Kenya Deb 29 Jul 2009, Column 4561
[145]Parliament of Kenya Deb,Tuesday19, 8th June, 2010
[146]For detailed facts see Commission of Inquiry into Accident involving Aircraft Registration 5Y-CDT Type AS 350 B3e Report, 2013
[147]Civil Aviation(Investigation of Accident) Regulations, Regulation 9
[148]Bernard Momanyi, "Saitoti family claims foul play in probe" *Capital News* (Nairobi June 26, 2012) <http://www.capitalfm.co.ke/news/2012/06/saitoti-family-claims-foul-play-in-probe/> accessed September 3, 2018

commission.[149] There were also evidential inconsistencies and concealing of the toxicologist results by government pathologists.[150] However, the commission concluded that overloading, lousy weather, and unqualified pilots might have caused the accident concluding that 'loss of situational analysis" as the probable cause of death.[151] Interestingly, despite the explicit provisions of the Act, the CAJ was still demanding for the disclosure of the report and forwarding it to the National Assembly as late as April 20th, 2013 despite the report being handled to President Kibaki.[152]

2.4.7 Tana River District Commission

In mid-2012, Tana River' Districts residents were embroiled in ugly tribal clashes on the boundaries of the Tana River Districts that left over one hundred people dead.[153] Mwai Kibaki on 12th September 2012 appointed a commission to inquire into the causes and make recommendations.[154] Three years since its conclusion, Kenya National Human Rights Commission was still demanding the release of the report.[155]

[149] Laban Wanambisi, "Eurocopter in trouble over leaked report" *Capital News* (Nairobi September 7, 2012) <https://www.capitalfm.co.ke/news/2012/09/eurocopter-in-trouble-over-leaked-report/ >accessed September 3, 2018

[150]The Standard Saturday Team, 'Saitoti's death was preventable, report concludes' <https://www.standardmedia.co.ke/article/2000081925/saitoti-s-death-was-preventable-report-concludes> accessed September 3, 2018

[151]Supra n 146 p. 56

[152]Nzau Musau 'Report yet to be released one year after Saitoti crash' Star News (Nairobi, January 11,2013) <https://www.the-star.co.ke/news/2013/06/11/report-yet-to-be-released-one-year-after-saitoti-crash_c786336> accessed September 3, 2018

[153]Chrispinus O., **'**President Kibaki forms judicial commission to probe ethnic violence' (2012) <http://www.coastweek.com/3538_tanariver_01.htm> accessed July 31, 2018

[154] Government of Kenya, Judicial Commission of Inquiry into the Ethnic Violence in Tana River, Tana North and Tana Delta Districts

[155]NTV 'KNCHR demands publication of report on 2012/13 Tana River clashes' <https://ntv.nation.co.ke/news/national/2725528-3445576-hyfrv4z/index.html> accessed July 31, 2018

2.5 UHURU KENYATTA'S PRESIDENCY

Uhuru Kenyatta was elected as the President in March 2013 general election and his victory affirmed by the Supreme Court.[156] Arguably, President Uhuru's presidency is pegged on the successful implementation of the Constitution. After the Westgate attack, the President promised a CI but it never materialized and one of the major reasons cited is the disclosure amendment made in 2010 which could possibly expose security details to the public.[157] Notably, President Kenyatta's government has not appointed any CI but has instead used presidential commissions, task forces, and committees. However, Acts of Parliament such as the National Coroners Service Act enacted in 2017 demonstrate that these institutions are here to live.

2.6 Conclusion

From the foregoing discussion, it is clear that CIs in Kenya are not new and are as old as the government itself. The colonial government used the CIs for colonial entrenchment and the successive governments have largely maintained them for their own interests. Due to various loopholes in the Act including the mechanism of checking against abuse of commissions, the integrity of the appointees, independence of inquiries, implementation follow-ups and overconcentration of powers under the Act in one institution is largely to blame for the failures of various CIs. However, few as they may be, some CIs have been useful tools of accountability and transparency.

Majority of the CIs in the colonial period responded and advanced colonialism while those formed under between 1963 and 2010 reflect old constitutional order. Many of the issues the

[156] *Raila Odinga & 5 Others* v *Independent Electoral and Boundaries commission & 3 Others* [2013] eKLR
[157] Dave Opiyo, 'President's dilemma in naming commission to probe Westgate attack' *Daily Nation* (Nairobi October 26,2013) < https://www.nation.co.ke/news/politics/-commission-to-probe-westgate-attack/1064-2048548-k3krbf/index.html > accessed September 3, 2018

commissions reflect are the very ones the Constitution sought to change. The commissions demonstrate the old constitutional order of non-accountability, transparency and secretive governance which the Constitution of Kenya, 2010 sought to change. However, since the promulgation of the Constitution in 2010, the Act has not been amended to reflect post-2010 regime.

CHAPTER 3: LEGISLATIVE, INSTITUTIONAL, AND POLICY FRAMEWORK OF GOVERNANCE OF THE COMMISSIONS OF INQUIRY

3.0 Introduction

The previous chapter has examined the various commissions formed since 1912. The chapter has characterized the commissions are largely uninspiring. To locate the ineffectiveness, this chapter examines the legal, policy and institutional framework governing CIs in Kenya. The main aim is to lay bare the framework pointing out how various provisions have been used and interpreted by courts. The central argument in this chapter is that the Act reflects the old constitutional older and lacks in accountability, transparency, leadership and integrity and respect for devolution. To this end, the chapter is divided into two main parts. One part discusses the national framework. As the primary task of this chapter is to analyse the Act critically, it dedicates most of its effort in analysing this legislation with the help of scholarly and courts' decisions. The second part of the national framework discusses the Constitution, Fair Administrative Action Act, 2015, Leadership and Integrity Act and the Public Officer Ethics Act. The chapter later discusses the regional and international framework on CIs.

3.1 National Level

3.1.1 Constitution of Kenya, 2010

The Constitution provides that sovereignty resides in the people and public institutions derive their authority from the people.[1] Accordingly, the institutions serve the people and their interests. In the exercise of this authority, the Constitution prescribes the national values and principles including the rule of law, accountability, transparency, integrity, openness and public

[1]Constitution of Kenya, 2010 Ar. 1

participation.[2] Further, it provides for leadership and integrity provisions that call the officers to be accountable and transparent in the performance of public functions.

Additionally, the Constitution provides for the Bills of Rights which are only achievable if institutions are accountable and transparent. In ensuring accountability and transparency, institutions such as CIs are established to assist in holding the government accountable.[3]

3.1.2 Commissions of Inquiries Act, Chapter 102, Laws of Kenya

3.1.2.0 Issuing a commission

The Act empowers the President whenever he opines it's advisable to form a CI.[4] The President may direct the commission to inquire into the conduct of any public body, public officer or any other matter that he/she opines to be of public interest. The commissioning is done through publication in the Gazette.[5] The Act gives the President complete discretion in the issuance of the commission.[6]

The Act contemplates three types of commissions: commissions to inquire into the conduct of a public body, a public officer and a general category of any matter of public interest. However, in all the circumstances, it must be that the President has opined that the inquiry is in the public interest.[7] The Act does not explain the scope of the public officer or public bodies or whose conduct may be subject to an inquiry. Understandably, the Act may have been correct to state that inquiries under the Act could be subject of any public officers and public body in the era of

[2] ibid Ar. 10
[3] *Moraa Gesicho* v *Attorney General [2012] eKLR*
[4] Commissions of Inquiry Act, s 3(1)
[5] ibid s. 18
[6] *Joyce Nelly Ochogo Okal* vs *Attorney General & 2 Others* [2013] eKLR
[7] Commissions of Inquiry Act, s 3(1)

the imperial presidency. It will be argued in the next chapter that such a provision contradicts explicit provisions of the Constitution.

In the past, the various Presidents have appointed inquiries into people's conduct. An example of such a commission is the Njonjo Commission. AfriCOG notes that the inquiry was initiated by the President, both as the appointing authority and the complainant.[8] The environment surrounding the commissioning was that an unnamed traitor had collaborated with the foreigners and castigated the 1982 coup *de tat*.[9] The unnamed traitor as it would later emerge was Charles Njonjo. Condemned as he was, the inquiry would continue and indict Njonjo of the allegations. The Penal Code as it was then contained a clear provision on treason which could have effectively dealt with treasonable allegations. Critics of this commission, who this research agree have "convincingly argued" that the inquiry was a scheme to have Njonjo out of government because he was seen as a threat to President Moi.[10]

The second category is those inquiries whose target is the conduct of public bodies. The Constitution or Acts of parliament establishes various public institutions. From the Act, it provides that any public body may be subject of an inquiry.[11] However, as it will be demonstrated in the next chapter, this is inconsistent with the Constitution. There have been numerous CIs on public bodies starting with Commission of Inquiry into Maize shortage whose primary focus was the Maize Board of Kenya in 1966. Similarly, the Golden Berge affair was an inquiry into on the various institutions and their role in the infamous corruption scandal.

[8]Africa Centre for Open Governance (AfriCOG) 'All that glitters? An appraisal of the Goldenberg Report' (2011) AfriCOG p.12
[9] Lea, David, and Annamarie Rowe (eds) *A political chronology of Africa* Vol 4 (Taylor & Francis, 2001)
[10] Press, Robert M, 'Peaceful Resistance: Advancing Human Rights and Civil Liberties' (2006) Aldershot, U. K.: Ashgate
[11] Commissions of Inquiry Act s 3(1)

The third category of commissions is general, and the Act does not define its scope. However, a literal interpretation of the Act shows the unrestricted scope and the President can form a commission to inquire literally on anything provided in his opinion is in public interest. It is noteworthy, however, that in the Act no public institutions or person can check the exercise of this rather broad discretionally power.

In public administration, the term public interest is not only one of the widely used terms but also the least defined.[12]However, once one determines the scope of public interest in certain circumstances, its ramifications are far-reaching.[13] The scope of public interest may be extensive and if unregulated may be subject to misuse. The difficulty in determining what amounts to public interest particularly so when two competing claims are genuinely for the public interest. The second difficulty is that although it is not possible to precisely define public interests, circumstances may themselves dictate whether a matter is of public interest or not. The discretion of determining what amounts to public interest must, however, be properly, rationally exercised and in good faith.[14] Discretion must be checked lest it is misused and in line with this principle courts in taming discretion require that it be judiciously exercised.[15]

The term public interest is not a recent concept and existed in different terms in ancient philosophers' writings including Aristotle (common good)[16] and Locke (public good).[17] However, its definition hasn't been offered though there is a consensus that it refers to considerations pointing to public order and the well-being of the citizenry. In conceptualizing the

[12]Wheeler, Chris. "The public interest we know it's important, but do we know what it means." (2006) No. 48 AIAL Forum Australian Institute of Administrative Law, p. 12.
[13] Ibid p. 34
[14]Lewis, Carol W. 'In pursuit of the public interest' (2006) 66, no. 5 Public Administration Review, 694
[15] *MC Holdings Limited* v *Nzioki* [2004] 1 eKLR 173
[16] Keys, Mary M *Aquinas, Aristotle, and the promise of the common good* (Cambridge University Press, 2006)
[17]Dunn, John 'The concept of trust in the politics of John Locke' (1984) Philosophy in history: Essays on the historiography of philosophy, 279

scope of public interest, the Australian Senate Committee on Constitutional and Legal Affairs expressed itself thus:

> public interest' is a phrase that does not need to be, indeed could not usefully, be defined... Yet it is a useful concept because it provides a balancing test by which any number of relevant interests may be weighed one against another. …the relevant public interest factors may vary from case to case – or in the oft-quoted dictum of Lord Hailsham of Marylebone 'the categories of the public interest are not closed[18]

The *Black's Law Dictionary*[19]defines public interest as *"the general welfare of the public that warrants recognition and protection"* or *"something in which the public as a whole has a stake, especially an interest that justifies governmental regulation".* The import of these definitions is that public interest connotes the principle of "trust".[20]

Chris Wheeler opines that there exist two components of public interest: objectives and outcomes and process and procedure.[21] The objective and outcome component connotes that the purpose for which the act is done and the overall result targeted should be for the benefit of the public.[22] The process and procedure, which is the least discussed of the components call for impartiality, rationality, accountability, and transparency.

From the preceding, it is clear that everyone seems to know what entails public interest but no one offers a precise scope. The lack of a precise definition is itself a risk and if not regulated may be open to abuse. In such circumstances, there is wisdom to subject the discretion in more than one person to have a two-tier determination or further specifically state what is not in public

[18]Australian Senate Committee on Constitutional and Legal Affairs Report 1979
[19]*Black's Law Dictionary* 9th Edition
[20]Huffman, James L. 'A fish out of water: the public trust doctrine in a constitutional democracy' (1988) 19 Envtl.L 527
[21]Wheeler, Chris. "The public interest we know it's important, but do we know what it means." (2006) No. 48 AIAL Forum Australian Institute of Administrative Law p.29
[22] ibid p. 34

interest. What emerges from the above propositions is that a matter is of public interest inherently and does not become a public interest because there is pressure from the public.[23]

The history of commissions of inquiry in Kenya on this matter is somewhat controversial. In most of the commissions, the appointing authority has appointed CIs after public pressure from citizens, civil society organisations, and Parliament.[24] Arguably, the pressure thus determines what amounts to the public interest which is in itself flawed. Such an interpretation is reactionary in nature. If therefore, the public does not follow on a particular issue, even if it were a matter of public interest, it would, not addressed.

The timing of issuing a commission is itself a clear indicator of whether the commission is formed in good faith and hence in public interest.[25] By way of examples, the Golden Berg commission was formed by NARC government upon assuming power, but most of the recommendations of the commission had been implemented even before the commission finalised its report. Chiloba questions this issue and concludes that the commission may have been issued to legitimise government policies and strategies. Legitimizing government actions is not within the ambit of public interest because it is deception in disguise.[26] The Artur Brothers commission was first formed when the pressure increased on the government to explain the presence of the two Brothers, who had been in the country and who seemed very powerful. First, such a commission responds to pressure. Secondly, the non-publication of reports demonstrates

[23]Legislative Council Protectorate and Colony of Kenya Deb, July 25 1962, Vol LXXXIX, Col. 1240
[24]Parliament of Kenya Deb, 12 February 1970, Vol XIX Col.203, Parliament of Kenya Deb, Parliament of Kenya, 22 September 1972, Vol XXVII Col 406
[25]Sulitzeanu-Kenan, R, "Reflection in the Shadow of Blame: When do Politicians Appoint Commissions of Inquiry?" (2010) 40(3) British Journal of Political Science, 613
[26]Adam, "Reckoning schemes of legitimation: On commissions of inquiry as power/knowledge forms." (1990) 3, no. 1 Journal of Historical Sociology 1

that indeed it was formed to let the public forget about it. "Cooling public"[27]pressure cannot amount to public interest.

The very conception of a state is that it is founded on law.[28] Accordingly, where an existing law can address a specific problem, the society would demand that the available law is used to solve the specific problem. This presupposes that if other specialised laws can address a particular, it should not be subject to inquiry. Put differently; if the issue at hand is adequately provided for in the law, public interest demands that the issue be dealt with by that law because a state thrives in the law.[29] As has been demonstrated so far and it will continue to emerge, the majority of commissions in Kenya have been an evasive way of solving issues.[30] Put differently; they are resulted to "cool a hot potato" and postpone the problem. The Artur commission could have been easily investigated using investigatory bodies, but because inquiries are a way of running away from accountability, one was initiated. The Charles Njonjo could have been dealt with using treason laws. Commissions are at the discretion President, and their reports were until 2010 very secretive. To avoid accountability provided by the specific laws, commissions were tools at disposal.

[27]Roderick Macleod, 'Parking a hot potato: Are commissions of inquiry (in) effective?' *ENCA* (Capetown 16 August 2013) <http://www.enca.com/opinion/parking-hot-potato-are-commissions-inquiry-ineffective> accessed 4 December 2017

[28]Riley, Patrick, *Will and political legitimacy: A critical exposition of social contract theory in Hobbes, Locke, Rousseau, Kant, and Hegel* {Harvard University Press, 1 Jan 1982)

[29]Mbote, Patricia Kameri, and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa 2011) p. 89

[30]Eliud Kibii, 'Commissions or Omissions of Inquiry? Why Kenya has failed to Address Historical and Other Injustices' Elephant (Nairobi, April 5, 2018) < https://www.theelephant.info/features/2018/04/05/commissions-or-omissions-of-inquiry-why-kenya-has-failed-to-address-historical-and-other-injustices/> accessed April 26, 2018

President Kenyatta for six years has not commissioned an inquiry. However, in 2013 after the Westgate attack, the President promised a commission into the matter but never came to be.[31] The National Youth Service scandal was perhaps the second largest saga after the Golden Berg scandal. There were various calls for a commission on this matter but which have been declined.[32] Onto the many terrorist attacks, Parliament has itself called for the formation of an inquiry to no avail.[33] The result is that Parliament forms committees that are inherently politically constituted and led. The National Youth Scandal has gone unsatisfactorily punished with acquittals and without the public ever knowing, the amount lost, the culprits and what caused the issues. The import is that since the appointing authority is one, and the commissions should majorly investigate the conduct of his officials or government functioning, none is formed.

What emerges that the discretion of determining what is in public interest may be and has been misused. The formation of the commission, timings, and lack of forming such commissions are all pegged in public interest. As a result, the public is deceived. There is a lack of objectivity in deciding public interest.

Commissions are indispensable tools of transparency and governance.[34] First, they are inquisitorial in nature overcoming the challenge of the adversarial system.[35] They are further

[31]Macharia Gaitho, 'Westgate probe: Could it be Uhuru doesn't want to embarrass the military?' *Daily Nation (*Nairobi, 2013) <https://www.nation.co.ke/oped/opinion/Westgate-probe--Uhuru-doesnt-want-to-embarrass-military/440808-2050906-n0phe6/index.html> accessed April 26, 2018

[32]Cyrus Ombati 'Anne Waiguru wants President Uhuru to form a commission of inquiry to investigate Josephine Kabura's affidavit' Standard Digital (April 24, 2015) <https://www.standardmedia.co.ke/article/2000199444/anne-waiguru-wants-president-uhuru-to-form-commission-of-inquiry-to-investigate-josephine-kabura-s-affidavit> accessed April 26, 2018

[33] Wambugu Kanyi 'Nyokabi wants a commission of inquiry to probe terror attacks' *The Star* (Nairobi, April 10, 2015) <https://www.the-star.co.ke/news/2015/04/10/nyokabi-wants-commission-of-inquiry-to-probe-terror-attacks_c1116101> accessed September 3, 2018

[34] Gomery, J.H., 'The Pros and Cons of Commissions of Inquiry' (2005) 51 McGill LJ, 783
783

geared towards informing rather than finding the guilt of people. When a tribunal is set to find people's guilt, they are limited in the scope as the evidence, and every decision is limited to solving that specific thing. In contrast, commissions have broad powers, and their nature of work is that they collect a lot of information to inform convincingly. The importance of issuing of commissions and engagement of the public in post-2010 was appreciated by the court in *Moraa Gesicho V Attorney General* where the learned judge held:

> A Commission of Inquiry such as the one appointed is an avenue for the realisation of the values of the Constitution set out in **Article 10** which include transparency, public participation, and good governance. The petitioner has the right and opportunity to appear before the Commission to submit on the terms, nature, and extent of the terms of reference so that the Commissioners can divide on them.[36]

Commissions of inquiry should be issued in warranted circumstances to pursue accountability and transparency in government.

3.1.2.1 Appointing Authority

The appointing authority of inquiries under the Act is the President. The President is the head of the national executive,[37], the arm of government subject of inquiries and also the only appointing authority. Gomery notes that it takes extra-ordinary governments to appoint commissions of inquiry whose outcome may tarnish them or expose them to wrongdoing.[38] In Kenya at least from experience, the appointment of inquiries is majorly involuntary. Even where there is a genuine public interest in the inquiry, a commission may never be formed for the sole reason that it may tarnish the image of the government. The reluctance in forming commissions in post-2010 has been attributed to the disclosure amendment in 2010. The fact that the formation is at the

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[35] Nagorcka, F., Stanton, M. and Wilson, M., 'Stranded between Partisanship and the Truth-A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice' (2005) 29 Melb. UL Rev.448, p.448
[36] *Moraa Gesicho V Attorney General* [2012] eKLR
[37] Constitution of Kenya Ar. 131
[38] Gomery, J.H., 'The Pros and Cons of Commissions of Inquiry' (2005) 51 McGill LJ, 783, p. 783

discretion of the President leaves the public with little to do other than to keep complaining as mysteries keep passing.

The conduct of the county government and its public officers cannot be the subject of inquiries at least under the Act as will be demonstrated in the next chapter. Although there may exist a genuine public interest on a matter of one or more county governments, a public officer or a department in county governments, the current legal framework leaves county governments out of reach under the Act.

From the foregoing, it is clear that, retaining the President as the sole appointing authority leaves county governments out of reach of commissions. Secondly, the power is put to abuse by inaction in public interest cases. These fears and interference of such commissions left to one person are best captured by Parliamentary debate[39] where the Members of Parliament expressed confidence in Parliament sanctioned commissions as compared to those appointed by the President.

3.1.2.2 Terms of reference

The Act requires the President while issuing a commission to specify the terms of reference which determines an inquiry scope. Under the Act, the President may also amend the terms of reference by adding or removing some. The scope of inquiry is therefore at the President's discretion. Terms of reference are an important part of the commissions as they direct the commission on its mandate.[40] Acting out of the mandate amounts to ultra vires and judicial

[39]Parliament of Kenya Deb,April 25, 2001, Col 580

[40]Roderick Macleod, 'Parking a hot potato: Are commissions of inquiry (in) effective?' *ENCA* (Capetown 16 August 2013) <http://www.enca.com/opinion/parking-hot-potato-are-commissions-inquiry-ineffective> accessed 4 December 2017

review remedies automatically apply.[41] In the case of *Moraa Gesicho V Attorney General*, the petitioner sued on the basis that the scopes of terms of reference of the Judicial Commission of Inquiry into the Helicopter Crash of 2012 were improper and could influence the commission's work. The court in dismissing the petition held that the President has unfettered and exclusive powers to formulate terms of reference thus:

> I am satisfied that the President is the proper authority under the *Commission of Inquiry Act* to appoint a Commission of Inquiry. It is the president to decide the terms of reference of the Commission, and there is nothing in the Act that limits the scope or matters which the President may refer to the Commission.

As argued elsewhere, the terms of reference are the oxygen of a commission. It is, therefore, possible to limit the inquiry and predict the outcome by designing the terms of reference in such a manner that the commissions are limited to inquire into some matters and leave others in a given scenario. Objectivity, rational and purposeful tots are prerequisites of an objective inquiry. The sentiments of the court in the above case are worrying about reinstating the view that Presidents powers in formulating ToRs are unfettered.

3.1.2.3 Composition of the Commissions

The Act defines a commissioner as the person appointed to inquire into any matter subject of a commission.[42] The President when appointing a commission also appoints the commissioner(s). Although the number of commissioners in a commission is at the discretion of the President, the subject matter majorly informs the number of commissioners a commission would have.

[41] *Eric Cheruiyot Kotut* vs *S.E.O. Bosire & 2 Others* [2008] eKLR
[42] Commissions of Inquiries Act, s 1

The Act provides that in case of divergent views as to any issue, the matter is to be decided by a majority of votes and in case of a tie, the chair of the commission or in his absence his deputy has a second vote.[43] Notably, the majority of the commissions formed have an odd number of commissioners. When more than one commissioner is appointed, the commission may specify who among them is the chairman and if the President so desires the deputy chair. The Act does not give the qualifications for persons to be the commissioners. The President, therefore, is and has over the years appointed those that he so wishes to be appointed as the commissioners.

The Constitution is the supreme law of the land and binds all person interpreting, applying and implementing it. The commissions as demonstrated in the *Morara case* are anchored on Article 10 of the Constitution and as such the process of appointing and commission must adhere to its dictates. Accordingly, Chapter six of the Constitution and the Leadership and Integrity Act, 2012 are applicable. This Chapter would definitely dictate some of the qualifications of the persons who may be appointed as commissioners of commissions of inquiry. However, in Kenya, chapter six has not so far achieved its purpose.[44] It may be the sleeping lion in Kenya's governance software.[45]

The history of commissions in Kenya demonstrates that commissioners are carefully chosen. It is important to note that the commissioner's personality and ideology may and does affect the outcome of any matter he applies his mind. Secondly, the personal standing of the person appointed is essential. To demonstrate the careful selection of commissioners, in the Feetham Commission, Feetham appointment was contested because of his exposure in African affairs and

[43] ibid s. 8

[44] Ash Pal Ghai And Jill Cottrell Ghai, 'The vision of Chapter Six of the 2010 Constitution' (the Star, November 5, 2016)<https://www.the-star.co.ke/news/2016/11/05/the-vision-of-chapter-six-of-the-2010-constitution_c1448708> accessed April 26, 2018

[45] Kenya's Constitution is arguably the most progressive and comprehensive textually. However, in practice, a lot is yet to be done for purposes of implementing its dictates. The systems set out in the Constitution are excellent except that the people in charge of the institutions and implementation of the Constitution have failed.

was feared that he could make recommendations favoring the Africans contrary to government's intention. Similarly, the Koech Commission of 1998 faced a similar challenge. The government was keen on maintaining and legitimising the 8-4-4 system that had been opposed since its inception. The appointment of the David Koech, from the Presidents backyard, was seen as a move to curtail radicalism.[46].

The favourite cadre of persons for appointment as commissioners in Kenya are judicial officers. There are several reasons why this could be so. First, judges belong to a prestigious profession that society highly respects and as such have arguably an impeccable reputation.[47] Secondly, judges' working stations are courts: the temples of justice.[48] Their ordinary work demands fairness, independence, impartiality, and neutrality. They do not engage in political debates and therefore do not or are not expected to lean on any particular side of the government.[49] Indeed the Act provides that commissions' proceedings are deemed as judicial proceedings for purposes of administration of justice. However, this research advances the argument that indeed due to their reputation and high standing their appointment could be to legitimise the commissions' outcome. Reports of commissions overseen by judicial officers would ordinarily assume some level of respect and more trustworthy.

Generally, politic surrounds matters of general public interest, and even when they are inherently apolitical, politics has a way of finding themselves into such matters. Judges in inquiries,

[46]Owate N. Wambayi, 'Ministry of Education Science and Technology National Council For Science and Technology,Unit Cost Of Basic Education – Kenya' <https://oris.nacosti.go.ke/modules/library/publications/research_reports/nacosti-dl-rr-1051.pdf> accessed July 31, 2018 p.78

[47] Ojienda, Tom, and Katarina Juma, Professional Ethics: A Kenyan Perspective, (LawAfrica Publishing Ltd 2011)

[48] *Judicial Service Commission* v *Speaker of the National Assembly & another* [2013] eKLR

[49] Dimino, Michael R 'Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians' (2003) 21, no. 2 Yale Law & Policy Review, 301

therefore, have found themselves in murky political waters regarding.[50] Bosire, who was a judge of appeal chaired, faced the most judicial review orders ever issued against a commission in Kenya. The outcomes of these judicial review proceedings painted a bad picture of the commission and hence a senior sitting judge. Some court judgments on this commission display a picture of incompetent commissioners. Although this may be true as judged from the report, politics surrounding the inquiry played a great role in the inquiry process. The Ouko's death inquiry also chaired by former chief justice Gicheru was uncharacteristically revoked in the most unclear circumstances. It tainted the judge's standing at some point the judge had to for defamation as a result of the ridicule on the commissions' proceedings.[51] Due to political nature of the matters subject of inquiry, judges who end up as commissioners are subject to ridicule and if the outcome of the commissions does not resonate with the people's expectations, the trust deteriorates. This trust issues negatively affect their reputation and work as judges in later cases

3.1.2.4 Secretary to the commission and assisting counsels

The Act provides that the President may appoint a secretary to any commission of inquiry. The Act does not specify the specific roles of the secretary to the commission apart from the administration of the oath to the witnesses summoned by the commission which is a shared duty with the commissioners. In practice, however, the secretaries(y) are the administrative heads of the commission. They assist in the organisation of the commission to facilitate the inquiry.[52]

The Act does not provide for the position of assisting counsels. However, the majority of the CIs have had two or more assisting counsels. The role of assisting counsel at least from experience is

[50] Mbote, Patricia Kameri, and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa 2011) p.10
[51] *Johnson Evan Gicheru* v *Andrew Morton & another [2005] eKLR*
[52] Africa Centre for Open Governance (AfriCOG) 'All that glitters? An appraisal of the Goldenberg Report' (2011) AfriCOG p. 23

integral to the success of the inquiry. Up until Akuwimi commission, there were no controversies about their role. In this commission, President Moi appointed Mr. Gacivih as the assisting counsel but replaced later by Mr. Bernard Chunga, then the Director of Public Prosecutions in the AG's office. The AG's role was highly likely to be a subject matter for the inquiry due to lapse in the prosecution of tribal clashes suspects. LSK protested the replacement on the basis of conflict of interest without success.[53]

The exit of Mr. Gacivih, reportedly an "aggressive prosecutor" saw reduced vigour of the commission in pursuance of witnesses. His replacement intentions were to exonerate senior government officials and instead focus on the people of the lower ranks.[54] The failure to prescribe roles of assisting counsels came into light in the Bosire Commission where the assisting counsels alleged interference by commissioners during witness interrogations. The commissioners, however, reprimanded them arguing that the commissioners were in charge of the inquiry and anyone else was subordinate to them. Another clash was witnessed when the two assisting counsels allegedly became allegedly unruly and were excluded from the commissions' inquiry.

3.1.2.5 The duty to make a full, faithful and impartial inquiry

Upon appointment, each commissioner should take an oath of office before a judge of the High court.[55] After the oath, the Act requires the commissioners to make a *full, faithful and impartial inquiry* and report to the National Assembly and the President in writing. The report should include a full record of the proceedings and the recommendations if it was directed to give them.

[53]Law Society of Kenya, Impunity, the Report of the Law Society of Kenya on the Judicial Commission of Inquiry into Ethnic Clashes in Kenya, Nairobi, 2000
[54]Africa Centre for Open Governance (AfriCOG) 'All that glitters? An appraisal of the Goldenberg Report' (2011) AfriCOG p. 2323
[55]Commissions of Inquiry Act, 5

Majority of cases involving inquiries in Kenya mainly revolve around the "full, faithful and impartial" requirement. The first classic case was the *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-Parte George Saitoti.*[56] The applicant was implicated in the Golden Berge Scandal having been the Minister of Finance at the material times. The commission in its report made recommendations for his prosecution. Unfortunately, there was no evidence on record to support the recommendations. The report also depicted a biased commission and kept referring the applicant as "guilty". It also had relied on inadmissible evidence. The applicant on these grounds filed a judicial review application claiming the commission had not made an impartial inquiry an argument which the court agreed with. The court found the findings to be unreasonable, biased and unwarranted. Similarly, the court in *Biwott Kiprono v in the Matter of the Report by the Judicial Commission of Inquiry into Tribal Clashes in Kenya* quashed the findings of that commission on the ground that the commission had made recommendations for prosecution of the applicant which recommendations were not supported by evidence on record. Such was also the finding *in the matter of the report by the Judicial Commission of Inquiry into Tribunal clashes in Kenya.*[57] Any report proceedings are measured against impartiality, faithfulness, and comprehensiveness of the inquiry. This duty is only possible if the independence of the inquiry process is guaranteed.

3.1.2.6 Regulation of proceedings

The Act requires that the general conduct of the proceedings conforms to the directions contained in the commission. The Act, however, bestows the duty of making rules of conduct and management, specifying the hours and place of sitting of the inquiry on commissioner(s).

[56]*Republic V Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex-Parte George Saitoti* [2006] eKLR

[57]*In the matter of the report by the Judicial Commission of Inquiry into Tribunal clashes in Kenya* H. C. Misc. Appl No. 1269 of 2002

The regulations must, however, be consistent with the regulations that may be made under section by the Cabinet Secretary under the Act.[58]

Every commission should provide directions on how the inquiry is to be executed and in suitable cases state the various directions.[59] The directions include the admissibility of adverse evidence on an individual's character or reputation. In such situations, the commission should not accept such evidence unless satisfied that its relevance to the inquiry. All reasonable efforts must be made to issue warnings to such persons and give such persons an opportunity to be present at such proceedings and to cross-examine the witness.

Hearsay evidence that affects the individual's reputations or character of a person is generally inadmissible.[60] Opinion evidence is also excluded. However, the Act allows the commissions for good reasons which are to be recorded depart from the above rules so far as it is necessary to ascertain the truth.

3.1.2.7 Witness summoning and examination

The Act empowers the commission to summon and examine witnesses and to require the production of books, documents, plans and to examine the witnesses on oath.[61] The commission may for purposes of avoiding delay, expense or for any other sufficient reasons but subject to the rules outlined above receive affidavit evidence. Any person whose conduct is under inquiry or who is implicated or concerned in any matter under inquiry is entitled to be represented by an advocate and any other person with the leave of the court. Failure to call witnesses or the person

[58] However, so far, there are no regulations in the Act as to the conduct of the inquiries under the Act
[59] Commissions of Inquiry Act, s 3
[60] ibid s 3
[61] ibid s 10

who is implicated in the inquiry is fatal and renders a report nullity.[62] Production of affidavit evidence was the issue in the case of *John Jackson Mwalulu & 8 others v Judicial Commission of Inquiry into the Goldenberg Affairs & 3 others*[63] where the commission had received evidence of the former President Moi by way of the affidavit, but applicants wanted the former President to appear in person. The High Court agreed with the petitioners on the basis that evidence of such a person was essential and there was a need for examination of the witness. However, the commission held its ground that the evidence in the affidavit was satisfactory which position was later supported on appeal. Interestingly, the commission recommended further investigation into Moi's conduct indicating that it did not find enough evidence to implicate him despite the requirement to make a full inquiry.

Section 13 of the Act deems all inquiries to be judicial proceedings for purposes of Chapter XI and XVII of the Penal Code.[64] Chapter XI provides for the offences relating to the administration of justice including perjury and subordination of perjury. Chapter XVIII, on the other hand, provides for criminal defamation. However, these provisions were declared unconstitutional in the case *of Jacqueline Okuta & another v Attorney General & 2 others*[65]and hence no longer applicable.

[62] *R* v *Attorney General ex -parte BW* 1 [2002] 1 KLR 668
[63] *Jackson Mwalulu & 8 others v Judicial Commission of Inquiry into the Goldenberg Affairs & 3 others* **[**2004] eKLR
[64] In the case of *Stephen Mwai Gachiengo & another* v *Republic* [2000] eKLR, it seems to suggest that a person who knows the law should head a commission that assumes the judicial character.
[65] *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR

3.1.2.7 Release of the Commission's Report

Since their inception in Kenya in 1912, there had been no obligation on any commission to publish its report and the recommendations to the public up until 2010 when section 7 of the Act was amended.

In the 1912 Ordinance, the commission could report to the Governor, and there was no duty on his part to release it to the public. This secretive nature, therefore, made the outcome of the commission the "property" of the Governor. However, protectorates and colonies were required to report to His Majesty on the general administration of the colonies and protectorate annually. Accordingly, reports of inquiries were often found in the Annual Reports. Secondly, commissions at this time were geared towards entrenching colonialism and colonialists were in power and the reports served their interests. Africans interests did not matter, and as such, the reports would be disclosed without worry of their contents.

Upon attaining independence, the powers of the Governor under the Act were assumed by the President. The annual reports to England also ceased. As such, the President became the appointing authority and the recipient of the commissions' reports and recommendations. The law before 2010 did not put an obligation on the commission to release the reports to persons other than the President. The President in various governments treated them as private property and rarely released to the public and in the evidence that they did, it would be many years after the completion. Follow-ups on the implementation could also not be possible without knowledge of the contents of the finding.

By 2009, it was obvious that the government would not voluntarily release the reports of such commissions.[66] Parliament, therefore, amended the Act in 2010 which now require the commission so appointed to report to the President in addition to National Assembly. In moving the motion for the Amendment Hon. Alouch indicates the purpose of the Bill thus:

> In the history of our country, numerous inquiries have been commissioned by the President in the exercise of the powers vested by section 3 of the Commissions Inquiry Act. The reports of such inquiries have, in terms of section 7 of the Commissions of Inquiry Act, been submitted to the President. In a good number of cases, the results of such inquiries have remained unknown to the public. This despite the fact that inquiries are constituted to interrogate matters that are of a public nature and which directly affect the public. The public is usually active participants in the proceedings and deliberations of such inquiries. Additionally, the inquiries are funded by the public. It is, therefore, an anomaly that the public would remain clueless as to the results of a large number of inquiries that have been commissioned. To address this anomaly, this Bill proposes an amendment to section 7 of the Act.[67]

It was hoped that the tabling of the report could have seen the report debated and hence would come to the knowledge of the public. Unfortunately, implementation of this provision has not gone without challenges. Three years after Commission of Inquiry into the Tana River Districts Tribal Clashes the Kenya National Human Rights Commission was still demanding the release of the report to Parliament.[68] This amendment is one of the primary reasons why the President did not commission the Westgate inquiry. The argument was that such an inquiry was to deal

[66]National Assembly 29th July 2009, Col. 21
[67] The Commissions of Inquiry (Amendment) Bill, 2009 Memorandum of Objects and Reasons
[68]NTV, 'KNCHR demands publication of the report on 2012/13 Tana River clashes' <https://ntv.nation.co.ke/news/national/2725528-3445576-hyfrv4z/index.html> accessed September 3, 2018

with sensitive security issues and the blanket disclosure requirements to the National Assembly were undesirable. Although access to information is a fundamental right, the release of some information may be too sensitive, and limitations to the amendment may be desirable.

3.1.2.8 Termination of inquiries and commissioners' term

The commission's work comes to an end upon handing its report to the President and National Assembly but within the allowed time during the commissioning.[69] However, the President may extend the time for the commission. If the time is not extended, the commission has to do all it has to ensure it's done before the set time; otherwise, its findings are a nullity[70]

The Act also empowers the President to amend or revoke a commission at any time. Curiously, the law does not require the President to give reasons for an amendment or revocation. Additionally, the law has no provisions to check the exercise of this power. In exercise these powers, President Moi revoked the Ouko inquiry under unclear circumstances after the "key witness" started testifying before the commission. This commission had been formed after three other investigations had been conducted but which had not been successful in unearthing the mysterious death. Moi called on the police to intensify investigations despite the police having failed to previously establish the circumstances of the death. The revocation was followed by the arrest of the family lawyer who had represented the family in the commission. That was the end of the commission.

A commissioner serves at the unfettered discretion of the President. Under the Act, the President may appoint any commissioner, add a new one, and change the designation any of the commissioners. Similarly, the President may substitute a commissioner if he or she is unable or

[69] *Wilfred Karuga Koinange* vs *Commission Of Inquiry Into Golden Berg Commission* [2006] eKLR
[70] *Republic* v *Attorney-General Ex Parte Biwott Kiprono* [2002] eKLR

willing to act or dies or in President's opinion not suitable to continue to serve as a commissioner. This power is also unchecked.

3.1.2.9 Implementation

The law requires the commission to conduct the inquiry and on completion of the inquiry to report to the President and National Assembly in writing, the result of the inquiry and reasons for the conclusions.[71] Under Section 7(2), the Commission should also submit its recommendations.

Notably, the Act neither provides for implementation mechanisms nor any obligations to implement by either the President or the National Assembly. It similarly does not have any incentives for ensuring implementation or at least follow up of the inquiries' recommendations. The courts have pronounced themselves severally on the non-obligatory nature of the implementation of the recommendations or the report. In *Mureithi & 2 others v Attorney General & 4 others*[72]the plaintiffs, residents of Nyeri of Muthaini clans sued the government asking for mandatory implementation of Ndung'u Commission's report. Ndung'u Commission had observed that during the state of emergency in the 1950's, the Catholic Church had taken their land without compensation. The Commission recommended compensation to the clan. In rejecting their prayers, the court held:

> From the above provisions, it is clear that once the President is presented with a report, he has complete discretion on what to do with it. The court has no doubt that the President has before him great policy choices to make concerning the Report which has been availed to him, but it is not the province of the Court to interfere with Policy Considerations. There is no statutory requirement that upon receipt of any report, he has

[71]Commissions of Inquiry Act, s 7
[72]*Mureithi & 2 others v Attorney General & 4 others (2006) eKLR*

> to act in a particular way. From this, it is apparent that no orders have been sought against the President nor was he made a party to the proceedings. Under the Commission of Inquiry Act, neither the President nor the respondents joined are under any statutory duty to act in a particular manner concerning the report.

The Ndung'u report was the subject of several other cases reiterating the above observation.[73]

Implementation of the reports and recommendations are therefore at the discretion of the President. The Local Government Commission report was discarded, and the government adopted its methods of addressing the local governance. However, it was because the outcome was not what Kenyatta expected. In the Koech commission reports, the government attacked the outcome as being incapable of implementation. Majority of the reports were never released to the public, and as such, it was not possible to tell their implementation status.

This research appreciates the various policy considerations that the government must be given in the implementation of recommendations. Commissioners although, specialists in various fields have limited if any experience of how to best tackle a particular problem. As such, it is not and should not be made mandatory to implement the specific recommendations. However, the release of the report and non-action on the reports is not desirable. Having an inquiry formed at the public interest, expended public funds in the process, it's only fair that some actions be taken on the report.

[73] *Republic* v *Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah* [2015] eKLR

3.13 Leadership and Integrity Act, 2012 (Leadership Act) and the Public Officer Ethics Act, 2003 (Ethics Act)

The Leadership Act provides for the elaborate provisions on leadership and integrity requirements of public and state officers. It contains principles of leadership and integrity including competency, honesty, and faithfulness to public interests by public officers. Similar provisions are contained in the Ethics Act. Accordingly, commissioners in any inquiry must meet these minimal qualifications.

3.14 Fair Administrative Action Act, 2015

This Act implements the right to fair administrative action in the Constitution. It embodies the natural justice principles and provides for the right for a review of administrative actions. Concerning this research, the Act is applicable as it sets procedures for judicial review which may be utilised if one were to challenge the outcome of an inquiry.

3.2 Regional Level

3.2.0 African Charter on Human and People's Right (Banjul Charter)

In addition to rights contained in the other international human rights, the Banjul Charter provides the right of development. Scholars have generally agreed that the right to development is inextricably linked to good governance that creates an environment for people's social, cultural, economic and political development. To achieve development, institutions need to be responsive, accountable and transparent in resource utilisation.

3.2.1 East Africa Community Treaty, 1999

The East African Treaty provides the fundamental principles and values that assist the partner states in achieving the objectives of the Community. One such principle is the adherence to good governance principles including transparency and good governance. Further, the States in the

admission of new members prescribes good governance as one of the conditions. Further, the treaty mandates the Summit to review good governance adherence within the Community.

3.3 International level

3.3.0 United Nations Sustainable Development Goals (2030 Agenda)

The Sustainable Development Goals (SDG's) though not legally binding depicts intents of United Nations (UN) members' broad policies and goals which they commit to entrench in the respective states by 2030. Goal 16 aims to structure strong, effective and accountable institutions. This goal broadly addresses the need for institutions to embody good governance principles including accountability, transparency, the rule of law and public participation as they are instrumental in overcoming other SDG's goals and general development of the society. Further 2030 Agenda follow-ups require transparent, accountable and inclusive review processes.

3.3.1 Universal Declaration of Human Rights, 1948

This instrument contains human rights access to information, democratic participation and sovereignty of the people as the basis for the establishment of governments. These rights are values in the achievement of accountability and transparency.

3.3.2 International Convention on Civil and Political Rights (ICCPR), International Convention on Economic, Social and Cultural Rights (ICESCR)

ICCPR guarantees the civil and political rights of citizens of signatory states. Key among them is rule of law, access to information, democratic participation, equality before the law and open justice. Generally, the achievement of these important rights is intertwined with good governance principles including accountability and transparency of governments. On the other hand, ICESCR guarantees the economic and social-cultural rights including health, food, education

among others. The ICESRC Committee stresses the importance of accountability and transparency in the achievement of these rights.

3.4 Conclusion

The focus of this chapter has been to outline and analyse the legal regime governing commissions. A critical analysis of the Act through the lenses of various CIs demonstrates a legal regime that is largely ineffective and one that cannot guarantee effective inquiries. The chapter also reveals that the Act reflects in various aspects the old constitutional order in that it lacks accountability and transparency in inquiries despite concentrating power in one institution. Generally, the Act in various aspects including inadequate independence of inquiries provisions fails to guarantee effective institutions to achieve good governance principles as required by the Constitution.

CHAPTER 4: INCONGRUENCIES: THE CONSTITUTION AND COMMISSIONS OF INQUIRY ACT

4.0 Introduction

The proceeding chapter has examined the legal, policy and institutional framework governing CIs in Kenya. The chapter has concluded that the Act in various ways fails to guarantee a good working environment for inquiries. In this chapter, the research evaluates the extent to which the Act is inconsistent with the Constitution. It advances the argument that the Act contradicts in various aspects with the Constitution which inconsistency presents a challenge to the utilisation of CIs in Kenya. In order to demonstrate the incongruences with the Constitution's spirit and the letter, the chapter explores the rationale for each of the discursive issues being devolution, participatory governance and institutional independence, national values and principles and leadership and integrity as contained in the Constitution of Kenya Review Commission (CKRC) Report and the Committee of Eminent Persons (CoE) Report.

The CKRC was appointed pursuant to the Constitution of Kenya Review Commission Act (CKRC Act).[1] The enactment of the CKRC Act was a culmination of intense debates on whether the Constitution was to be reviewed or overhauled altogether and the manner in which any of the chosen methods was to be carried out.[2] Although CKRC initially faced opposition from *Ufungamano's* People's Commission of Kenya (PCK), the CKRC reached out to PCK for one consultative process.[3]

[1]Constitution of Kenya Review Commission Act, no. 6 of 1998 as amended in 2000 and 2001
[2]Constitution of Kenya Review Commission "Civic Education for the Referendum CKRC Curriculum" <http://katibainstitute.org/Archives/images/CKRC/CK/Special%20Working%20Documents/The%20CE%20Curriculum.pdf> accessed August 29, 2018
[3]Kindiki, Kithure, "The emerging jurisprudence on Kenya's constitutional review law." (2007) no. 153, 1 Kenya law review: 153-187

CKRC collected views from all over the country and had first-hand experience with the common *mwananchi*. It collected their views on various issues and documented them in the CKRC report. In exploring the rationale for the selected issues, this research relies on this report as it captures the real intentions of the people. Additionally, the Committee of Eminent Persons (CoE)[4] that was appointed later in 2008 was to build on the report of this commission in coming up with a harmonised constitutional draft. These efforts culminated in the promulgation of the Constitution of Kenya, 2010 which fundamentally changed the governance structures.

After examining the rationale of the discursive issues briefly, the chapter examines the constitutional provisions providing for the discursive issues. The chapter finally compares these constitutional provisions and the Act demonstrating the inconsistencies.

4.1 Devolution

4.1.0 Examining the rationale through historical lenses

Devolution; the mandate to make and implement the policy, political and economic decisions at local levels is perhaps the major fulcrum of the Constitution.[5] The constitutional architecture demolishes, more aptly than the Independence Constitution the centralised, partisan, sectarian and divisive "rigged development".[6] The rigged development may be attributed largely from the 1965 policy paper which sought to develop the countries by investing in the "more productive areas" [7] Yet it is this policy's biased directive that led to more inequality among people and areas concentrating development in "productive" areas administered from Nairobi at the expense of the

[4]President Kibaki appointed the CoE in 2009 to identify and resolve outstanding issues before preparing a Draft Constitution. The Committee collected the views from the public and hence reflected the real intentions of the current Constitution.

[5]Albert K. Mwenda, 'Devolution in Kenya: Prospects, Challenges and the Future Research Paper Series No. 24 Institute of Economic Affairs, Nairobi.

[6]*Speaker of the Senate & another* v *Attorney-General & 4 others* [2013] eKLR as per Mutunga W, CJ& President of Supreme Court concurring opinion**,** see also Yash Pal Ghai 'Devolution: Restructuring the Kenyan state,' (2008) Vol. No. 2, Journal of Eastern African Studies, Routledge Publishers

[7]Government of Kenya, Sessional Paper No. 10 of 1965 par. 133

larger parts of Kenya. Courtesy of constitutional amendments at the time and this policy, developmental plans were drawn and dictated from far, detached from its consumers and were concentrated on the "productive areas".[8]

By the 1990's it was unequivocally clear that participatory governance and localised development sensitive to the specific areas was the only cure for the dominating inequalities.[9] Although local authorities had existed since independence, following the Local Government Commission of 1966, the Central government had gotten hold of the local authorities[10] and decision making was majorly from Central government officials implemented through the infamous "provincial administration".[11] Political actors severally opposed the attempts to decentralise the political and administrative power forcing the country to refocus to fiscal devolution in the period between the 1990's and early 2000's[12] through the introduction of various programmes.[13] The Constitution of Kenya Review Commission *(CKRC)* capturing this desire noted that people wanted a rigorous devolved power and demolishment of centralised government.[14] Importantly, the people insisted on the substantial devolution of powers but more importantly, the devolved units should have discrete functional demarcation, fiscal independence

[8]*Speaker of the Senate & another* v *Attorney-General & 4 others* [2013] eKLR as per Mutunga W, CJ& President of Supreme Court concurring opinion par. 171

[9]Sihanya, Bernard, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' [2012] Nairobi: Friedrich-Ebert-Stiftung p.2

[10]Ben E. Kipkorir "Descent from Cherang'any Hills: Memoirs of A Reluctant Academic" (2010) 2 Journal of Colonialism & Colonial History 11 p.200

[11] ibid p. 78

[12] *Speaker of the Senate & another* v *Attorney-General & 4 others* [2013] eKLR

[13] For instance, the Road Maintenance Fuel Levy created under the R*oad Maintenance Levy* Fund Act, 1993 aimed at developing public including local authorities unclassified roads that had been neglected at the expense of highways. Likewise, the Rural Electrification Programme Levy aimed at raising revenue to fund electrification of rural areas; Local Authorities Transfer Fund under the *Local Authority Transfer Fund Act, 1998 aimed at financing local development and* Constituency Development Fund under the Constituency Development Fund Act 2003 and provided for a share of the national revenue being utilized to finance development projects at the constituency level

[14]The CKRC was established under Constitution of Kenyan Review *Act* 1998. The commission was mandated to crisscross across the country collecting views of citizens on the constitution review.

and accountable to the people directly.[15] The Committee of Experts in their report placed devolution once again at the centre of the constitutional negotiation.[16] To guarantee the independence of devolved units, the functions, financial support and filing of positions were completely removed from the national government. In any event, the Committee concluded it did "not see a direct supervisory role for the National government."[17]

4.1.1 Devolution under the Constitution

This historic struggle for a devolved system of governance is perhaps the best-captured issue in addition to the expansive Bill of Rights. The Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised at the national and county level.[18] Importantly, the county governments derive their power directly from the people. Further, the two levels of government are distinct, inter-independent and are to engage on the basis of consultation and cooperation. The Constitution also provides for the objectives and principles of devolution, structure, and composition of the devolved units and delineates functions of county governments. The principles include respect for democracy and separation of powers, fiscal independence and sustainability and affirmative action.[19] The objectives of devolution include promoting democracy and public participation, self-governance and decentralization of state organs.[20]

[15]The Constitution of Kenya Review Commission (CKRC) Report, 2005 pg. 242
[16] The Committee Of Experts on Constitutional Review was established under the Constitution of Kenya Review Act (2008)
[17]Committee of Experts on Constitutional Review Report, 2009 pg. 57
[18] Constitution of Kenya Ar. 1
[19] Constitution of Kenya Ar. 175
[20] ibid Ar. 175

The Constitution also guarantees the independence of county governments by allowing the negotiated transfer of power[21] and provides that the two level of government should respect, consult, cooperate and support each other.[22] The Constitution also guarantees the fiscal independence of the counties by providing for the minimum share of the national government revenue to be transferred to counties annually.[23] Additionally, even on legislation, it is not automatic that all laws enacted by the national government institutions override the county government legislative assemblies.[24] Suspension of county governments is also a participatory, consultative and carefully supervised the process.[25] The Constitution also creates the Senate specifically to support devolution through oversight, legislation and revenue divisions. All these provisions point to the independence of county governments and the reduced control from the national government particularly the President.

4.1.2 Commissions of Inquiries Act and devolution

As was observed in the previous chapter, the Act empowers the President to appoint a CI whenever he desires, in public interest, to investigate any public officer or the conduct or management of any public body.[26] The Act does not explicate the scope of the public officer or public office whose conduct may be subject to an inquiry. The Interpretation and General Provisions Act defines a public office as "an office or employment the holding or discharging of which by a person would constitute that a person that a public officer." It further defines a public

[21] Constitution of Kenya 187
[22] ibid.189
[23] ibid Ar.203(2)
[24] ibid Ar.191
[25] ibid Ar.192
[26] Commissions of Inquiry Act, s 3

officer as a person in the service of, or holding office under, the Government of Kenya, whether that service or office is permanent or temporary, or paid or unpaid." [27]

The Constitution defines a public office as "an office in the national government, a county government or the public service if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament". Further, it defines a public officer as any state officer or any person who holds a public office.[28]

The question as to who holds a public office in Kenya is a fairly litigated area and particularly in matters of remuneration. Notably, the courts in line with Article 259 have defined a public officer in a generous as to include anyone performing a public duty. Such general interpretation aims to avoid a cadre of a public sector whose actions, duties and responsibility are not subjected to the same conditions as other public officers.[29]

Going by the above definitions, it is clear that county governments, departments, and employees therein are public offices and public officers respectively. Unlike the previous constitutional dispensation, the President has little if any control of the functioning of devolved units and its officers. Although the Act provides that a commission can be formed to inquire into the conduct of any public officer, it is doubtful whether all public officers could be subject to such an inquiry. The post-2010 legal order overhauled the structure of governance creating independent two-tier levels of government[30] whose conduct and performance of public institutions (county governments) are out of the reach of the President's direct intervention.

[27]Interpretation and General Provisions Act Chapter 2, Laws of Kenya s. 3
[28]The state officers include a member of a county assembly, governor or deputy governor of a county, or other members of the executive committee of a county government.
[29] *National Union of Water and Sewerage Employees v Mathira Water and Sanitation Company Ltd* 2 *others*[2013]eKLR
[30]Constitution of Kenya Ar. 2

The import of autonomy of the county governments is that no CI under the Act can lie as to the conduct of any of the county governments. Secondly, public officers working in county governments are under the direction and control of their respective county governments. Their conduct can only, therefore, be a matter of county government and the other national institutions mandated under the Constitution.[31] The President cannot, therefore, appoint a commission in respect of public officers working in the county governments. This has two implications; first, the Act is inconsistent with the Constitution because it provides that an inquiry can lie as against any public office and officer which includes county governments and its officers which could amount to control and interference of independence of county governments. Secondly, given that the Act exclusively empowers the President to appoint a commission and having argued that such an action as against a county government or officers would be unconstitutional, it, therefore, leaves county government out of the reach of county governments denying the county governments this important tool of good governance.

4.2 Power distribution: Institutional independence and inclusiveness

4.2.0 Contextualizing power distribution

The single most notable characteristic of the previous constitutional dispensation is the creation and sustenance of an all-powerful president.[32] Although the 1963 Constitution had demolished this dominance, the constitutional amendments in the first few years up to 1969 reverted this position by a concentration of power in a central government and more specifically in the

[31]One such example of national government institution include Ethics and Anti-corruption Commission established by Ethics and Anti-Corruption Act, 2011 pursuant to Article 79 of the Constitution of Kenya 2010

[32]Sihanya, B., "The presidency and public authority in Kenya's new constitutional order" (2011) Society for International Development (SID), Regional Office for East & Southern Africa

President as the head of the executive.[33] This was mainly through the weakening of Parliament and subjecting the holders of constitutional offices to the authority of the President.[34]

Political as the office of the President is, the above offices were politicised and ethnicized particularly the public service. There were gender discrimination and patronage of the public service losing its neutrality. Consequently, Kenyans lost confidence in almost all political institutions and sadly the Judiciary. Disillusioned by the exercise of the centralised power of the Presidency, CKRC notes that people were determined to abolish the imperial Presidency and instead creating strong institutions and distributing the power to various institutions with clear checks against the exercise of each of the powers.[35]

The pre-2010 administration also neglected the participation of people in governance.[36] Governance was modelled as ruling the people rather than serving the people. The desire to engage the public in policy development, law making, project development and more importantly monitoring of governance are well captured in the CKRC report.

4.2.1 The Post -2010 Constitutional Dispensation

Perhaps due to the President's control of governmental institutions, public servants, the Act was modelled in such a way that the President could question, inquire and act on the conduct of any public office and officer therein or any matter of public interest.[37] The 2010 constitutional dispensation establishes ten independent constitutional commissions and two independent offices

[33]Sihanya, Bernard, 'Constitutional implementation in Kenya, 2010-2015: Challenges and prospects' [2012] Nairobi: Friedrich-Ebert-Stiftung p.12

[34]In 1964, the President was empowered to hire the Public Service Commissioners, and by 1966 the President could dismiss public servants. By 1986 judges, the Attorney General, Auditor General and Controller of Budget all served at the whim of the President see the Constitution of Kenya Review Commission (CKRC) Report, 2005 pg. 31-33

[35] ibid p.197

[36] Ronoh, Geoffrey. "Public Participation Process in the Devolved System of Governance in Kenya" (2017) Vol. V, Issue 11, November International Journal of Economics, Commerce and Management United Kingdom

[37] The Commissions of Inquiries Act, 1962 s. 3

with total independence in running their affairs including control of their functions, hiring of their staff and exercise of disciplinary measures of their staff.[38] The Constitution also provides for mechanisms of removal holders of the offices and subjects their removal to the National Assembly.[39] The Commissions and independent offices also report to Parliament, and the President and both have a supportive role over the commissions.[40] The constitutional architecture also at least on paper guarantees the independence of Parliament and the Judiciary. The creation of the independent commissions and offices, strong Parliament and independent Judiciary, was to distribute power initially held by the Executive and to keep the executive in check and protection of national values and principles.[41]

The conduct of the above institutions and the office holders are not at the discretion of the President. Further, going by the various constitutional provisions, there is a clear departure from a centralised, all-powerful president to a devolved and shared powers structure and functions properly checked to avoid misuse.[42] Given the interpretation of public office in the Constitution and the Interpretation and General Provisions, these independent commissions and offices are public offices. Allowing the President to form inquiry commissions on any of the public bodies including independent constitutional commissioners and the office holders therein contravenes clear provisions of the Constitution particularly Article 248 and 251. The Constitution does not envisage President's control over these commissions, and the Constitution puts in place institutions such as Ethics and Anti-Corruption Commission and CAJ to handle inquiries into conduct of the commissioners. Such inquiries by the President would amount to interference with the commissions' independence in exercising disciplinary actions against their staff.

[38] Constitution of Kenya, Ar. 248 & 249
[39] ibid Ar. 251
[40] Supra 38 Ar. 254
[41] The Constitution of Kenya Review Commission (CKRC) Report, 2005 p.46
[42] Ibid p. 47

The Act as was demonstrated in the previous chapter leaves the formation, control, dismissal of commissioners, and termination of inquiries in the hands of the President. All these powers are without any restriction, check or supervision by other institutions. It is doubtful whether such provisions would survive in the new constitutional dispensation. The exercise of the powers under the Act revolves around the Presidency as the only institution that can trigger the formation of CIs. Important as they are, the restriction denies the people to have to say information of such commissions and even to petition for such inquiries. The Act retains the centralised power system and defies the distribution of power principle and operates to the exclusion of all other people.

4.3 National Values and Principles

Modern Constitutional drafting has endeavored to capture the underlying philosophy of the state against which all governmental structures systems, actions, and services are to be measured against.[43] Constitutions express philosophies and underlying principles in the form of directive principles and values and at times in the preamble. At a quick glance at these values and principles, one understands the constitutional architecture, state's organisation and aspirations of the people.[44] Such constitutions require any law or act to assist in the achievement of the directive philosophies expressed in the values and principles. They constitutionalise the norms, common goals, common ideals against which all persons are governed.

Unlike the previous Constitution, the current Constitution contains the values and the principles of governance in Article 10. The principles and values and binds all persons, both in private and

[43]Anon., 'Founding principles of a Constitution' (*The Zibambwen* , 2010) <http://www.thezimbabwean.co/2010/07/founding-principles-of-a-constitution/> accessed July 25, 2018
[44] ibid par. 2

public sector when applying or interpreting the Constitution, in enactment, application or interpretation of any law and implementation of any policy decisions.

The principles and values of governance include accountability, transparency, good governance, the rule of law, inclusiveness, public participation, democracy and devolution of power. Undoubtedly, government operations in Kenya before 2010 were coupled with secretive dealings, maladministration and lacked adequate accountability measures.[45] This was necessitated with personalised and concentrated power and inadequate checks on the executive, weak judiciary and parliament as well as other institutions. The government was mostly unresponsive, unaccountable and was marred with bad governance. Government functions and actions were to the exclusion of the public and often, violated rule of law and human rights.

CIs are one way of ensuring accountability, transparency, and integrity of government operations. First, inquiries are information gathering tools, utilized by governments within government architecture.[46] The information gathering inquiries are interested in the facts, opinions, and events that took place in a given situation. Out of the facts, the government forms informed decisions on the cause of action to take. Secondly, the inquiries are essential policy institutions due to their apolitical nature and their flexibility. Sadly in Kenya, however, they have been utilised severally for the wrong reasons and have mostly not ended up achieving accountability, transparency and sound governance principles.

[45]The Constitution of Kenya Review Commission (CKRC) Report, 2005 191

[46] Eliud K, "Commissions or Omissions of Inquiry? Why Kenya Has Failed to Address Historical and Other Elephant (Nairobi, April 5, 2018) Injustices"(2018) <https://www.theelephant.info/features/2018/04/05/commissions-or-omissions-of-inquiry-why-kenya-has-failed-to-address-historical-and-other-injustices/>accessed July 25, 2018

4.3.0 Accountability and Transparency

As was observed in the conceptual framework, accountability requires the exercise of power by an officer be subjected to another institution or person to ensure rationality and justification of one's decisions. Entrenched in the Article 10 of the Constitution, accountability is one of the underlying philosophies behind the exercise of any power under the Constitution and indeed any power derived from the Constitution.[47] Accountability mechanism must as such be replicated in laws, policies and indeed the exercise of any public authority. Transparency on the other hand as was defined in chapter one calls for openness and information disclosure in the exercise of powers. Availing information on the reports to the general public or at least to the core participants of the process is a step towards transparency.

In interpreting the Constitution, Article 260 enjoins every person to interpret the Constitution in a manner that promotes its purposes, values, and principles. The courts in interpreting this provision have held that in interpretation, adoption or application of any power, legislation or action, such an interpretation must advance the values, principles, and spirit of the Constitution.[48] Consequently, it this mandatory view that one must examine the Commissions of Inquiry Act with. Does it provide accountability mechanisms for the exercise of power it confers? Read wholesomely does the Act help achieve accountability which the inquiries are based on? Does the Act advance transparency principle?

The Act concentrates on the formation of inquiries in the person of the President whenever he so desires, despite the many governmental departments and over twenty ministries. The President chooses the commissioners, the timeframe within which to report and can terminate inquires

[47] *Moraa Gesicho V Attorney General [2012] eKLR*
[48] *Federation of Women Lawyers Kenya (FIDA)* v *Attorney General & another [2018] eKLR*

without reasons or being accountable to any institution when exercising such powers. The Act does not envisage accountability of the President in the exercise of these powers.

Additionally, the Act does not create criteria or rather safeguards to guide the formation of inquiries further complicating the possibility of legally questioning the propriety of the exercise of such powers. Indeed, in the past commissions, the majority have been formed to cover up or postpone issues or to remove them from the public debate without the real intentions of holding the people accountable.[49] The Act also does not contain safeguard to guarantee the independence of such commissions. By concentrating power on one institution which exercises power without checks, it leaves such inquiries prone to influence from the master. In essence, the purpose of such commissions becomes compromised and their reliance to ensure accountability and transparency in governance is doubtful. An independent inquiry is a requirement if accountability goals are to be achieved.

The Act limits the production of the reports and the recommendations only to the President and National Assembly. However, the disclosure of the report to National Assembly has not been without challenges as demonstrated by the Tana River Commission in chapter two. One must appreciate that inquiries are formed in public interest, and it is ironical to keep the reports as confidential documents. Understandably, some of the inquiries may contain sensitive security information, and it may not be in public interest to publish them, this research adopts the view that recanted copies of the reports could be published. The Act in its current state does not assist in realising the transparency principle in the Constitution.

[49]Mbote, Patricia Kameri, and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa 2011) p. 89

Finally, and most, unfortunately, the Act does not provide mechanisms of implementation or follow up of the findings of such commissions. Before the amendment of the Act in 2010, the practice was that the reports were either never made public or would be published long after the conclusion of the inquiry. This practice made it difficult to follow up on the fate of the recommendations. Many reports, therefore, remained secretive or could be released long after the finalisation of the inquiries. Although publication to the Parliament was provided for in 2010, there ought to be implementation mechanisms if these institutions are to be effective and achieve accountability in the long run.

4.3.1 Inclusiveness and public participation

Another major dominating characteristic of the pre-2010 constitutional dispensation is the exclusion of people in public affairs. Consequently and in line with power concentration strategy citizens were reduced into mere recipients of government decisions. CKRC report notes for instance that "one of the glaring legacies of the system is that it did not allow for public participation and has, in the submissions to the Commission, by the people, been referred to as the "…antithesis of people's right to govern themselves." In a bid to reverse this legacy the Constitution in Article 10 requires public participation and indeed inclusion of the people in the decision-making process.

The Act as has been observed earlier revolves around the institution of the Presidency. It contains no mechanism of the commissions engaging with the public in carrying out their work. In the end, from the commissioning to confidentiality of the reports, the public is a mere observer. One must appreciate that in Kenya, inquiries are also policy-making institutions such as Koech and Planning Commission. As such, the inquiries may and do have far-reaching consequences on issues that have an impact on the general public. Given that it's a constitutional

principle, the lack of public participation mechanisms only reflects the notion that the public is a mere recipient of decisions. The courts in the post-2010 era have firmly held that the public is an important constituency in governance that must get involved in governance.[50]

4.3.2 Gender equity and Equality

Gender equity is the equal treatment of men and women particularly in the chances to participate in public affairs and indeed all sectors of life.[51] In Kenya, women have been on the receiving end of inequality generally in economic, social affairs but most important public affairs. Notably, gender equality was one of the major issues under discussion in constitutional negotiations, and particularly the participation of women in public life.[52] In the end, gender equality provisions form major provisions of the Constitution of Kenya, 2010.

The Constitution enumerates equality as one of the underlying principles of governance.[53] Accordingly, any action, law or policy must ensure that all persons are treated equally be it in private or public spheres. Secondly, Article 27 guarantees the right to equal treatment of both men and women in political, economic, cultural and social spheres. The Article prohibits discrimination on various grounds of equality gender. Most importantly, the Constitution requires the state to take legislative and other measures to implement that not more than two-thirds of the members of an elective or appointive body are of the same gender.[54]

[50] *Republic* v *County Government of Kiambu Ex parte Robert Gakuru & another* [2016] eKLR
[51] The Constitution of Kenya Review Commission (CKRC) Report, 2005 p.44
[52] Patricia K. Mbote, Nkatha Kabira, "Separating the Baby from the Bath Water: Women's Rights And The Politics of Constitution-Making in Kenya." (2008) no. 1, 14 East African Journal of Peace and Human Rights 1
[53] Constitution of Kenya, 2010 Ar. 10
[54] ibid Ar. 27(8)

In elective positions, the Constitution incorporates the two-thirds principle as a general principle of the election system.[55] Although the implementation of the two-third principle is yet to be actualised in the national electoral bodies, the same has been successfully implemented in county assemblies.[56] However, in appointive positions, there is a significant implementation of this constitutional provision.[57]

As was noted in chapter three, a CI is an appointive public office, and as such, it must comply with the provisions of the Constitution. Unfortunately, the Act does not incorporate the two-thirds gender principle. Being a constitutional requirement and indeed an underlying value in governance, the Act should provide that not more than two-thirds of the commission at any particular time should be of the same gender.

The Constitution has breathed new life in governance structure, and laws must conform to the requirements of the Constitution. Measured against the principles and values of the Constitution, it is clear that the Act derogates from both the letter and the spirit of the Constitution in the ways demonstrated above.

4.4 Leadership and Integrity

Leadership and integrity are essential facets of democracy in the exercise of power entrusted to people.[58] Public trust requires that officials do exercise power in the interest of the donors: the public. Accordingly, they must act in ways that avoid personal benefit to the office bearers.

[55] Supra n 53 Ar. 81

[56] Unlike the National Assembly and Senate which the Constitution limits the number of nominees to ensure two-thirds gender rule, in Article 177 (1) (b), the Constitution leaves the number open making it mandatory for County Assemblies to implement the principle without further legal enactments

[57] Maria Nzomo, "Women in Political Leadership in Kenya: Access, Agenda Setting & Accountability" (2014) Institute of Diplomacy & International Studies, University of Nairobi. However, even on appointive bodies, it has not been without challenges, see *Federation of Women Lawyers Kenya (FIDA-K) & 5 others* v *Attorney General & another* [2011] eKLR

[58]Samuel Kimeu 'Corruption as a challenge to global ethics: the role of Transparency Ethics' (2014) 10:2 International, Journal of Global 231

Further, the integrity of persons, accountability and transparency are closely related principles whose existence depends on the other. Kenya's public service and state offices biggest challenge to date is the integrity of the office bearers.[59]

The previous constitution neither contained leadership nor integrity provisions. However, the respective offices had codes of conduct which officials were required to follow.[60] CKRC report points out that the people expressed dissatisfaction with the integrity of the office bearers and wanted a constitutional recognition of leadership and integrity.[61] The appointment process of public officials was particularly of interest to the people who required a more vigorous and transparent process.[62]

The Constitution in reflecting the above desires enumerates integrity as one of the principles of governance.[63] The Constitution also dedicates chapter six to leadership and provides the guiding principles of leadership and integrity. These principles include personal integrity, competence, and suitability.[64] Further officials are required to be impartial and committed to serving the people of Kenya. Additionally, the officials should avoid conflict of interest. These are important principles of governance required of any person performing a public function.

The Act does not enumerate qualifications of the persons to be appointed in the inquiries. Truly, inquiries are important and may be technical at times and may require expertise away from the general qualifications. In line with the Constitutional principles of competency, the composition of a commission should ensure competency of the persons appointed in them. Similarly, as the

[59]P.L.O Lumumba, 'The Trial of Integrity, Katiba Institute' (Katiba 2014) <http://www.katibainstitute.org/the-trial-of-integrity-in-kenya/>accessed July 25, 2018
[60] Constitution of Kenya Review Commission (CKRC) Report, 2005 pg 222
[61] ibid p. 223
[62]ibid p.219
[63] Constitution of Kenya Ar. 10
[64] ibid Ar. 73

Act requires the commissions to make full, faithful and impartial reports, this is only possible if there are mechanisms for avoiding or disclosing conflicts of interest, independence of such commissions and integrity of the persons holding the offices. Unlike the previous constitutional dispensation, the current regime sets qualifications of any person serving in the public office. The Act falls short of such requirements.

One of the major complaints with the Akiwumi Commission was the replacement of Mr. Gacivih as the assisting counsel to the commission with the Director of Public Prosecutions Mr. Bernard Chunga whose office was subject of investigations. It was reported that after the replacement the commission lacked the vigor it had always exhibited in the calling of the witness. LSK observed that the replacement was aimed at compromising the process despite the clear conflicts of interests.[65] Given these leadership and integrity principles, such practices have no place.

The Act, therefore, must require that the appointees to such commissions meet the constitutional threshold a restriction that the Act does not envisage as it gives the President to appoint whomever he wishes without application of these important standards.

4.5 Review mechanism and Disclosure

World over, at least in democratic states, the exercise of any administrative or judicial authority is subject to either a review or an appeal process.[66] Courts are structured in a hierarchical order with the possibility of appeals to the highest appellate court, particularly on human rights and

[65]Law Society of Kenya, Impunity, the Report of the Law Society of Kenya on the Judicial Commission of Inquiry into Ethnic Clashes in Kenya, Nairobi, 2000

[66]Freeman, Samuel, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 no. 4Law and Philosophy 327

governance issues.[67] The review or appeal process is particularly important for two basic reasons; first, the fact finder may make errors in deriving conclusions from a set of facts or secondly may make wrong application of the law on an agreed set of facts. As such, the process allows for the appellate body to review and correct such errors. Secondly, there may emerge new evidence on the subject matter long after the matter is settled. It is therefore important there exists a mechanism for review of a decision of any judicial or administrative body.

Ordinarily, legislation set a time limit within which an aggrieved person should apply for review for an appeal. The time limit is important to ensure that such matters are concluded within a reasonable time and for the certainty of findings.[68] As such, a party that does not litigate within time may be denied audience for review or appeal unless he demonstrates his vigilance in pursuing the matter.

The Constitution of Kenya entrenches the importance of appeals and subjecting bodies' decisions to review. Article 47 provides for the right to fair administrative action that is fair, expeditious and efficient. Further, it provides for written reasons in instances where an action is likely to affect fundamental freedom or right. The Constitution further provides for the right to a fair trial which includes any dispute to be impartially determined. The Constitution further establishes the Judiciary with a hierarchical nature for purposes of redress. The High Court has a supervisory role over tribunals and other subordinate courts. Article 23 of the Constitution also mandates courts to grant a wide range of remedies including judicial review in the enforcement of human rights. Clearly, review of public bodies' decisions is a constitutional requirement.

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[67] Jonathan P. K., 'The Judicial Hierarchy: A Review Essay' an essay prepared for Oxford Research Encyclopedia of Politics <http://www.princeton.edu/~jkastell/judicialhierarchyoxford/kastellec_oxford_review_essay.pdf> access July 25, 2018

[68] Anon., "The Review and Appeal Process" (*Workers Compensation Board*, Alberta April 3 2010) <https://www.wcb.ab.ca/assets/pdfs/public/policy/manual/printable_pdfs/g2.pdf accessed July 25, 2018

Evidently, from the above constitutional provisions, review or an appeal is a right subject to set conditions and timelines. The Act does not provide for a review or appeal process or timelines within which to appeal. However, the lack of express provisions hasn't prevented aggrieved persons from appealing through constitutional provisions by way of judicial review. One particular problem that has arisen on several occasions concerning judicial review is that the Law Reform Act[69] and Order 53 of the Civil Procedure Rules[70]Limit the period within which to file judicial review to six months. Notably, the Act does not provide for the release of the report to the persons concerned. From experience, the reports have not been promptly disclosed coming long after the after the six-month timeline. The courts have however held that the failure to disclose the report tolls the time limit until when the report is published.[71] Although the Act requires disclosure to the President and the National Assembly, it contains no provisions on disclosure to the participants hence limiting the right for the review. One would have to utilise Article 33 of the Constitution on the right to information and the Access to Information Act.[72]

Judicial review has changed especially after its entrenchment in the Constitution whereupon the traditional common law judicial review remedy has been expanded.[73] As such, the six months period may be done away with if one litigates under the Constitution as a human right or fundamental principle. However, to fully utilise the review process, the Act must reflect the constitutional provisions on review and appeals by first allowing disclosure of information albeit in recanted provisions should it be sensitive. There is also the need to provide guidelines and

[69] Law Reform Act Chapter 26 Laws of Kenya, s. 9
[70] Civil Procedures Rules, 2010
[71] *Mureithi & 2 others v Attorney General & 4 others (2006) eKLR*
[72] Access to Information Act No. 31 of 2016
[73] MigaiAkech, *Administrative Law***,** (Strathmore University Press, 435 (2017), see also *James Gacheru Kariuki & 22 others* v *Kiambu County Assembly & 3 others* [2017] eKLR

timelines within which to appeal. The process will create certainty and allowing aggrieved persons to be redressed.

4.6 Conclusion

This chapter has argued that the Act in various aspects the Act is inconsistent with the Constitution. In devolution, the Act is inconsistent with the Constitution in that it empowers the President to set up inquiries in respect of all public offices and public officers. Given the independence of county governments, such inquiries would breach the counties functional autonomy. Under the Constitution, the President does not have any control over county governments. The Act does not provide any mechanism for participation of the people in establishing of such inquiries despite the explicit provisions of Article 10.

The Act also gives the President unfettered discretion to form inquiries without commensurate accountability mechanism while clearly; such unrestricted powers have no place in the Constitution. Similarly, the Constitution establishes independent Judiciary and Parliament, commissions and independent offices independent from the Presidency. The current Constitution subjects such offices and officers' actions to accountability to independent commissions and courts and to a minimal extent, the executive. Given that the Act empowers the President to appoint inquiries to inquire into the conduct all public offices including independent bodies, this would amount to interference with their independence as enshrined Article 248. Similarly, an inquiry into the conduct of officeholders in these commissions is spelled out in Article 251.

Importantly, the Act derogates from the national values and principles and leadership and integrity requirements. In accountability and transparency, the Act does not contain any mechanisms for holding the appointing authority's wide and discretionary powers accountable. It

concentrates all the powers in the Presidency from formation, appointment of commissioners, and revocation of an inquiry. Article 10 of the Constitution requires accountability and to this end, accountability mechanisms must be put in place which the Act does not envisage. To this extent, the Act is inconsistent with the Constitution.

The Act fails to provide for the adherence of two-thirds gender principle in composition of the inquiries despite clear constitutional provisions such article 10 and 27 that require adherence to two third gender principle. The Act also fails incorporate the qualifications of the commissioners despite the clear provisions of the Constitution under the leadership and integrity principles including competency, honesty and avoiding conflict of interest. These principles are important provisions for effective and full and impartial inquiry.

To this end, these inconsistencies present a challenge in utilisation of CIs in Kenya. There is a need to align the Act with the Constitution.

CHAPTER 5: THE LEGAL FRAMEWORK ON COMMISSIONS OF INQUIRY IN THE UNITED KINGDOM

5.0 Introduction

The previous chapter has identified the various inconsistencies between the Act and the Constitution. More specifically, the chapter has concluded that the Act offends devolution, accountability, transparency, leadership and integrity. In this chapter, the research analyzes the legal framework governing inquiries in the United Kingdom seeking to analyze how the UK law has addressed issues identified above. In the analysis, the chapter picks the various ways in which Kenya's Act differs with the UK's law. Given the significant success that the UK has had with inquiries, this chapter argues that in aligning the Act with the Constitution, Kenya could learn several lessons on how to structure commissions in devolved systems, to guarantee the independence of inquiries, qualifications of panelists and report disclosure mechanism. The chapter is divided into six parts. It starts by giving a general overview of inquiries in the UK, types of inquiries and comprehensively delves into the Inquiries Act, 2003 provisions.

5.1 Inquiries in the United Kingdom: An Overview

United Kingdom (UK) values inquiries and they form part of the UK's unwritten Constitution.[1] Over time, the UK has utilised them as authoritative tools of accountability and transparency and their findings have formed the basis for substantial changes. Although UK's history with inquiries is not as ugly as Kenya's, the country has since reformed the med its inquiries law, which law has registered significant success.

[1]Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative scrutiny Report of Session 2013–14,The Stationery Office Limited

Kenya's inquiry legal framework was enacted at a time when Britain was in charge of the country. As such, the law reflects the British model of governance of inquiries in 1912. This law was replicated in many other Common Wealth countries in similar terms as Kenya's. However, UK has repealed its legal regime on statutory inquiries in 2005 repealing a law that had existed for eighty years.[2] The new legal framework thus presents best practices for inquiries from the UK's experience for over eighty years. As a measure of accountability, relevance, and reforms, UK has carried out a substantive post-2005 assessment of the new law. The assessment paints a picture of a law that has been successful compared to the previous legal regime. The UK also has a devolved government structure which has been reflected in her inquiries law. Due to this attributes, this research chooses the UK as a perfect jurisdiction to learn on how inquiries are governed.

5.2 Types of Inquires in the United Kingdom

5.2.0 Non-statutory inquiries

As the name suggests, there is no statute that governs nonstatutory inquiries. Ministers commission these inquiries as an alternative to statutory inquiries through executive orders.[3] Unlike statutory inquiries whose default position is that they are held in public, non-statutory inquiries may be held in private.[4] Further, they don't compel the attendance of witnesses and the witnesses don't give evidence under oath.[5] The government prefers them majorly because of non-insistence of legal procedures[6] and the privacy of the process.[7] Various departments may

[2]The Inquires Act, 2005 repealed the Tribunals of Inquiry (Evidence) Act, 1921.
[3]Salmon Commission: Royal Commission on Tribunals of Inquiry Report, 1966
[4] Jack Simson, "Public Inquiries: non-statutory commissions of inquiry" (2016) Briefing Paper Number 02599
[5] ibid p. 3
[6] ibid p. 3
[7]CPS Inquiries and Reviews - Guidance on CPS Engagement https://www.cps.gov.uk/legal-guidance/inquiries-and-reviews-guidance-cps-engagement accessed May 3, 2018

form non–statutory inquiries, unlike statutory inquiries which the Ministers are the only appointing authorities.[8]

5.2.1 Committees of Privy Counsellors

Another important form of inquiry in the United Kingdom is the Committee of Privy Counsellors. Members of such committees are all Privy Counsellor.[9] This type of inquiry allows the government to release sensitive information to the inquirers that it would otherwise not release to other forms of inquiry.[10] Therefore, the proceedings are highly private and reports are confidential.[11]

5.2.2 Royal Commissions

A royal commission is an *ad hoc* body set up by the Crown on the recommendation of the government. According to the 2018 United Kingdom Ministerial Code, a Minister proposing to form a royal commission should consult the Prime Minister in good time.[12] The cabinet must also approve the proposal after which the Prime Minister seeks the Queens Approval.[13] In Scotland, a Minister must consult the First Minister and should submit a proposal that contains

[8]Jack Simson, "Public Inquiries: non-statutory commissions of inquiry" (2016) Briefing Paper Number 02599 p.5, see also Cabinet Office Guidance available https://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/caboffguide.pdf accessed May 3, 2018

[9]Privy Consellors are members of the Privy Council of the United Kingdom which the formal adviser of the sovereign.

[10] Jack Simson, "Public Inquiries: non-statutory commissions of inquiry" (2016) Briefing Paper Number 02599, p.13

[11] ibid p. 13

[12] UK Ministerial Code (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_ministerial_code_january_2018__final___3_.pdf> accessed on May 3, 2018

[13] Ibid p. 11

the proposed structure and size of a royal commission.[14] The Queen appoints a royal commission through a grant of Royal Warrant.[15]

Royal commissions are used to inquire and issue recommendations on broad policy issues as opposed to fact gathering which is the main aim of statutory inquiries.[16] These commissions are generally flexible in terms of the legal procedures. They, however, they are slow to complete their tasks.[17]

5.3 Statutory commissions

5.3.0 Brief Historical Background

Until 2005, statutory inquiries were regulated by the Tribunals of Inquiry (Evidence) Act 1921 and many other sector-specific statutes.[18] In 1921, there were allegations that Ministers had ordered for the destruction of contractors' documents in an effort to conceal the invoices.[19] In order to investigate into these issues, Sir Banbury suggested the formation of a committee chaired by a judge.[20] In order to take the evidence on oath and enforce the attendance of witnesses, Parliament passed a general statute, the Tribunals of Inquiry (Evidence) Act 1921.[21] This Act provided that any proposal to set up an inquiry would have to be passed by resolution of both Houses of Parliament.[22] From 1921 to 2005, only twenty-four inquiries had been conducted under the Act.

The 1921 Act came under serious scrutiny in 1966 when the Crown appointed the Salmon Royal Commission on Tribunals of Inquiry. The scrutiny came after the Profumo scandal Inquiry led by Lord

[14]Scottish Ministerial Code 2018 (edn) <https://beta.gov.scot/publications/scottish-ministerial-code-2018-edition/pages/5/> accessed May 3, 2018
[15]The Scope the work that a royal commission is contained in the proposal hence it is discussed and passed by Cabinet and approval by the Queen.
[16] Salmon Commission: Royal Commission on Tribunals of Inquiry Report, 1966 p.18
[17]ibid 18
[18]Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative scrutiny Report of Session 2013–14,The Stationery Office Limited p.15
[19]ibid p.13
[20]Salmon Commission: Royal Commission on Tribunals of Inquiry Report, 1966 p.13
[21]Ibid p 13
[22]Tribunals of Inquires (Evidence) Act, 1921

Denning. In this Inquiry, adversely mentioned persons in the report were not given the opportunity to be heard.[23] Transcripts of the evidence were not published and Lord Denning acted as the judge, inquisitor and advocate in the inquiry and the inquiry was also held in private.[24] Although the report was never challenged due to Lord Denning's impeccable character and reputation, there were serious concerns about the effectiveness of 1921, particularly on evidence gathering.[25]

The Salmon Commission recommended the retaining of the 1921 Act but set the Salmon Principles on the protection of witnesses and principles of natural justice.[26] These principles were applied after that until 1992 when an inquiry into Exports of Defense Equipment to Iraq led by Lord Justice Scott. In this inquiry, Scott noted that Salmon principles made inquiries adversarial in nature, limiting their purposes.[27] The inquiries after the Scott inquiry adopted an inquisitorial system.

In 1999, Prescott, then Deputy Prime Minister of UK, appointed Marchioness Inquiry into the infamous Marchioness tragedy.[28] Lord Scott in the Inquiry's report recommended that there was a need to have a comprehensive legal framework because the 1921 Act had been very brief with unhelpful provisions.[29] Besides the 1921 Act, there were various other legislations that provided for inquiries creating unnecessary duplications. He also noted that there was a need to remove the adversarial provisions from inquiries. In this regard, Scott recommended that it was safer to leave the rules on evidence to the chairperson of the inquiries to determine the procedure on the case to case basis.

In 2004, dissatisfied with the inquiries regulation, the Commons Public Administration Select Committee commenced an inquiry into inquiries. The work of this committee coincided with the government

[23]Salmon, Cyril. "Tribunals of inquiry" (1967) 2, no. *3* Israel Law Review 313-331
[24]ibid p. 322
[25]ibid p. 322
[26]Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative scrutiny Report of Session 2013–14,The Stationery Office Limited p. 15
[27]Ibid p. 15
[28]See details of the tragedy in the Report of the Chief Inspector of Marine Accidents into the Collision between the Passanger Launch Marchioness and MV Bowbelle with Loss of Life on The River Thames on 20 August 1989
[29] Supra n 26 p. 15

initiative to reform the law on inquiries by drafting the Inquiries Bill. The Committee's report largely informed the Bill which received Royal Assent on 7 April 2005.

The 2005 Act repealed Tribunals of Inquiry (Evidence) Act 1921 and brought all statutory inquiries in the various legislations under it.[30] The major objectives of this Act were to create a rational and coherent framework for holding inquiries, guarantee the independence of inquiries, remove adversarial principles from inquiries, and provide a flexible regime for statutory inquiries. Additionally, the Act aims at reducing inquiries cost.[31]

Cumulatively, from 2005 to 2017, fifteen inquiries have been issued under the Inquiries Act, 2005. This may be compared to twenty-four under the Tribunal of Inquiries (Evidence) Act, 1921 for over eighty years. A post-legislative study of the Inquiries Act conducted by the Parliamentary Justice Select Committee concluded that the Act has brought sanity in inquiries proceedings. In the ensuing sections, this chapter will analyze the 2005 Act and various Rules under it.

5.3.1 Issuance of a commission

The Minister may initiate an inquiry where it appears to him that *"particular events have caused, or are capable of causing, public concern"* or *"there is public concern that particular events may have occurred."*[32] Evidently, the law is permissive. The Minister, however, has to satisfy himself that either of the conditions is met. The Minister may, therefore, initiate inquiries first, where there are actual events which may cause or have caused public concern.

In the second instance, there exist circumstances characterized by uncertainty as to the occurrence of events, but the uncertainty itself has alarmed the general public. Importantly, the Act allows the use of non-statutory inquiries in solving issues at hand depending on the

[30] Inquiries Act, 2005 s 49
[31] Jack Simson, "Public Inquiries: non-statutory commissions of inquiry" (2016) Briefing Paper Number 02599 p.6
[32] Inquiries Act, 2005 Chapter 12, s 1(1)

circumstances.[33] The discretion to use various approaches allows a certain matter to be solved in the best way possible.[34] The Act also allows conversion of other types of inquiries to be governed under the Act.[35] The conversion is particularly necessary due to the power of inquiries to compel the attendance of witnesses and documents production.

Despite its widespread use, the Act neither defines "public concern" nor enumerates factors for consideration in the determination of the scope of the term. The Black Dictionary similarly does not define the public concern but defines public to mean "relating or belonging to an entire nation, state or community".[36] The Review Board of Canada attempts the definition of the term and defines it as the "widespread anxiety or worry".[37] An exhaustive definition of public concern is arguably impossible. Accordingly, the circumstances under which the Minister may form inquiries may be infinitely variable. There are, however, both statutory provisions and non-statutory considerations that guide the formation of inquiries.

First, since the enactment of the Act, the Ministers have initiated inquiries in "*special circumstances that require something beyond the normal investigative or regulatory procedures"*.[38] This is in line with the 1966 recommendation by the Salmon Royal Commission that statutory inquiries should not be formed to inquire into local and minor matters.[39] The Government Response (the Response) to the Consultation Paper (Consultation Paper) that preceded the enactment of 2005 paper stated that although it was undesirable to state the specific circumstances when inquiries should be held, inquiries should only be *"called only in exceptional*

[33] ibid s 1
[34] Jack Simson, "Public Inquiries: non-statutory commissions of inquiry" (2016) Briefing Paper Number 02599 p.5
[35] Inquiries Act, s12, 15
[36] Black Law Dictionary, 8th Edition
[37] Mackenzie Valley Environmental Impact Review Board, 'Reference Bulletin: Operational Interpretation of Key Terminology' (2006) Yellowknife
[38] Beer, Jason *Public Inquiries* Oxford University Press, 2011
[39] Park, A. E. W., 'Royal Commission on Tribunals of Inquiry' (1967) 30, no. 4 The Modern Law Review 426

situations, in which no other investigatory mechanism would be sufficient to establish the facts or restore public confidence"[40] Put differently, inquiries should be sparingly used especially where an existing law sufficiently provides a solution.

Unlike the Kenyan situation, the UK Act prohibits inquiries from imputing either civil or criminal liability of any person.[41] However, the prohibition does not extend to instances where the inquiry panel in the discharge of its functions there is the likelihood of liability being inferred either from the facts or the recommendations of the panel. Further, the Act empowers the Minister to suspend an ongoing inquiry in two circumstances. Firstly, to allow completion of any other investigations on the matters subject of inquiry.[42] Secondly, the Minister may suspend an inquiry to allow determination of civil or criminal liability in any proceedings (in court or tribunal) of any person arising from the matter subject of inquiry.[43]

The prohibition of determining the liability and suspension powers are important safeguards against misuse of inquiries. The Act prefers imputation of liability by courts and other tribunals rather than inquiries. Accordingly, where there are competent institutions dealing with such liability an inquiry may not be initiated and if initiated, it may be suspended. In fact, one of the strongest arguments against a finding of liability by inquiries is to prevent substitution of criminal or civil proceedings with inquiries.[44] Secondly, an inquiry's main function is to gather information to help prevent future occurrences. As such, requiring imputation of liability limits this purpose because a panel concentrates on imputing the liability. Similarly, the suspension recognizes that liability imputation matters should be left to the investigatory authorities, courts,

[40]Government of United Kingdom, Effective Inquiries, Response to Consultation [CP (R) 12/04] 28/09/2004, the Response to consultation carried out by the Department for Constitutional Affairs
[41]Inquiries Act, 2005 Chapter 12, s 2
[42] ibid s 13
[43] ibid s 13(1)(b)
[44] Marlys Edwardh, Jill Copeland 'A Delicate Balance: Rights of the Criminal Accused in the Context of Public Inquiries' http://goldblattpartners.com/wp-content/uploads/00397683.pdf accessed on May 2, 2018

and tribunals. Therefore, inquiries are only secondary tools for ascertaining facts about issues. In Kenya, there are no such limitations. Indeed it is difficult to see how an inquiry into the conduct of a public officer may end without the imputation of liability. Further, in Kenya, there are no suspension provisions. Conversely, in the Bosire Commission, the government exercised *nolle prosequi* powers to stop criminal proceedings so as to allow the inquiry to proceed without offending *sub judice* rule.[45]

A prevalent practice in the United Kingdom is that people often request the Minister to form inquiries.[46] The Minister considers the request and either accede to it or declines. Although there are no statutory bases for giving declining reasons, the practice has been to issue a written decision with reasons.[47] The decision is amenable to judicial review by the courts hence the minister must in determining the request act in accordance with the conventional public law principles including correct legal test application, consideration of relevant facts, reasonableness and rationality.[48] Courts have on various instances interrogated the formation of inquiries especially when the Minister declines a request for an inquiry. The courts have been categorical that the Minister should exercise his discretion properly.[49] In this process, the courts then pronounce themselves on whether proper factors were considered in the process. The UK Government in response to post-legislative assessment expressed its willingness to form

[45]Commission of Inquiry into Golden Berg Affair (Bosire Commission) Report
[46]*Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69
[47]See generally various cases *The Queen vs Secretary of State for the Home Department* [2014] EWHC 194, See also Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, 2014 p. 9
[48] Inquiries Act s 8
[49]*The Queen* v *Secretary of State for the Home Department* [2014] EWHC 194

inquiries on petitions and that it would take such petitions more carefully and as such ready to embrace more consultative forum in initiating inquiries.[50]

5.3.2 Appointing Authority

The Minister in the United Kingdom is the appointing authority.[51] The Act defines a minister as a United Kingdom Minister, the Scottish Ministers, and a Northern Ireland Minister.[52] In Wales, a Minister also includes reference to the National Assembly for Wales. The United Kingdom has a devolved system of governance with Scotland, Northern Ireland, and Wales having separate devolved governments.[53] By defining a Minister to include various devolved administration ministers, the Act allows such ministers to form inquiries in matters their governments are competent to carry out.

Previously, inquiries would be initiated upon resolution by the houses of Parliament.[54] However, the government criticized this provision attributing it to the few inquiries in the previous regime as it was difficult to secure the resolutions. The Government supported the appointment by Ministers as it gives flexibility and Ministers, it argued, are best suited in determining instances when inquiries may be required.[55]

The Act limits the jurisdiction of Ministers in commissioning of various inquiries. It provides that a UK Minister may not form an inquiry whose terms of reference would require an inquiry to determine facts that are not wholly or primarily Scottish or Welsh, or a matter transferred to Northern Ireland or making recommendations that are wholly or primarily concerned with any of

[50] Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, 2014
[51] Inquiries Act, 2005, s 1
[52] ibid s 1
[53] Bogdanor, Vernon, *Devolution in the United Kingdom* (Oxford Paperbacks, 2001)
[54] Tribunals of Inquiry (Evidence) Act, 1921, s 1
[55] Government of the United Kingdom, Effective Inquiries, Response to Consultation [CP (R) 12/04] 28/09/2004, Response to consultation carried out by the Department for Constitutional Affairs

the devolved units without first consulting those administrations.[56] As such, the Act requires the UK Ministers to respect devolved governments.

In similar words, the Act prohibits ministers in devolved units from issuing inquiries into matters whose terms of reference require determination of facts or making recommendations that are not wholly or primarily concerned within their competences.[57] The Act also allows various ministers to form joint inquiries.[58] Joint inquiries apply where the matter relates to more than one devolved units.

A Minister proposing to form an inquiry or who has already appointed an inquiry should make a statement to the relevant legislature as soon as practically possible.[59] The statement should contain the person appointed or proposed to be appointed as the chair of the inquiry. The statement should also state the members appointed or proposed to be appointed and the size of the inquiry. It should also state the terms of reference or the proposed terms of reference.

The UK Prime Minister is responsible for the overall organization of executive and distribution of functions among the Ministers.[60] Accordingly, paragraph 4.11(b) of the 2018 UK Ministerial Code requires that a Minister proposing to issue an inquiry to consult the Prime Minister. The consultation should be well in advance to allow enough time for the Prime Minister to consider the proposal. Similar provisions exist in Scotland where the Ministers should consult First

[56] Inquiries Act, 2005 s 27
[57] ibid 12,s 28, 29, 30, 33
[58] ibid s 32
[59]ibid s 5
[60]Ministerial Code January 2018 Available <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_ministerial_code_january_2018__final___3_.pdf> accessed July 31, 2018

Minister in advance.[61] Wales has rigorous checks mechanisms for the exercise of power by ministers in general and as such, a decision to form an inquiry is checked by the Assembly.[62]

Unlike Kenya where commissions revolve around the President, the appointing authorities of an inquiry in the UK are the Ministers at the national level and at devolved units. Secondly, the Minister should consult the UK Prime Minister while ministers in devolved units should consult relevant persons before issuance of an inquiry. Additionally, the Minister should make a statement of the proposed inquiry or an appointed one to the relevant Parliament or Assembly. As was noted above, members of the public often make requests to the Ministers to initiate inquiries and the decisions of Ministers are amenable to judicial review.[63] The appointment of inquiries in the UK is a more engaging and consultative affair than the Kenyan system. This limits formation of inquiries in unwarranted instances and ensures the formation of inquiries where circumstances are suitable.

5.3.3 Terms of Reference

Terms of reference are the founding stone of an inquiry and as such should be carefully drafted in a consultative manner.[64] The appointing Minister is responsible for the formulation of terms of reference in consultation with the person he proposes to be the chair or one he has already appointed.[65] The Minister should make a statement on the terms of reference or the proposed

[61]Scottish Ministerial Code, A code of conduct and guidance on procedures for Members of the Scottish Government and Junior Scottish Ministers, 2018 http://www.gov.scot/Publications/2018/02/4516/5 accessed 3 May 2018,

[62]See Generally Ministerial Code: A code of conduct and guidance on procedures for Ministers National Assembly for Wales available <http://www.assembly.wales/laid%20documents/ministerial%20code-ld1134-26112001-24413/bus-guide-3c020f77000cf74a00004f3500000000-english.pdf> accessed 5 May 3, 2018

[63] Inquiries Act, 2005 Chapter 12, s 38

[64]Government of the United Kingdom, Effective Inquiries, Response to consultation carried out by the Department for Constitutional Affairs available http://webarchive.nationalarchives.gov.uk/+/http:/www.dca.gov.uk/consult/inquiries/inquiriescpr-12-04.pdf 2004 (Response to Consultation [CP (R) 12/04] 28/09/2004)

[65] Inquiries Act, 2005 s 5

terms of reference to the relevant legislature. As was noted previously, the terms of reference are important in delimiting the scope of inquiry both at the national level and the devolved systems. For instance, a UK minister must consult the various devolved units in terms of reference if the inquiry is to deal with matters concerning the devolved units.[66] The formulation of terms of reference is thus a consultative affair in the UK.

The Minister may after issuing terms of reference of an inquiry amend them if he considers it to be in *public interest*.[67] However, before amending, the Minister should consult the chairman or a person he proposes to appoint as the chairman. Additionally, the Minister should also inform the relevant legislature. The Government in appreciating the importance of careful drafting and possible misuse recommended consultations rather than retaining the power to formulate the terms to the Minister alone. Additionally, the government is considering introducing a preliminary investigation stage where outcomes of a short preliminary investigation assist in the formulation of terms of reference.

The scopes of terms of reference are subject to judicial review and have been successfully challenged.[68] These may be compared to *Moraa case* where the High Court of Kenya declined to disturb the terms of reference where the petitioner claimed that the terms of reference were improper and would likely influence the commissioners on the basis that only the President has the mandate to determine the terms of reference.

[66]ibid s 27
[67]Supra n 65 s 5(3), importantly this power is checked by the court as the decision is amenable to judicial review.
[68]*In the Matter of an Application by David Wright for Judicial Review of a decision of the Secretary of State for Northern Ireland*

5.3.4 Composition and Qualifications of Inquiry Panel

An inquiry panel may be composed of one panelist or several members.[69] The Minister should appoint each of the members in writing. Except for the appointment of the chair, the Minister should consult the chairperson or the person he proposes to appoint as the chairperson as to the appointment of the other members of the panel.[70] It follows, therefore, that the appointment of the chairperson precedes that of the members of the panel. The instrument appointing the chairperson should also indicate whether the Minister would be appointing other members and if so the proposed size of the panel.[71]With regard to increasing the size of the panel, the Minister cannot exceed the size that he submits to Assembly or Parliament without the consent of the chairperson of the inquiry panel.[72]

The Act sets the suitability criteria of panel members.[73] In the appointment process, the Minister should ensure that the panel has the requisite expertise necessary to make the inquiry. He should also ensure that there is balance in the composition of the panel considering the background of the terms of reference. To ensure there is competency in the panel, the Minister may also appoint an assessor to enrich the panel's expertise.[74]

The Act prohibits the appointment of a person who has a direct interest in the matter that is to be inquired or a person who has a close relationship with an interested person.[75] However, if the person's interest or relationship does not affect his impartiality, the Minister may nevertheless appoint him. The Act obligates the persons proposed to disclose any matter that may affect their

[69]Inquiries Act, 2005 s 3
[70]ibid s 4
[71]ibid s 6(2)
[72]ibid 12,s 7
[73]ibid s 8
[74]ibid s 11
[75]ibid s 8

eligibility.[76] Similarly, if the member during the inquiry becomes aware of interest or association, they should inform the Minister. A panel member should also not involve himself in any activity that may lead to having interest or close association. Although the government recognized that indeed the appointment of the panel members may influence the outcome of the inquiry, it rejected an independent panel to appoint members stating that the Ministers should themselves avoid impartiality.

One of the clearest departures from the Kenyan situation is section 10 of the UK's Act. The Act provides that if the Minister proposes to appoint a judge as a member of the panel, he should consult the heads of the courts in which the proposed judge adjudicates. Additionally, the UK 2018 Ministerial Code requires that the Lord Chancellor and Secretary of State for Justice be consulted in cases where judges are to be appointed.[77]

Unlike Kenya, where the President can appoint a judge into a commission of any nature, UK has elaborate consultations provisions with the proposed judge, the head of court in which the proposed judge adjudicates and the Prime Minister. Lord Justice Beatson warns against the appointment of judges in the UK because the appointment does not "depoliticize controversial matters" but only erodes the very independence that makes the judiciary attractive. [78] Elliot argues that judges should be appointed in matters that call for their particular skill only to avoid dragging their reputation in inherent politically controversial matters.[79] In Kenya, this scenario is

[76]Inquiries Act, 2005 s 9
[77]UK 2018 Ministerial Code, paragraph 4.12
[78]Lord Justice Beatson, 'Should Judges Chair Public Inquiries?' (2005) 121 Law Quarterly Review 221)
[79]Bamforth, Nicholas, and Peter Leyland, (eds) *Accountability in the contemporary constitution* (Oxford University Press 2013), See also: Mark Elliot, "Should judges lead public inquiries?"(2014) <https://publiclawforeveryone.com/2014/07/10/should-judges-lead-public-inquiries/> accessed 2 May 2018, see also Ishmael Moleya, "Appointment of sitting judges to preside over commissions of inquiry: A lawful but undesirable practice"(2014)<http://www.derebus.org.za/appointment-sitting-judges-preside-commissions-inquiry-lawful undesirable-practice/> accessed May 2, 2018, for a detailed observations of the UK Government on this issue, see

best captured by the Bosire Commission. In 2014, in an effort to adhere to these cautions, the UK government expressed its amenability to the amendment of the Act to provide that consent of respective heads of the courts be obtained instead mere consultations.[80] The consultations ensure that the heads of various courts review the inquiry proposal and prevent judges from being dragged into political matters.

A member of a panel remains in office until the inquiry comes to an end.[81] However, a member may resign by submitting the resignation notice to the Minister. The Minister may also terminate the appointment of a panel member on the grounds of illness, failure of a member to comply with his duty or discloses a conflict of interests. The Minister may not terminate services of a member if he was aware of in the interest before the appointment. However, the Minister should consult the chairperson before termination of the panel members.[82] The Minister should also consider representations of a member he intends to terminate his services after furnishing him with reasons for the proposed action. Additionally, if the affected member requests that the other panel members be consulted, the Minister should consult them.[83] To further enhance the independence of the panel, the UK government has already accepted a proposal to amend section 12 of the Act to provide that in case the Minister is to terminate the services of the chair, the Minister should notify the relevant legislature.[84]

Effective Inquiries A consultation paper produced by the Department for Constitutional Affairs Consultation Paper CP 12/04 6 May 2004

[80]Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, 2014

[81] Inquiries Act, 2005 s 12

[82] ibid s12(6)

[83] ibid s 12(6)

[84]Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, 2014

5.3.5 Internal Organization of the Inquiry

5.3.5.0 Regulation of Proceedings

The Act requires the ministers to make rules on procedure, evidence, custody of documents and awards.[85] Additionally, subject to the rules made under the Act, the Act authorizes the chairperson to make additional rules as to the general conduct of the inquiry.[86] In the exercise of this power, the chairperson should be impartial and consider the costs of the inquiry. The leeway for the chair to make rules is important in controlling the length and costs of an inquiry. In exercise of rule-making powers, the Lord Chancellor made the Inquiry Rules 2006 (2006 Rules) [87] and Scottish Ministers made the Inquiries (Scotland) Rules 2007 (2007 Rules).[88] The Select Committee on Post-Legislative Assessment has criticized the rules because they have led to lengthy and costly inquiries. This issue will be discussed in the next section.

5.3.5.1 Evidence

The chair may require tendering of evidence by notice to any person as a witness or as custodian of documents required as evidence.[89] Both 2007 the 2006 Rules, requires that a written request be sent to the proposed witness. The notice should indicate the consequences of not complying with such orders and how to request for exemption from testifying or production of documents. In determining the exemption application, the chair must consider the public interest. The High Court has the powers to enforce a request for appearance or documents production by the panel.[90]

[85]Inquiries Act, 2005 s 41
[86] ibid s 17
[87] Inquiry Rules 2006 No. 1838
[88]Inquiries (Scotland) Rules 2007 No. 560
[89] Inquiries Act, 2005 s 21
[90] ibid s 36

The Act prohibits the production of statutorily privileged information to the inquiry such information cannot be produced in a civil court.[91] Such information includes information that likely to injure the economy and information that would negate rule against self-incrimination.[92]

Under the 2007[93] and 2006[94] Rules, the panel should send warning letters to any person whom criticism has been made during the inquiry or who may be subject of criticism in the report. The warning letter should be accompanied by evidence relating to the criticism. The Rules prohibit the inclusion of significant criticism against any person unless the panel has sent a warning letter and the victim has responded to the warning letter. These provisions are a codification of some of the Salmon principles developed by Lord Salmon in the Royal Commission into Tribunals of Inquiry.[95]

Each member of the panel should treat the warning letters as confidential. However, these requirements by the rules have been criticized by Lord Leveson arguing that requirement is a waste of time.[96] Robert Jay QC expressed similar views agonizing over the requirement stating that it "caused us (*them*) huge grief and a huge amount of work and incurring of public expense."[97]

[91] Inquiries Act, 2005 s 22
[92]See generally the reluctance of courts in applying these restrictions in the case of *Kennedy v The Charity Commission* [2014] UKSC 20
[93] Inquiry Rules 2007 Rule 12
[94] Inquiry Rules 2006 Rule 13
[95]Select Committee on Public Administration First Report: The Salmon Principles <https://publications.parliament.uk/pa/cm200405/cmselect/cmpubadm/51/5114.htm >accessed May 2, 2018
[96]Government of United Kingdom, Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative scrutiny Report of Session 2013–14, The Stationery Office Limited p. 34
[97] Ibid p. 45

5.3.6 Public access to the inquiry proceedings

The default position in the UK is for the panel to conduct the inquiry in public.[98] The chairperson should ensure that members of the public have access to the inquiry proceedings and a simultaneous transmission of the same.[99] The chair should also ensure access to the evidence and documents produced in the inquiry. However, the Act prohibits recording or broadcasting unless authorized by the chair.

Access to inquiry or documents produced is however not without a limit.[100] The chair or the Minister may put a restriction on attendance, disclose of evidence or for avoiding risks, confidentiality or that which may cause harm or damage. The Select Committee on Post-Legislative assessment has criticized the powers of the Minister to issue restrictions and instead recommended the consent of the chair instead of consultations as it erodes the independence of the panel. The government, however, has rebutted this position arguing that the chair and ministers have so far worked in collaboration. The government has also argued that the Minister is best placed to determine what amounts to sensitive information in an inquiry.[101] In Kenya, the commission may conduct the inquiry in private if it so considers or if the President specifies in the appointment of the commission.

5.3.7 Inquiry Reports: Releasing and Publication

At the end of the inquiry, the chair should submit the report to the relevant Minister.[102] The report should set out the facts and the recommendations (if required). The report should be signed by all the members. If there are points of disagreements by the members, the report

[98] Inquiries Act, 2005 s18
[99] ibid s 18
[100] ibid s 19
[101] Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, 2014
[102] Inquiries Act, 2005 s 24

should disclose and describe the disagreement. The chair may deliver an interim report which contains anything that a final report may contain.[103]

The Act makes it the duty of the chair or the Minister to make arrangements for the publication of the report in full.[104] The chairman, however, may only arrange for the publication if the Minister delegated that responsibility on the chair of the inquiry before the start of the inquiry or any other time during the proceedings of the inquiry. However, parts of the report may be withheld if it is in the public interest or if such information is exempted under a statutory provision.[105] In considering the public interest, one should have regard to the extent to which the withholding might inhibit the allaying public concern or whether there is a risk of harm or damage avoided by withholding such materials. The Act defines harm and damage to include death or injury, national security, and international relations, the economic interest of the United Kingdom or commercially sensitive information.[106]

In Kenya, the Act does not put any limits as to the extent of disclosure of commission's report to the National Assembly. As was noted in chapter two and three, was reported that the President shelved the intention to hold an inquiry into the Westgate Terrorist attack for fears that the report would expose sensitive security information to the public. As noted in Chapter 3, implementation of section 7 in the most recent commission i.e the Tana River Commission was a challenge perhaps because of the sensitivity of some parts of the report.

[103]Inquiries Act, 2005 s 24(3)
[104] ibid s 25
[105]ibid s 25
[106]ibid s 25(6)

The person whose duty it is to make arrangements for publication may also cause the reports to be tabled before the Parliament or Assembly of the relevant administration.[107] The 2007 and 2006 Rules also makes it mandatory to furnish all core participants[108] and their legal representatives (if any) a copy of the interim report and/or final report before publication. The contents, however, are confidential until the report is formally published. In Kenya, until 2010, the reports of commissions in Kenya would be handled by the President and would never be published or if published, it would be many years after its receipt by the President. However, unlike Kenya, UK law provides for providing the copy of the report to the core participants.

5.3.8 Termination of the Inquiry

5.3.8.0 Power to Suspend inquiry

The Act empowers the Minister to suspend an inquiry by notice to the chair giving reasons and delivering a copy of the notice to the relevant Assembly or Parliament. The circumstances were discussed in details in a previous section. The power to suspend is well checked both procedurally and substantively. Procedurally, the Minister should inform the chair and lay a copy of the notice and the reasons on the suspension to relevant Parliament or Assembly. Substantively, the scopes of the reasons are limited to allow other investigations or determination of civil or criminal liability. Additionally, the fact that the Ministerial decisions are subject to judicial review ensures the discretion is exercised in warranted situations.

[107] Inquiries Act, 2005 s 26

[108] Rule 2 of the 2007 and Rule 5 of the 2006 Rules defines core participants to include those played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates, have a significant interest in an important aspect of the matters to which the inquiry relates; or may be subject to significant or explicit criticism before or after delivery of the report.

5.3.8.1 Termination of an inquiry

According to the Act, the inquiry comes to an end on the day after the delivery of the report and upon the chair notifying the Minister that the inquiry has fulfilled the terms of reference.[109] The Minister may also terminate the inquiry by notice to the chair.[110]

The Minister, however, cannot terminate an inquiry until he consults the chair of the panel. The notice should contain the reasons for the termination of the inquiry. The Minister should also lay a copy of the notice before the Parliament or Assembly. The process is checked because it involves more than one person and is amenable to judicial review. In Kenya, the President may terminate the inquiry at his will as it happened in the Ouko Commission as discussed in chapter two and three of this study. This power makes the commission very vulnerable and erodes its independence.

5. 3.9 Implementation of Recommendations

The Act does not contain provisions on implementations of recommendations or the findings of inquiries. However, the government had indicated its intention at the time of its enactment to have the relevant Minister state his response to the recommendations.[111] It also acknowledged the importance of follow up mechanisms to ensure there was action on the recommendations.[112] It is not clear why these provisions were omitted in the Act.

[109]Inquiries Act, 2005 s 14
[110]Inquiries Act, 2005 Chapter 12, s 14
[111]Effective Inquiries, Response to Consultation [CP (R) 12/04] 28/09/2004, Response to consultation carried out by the Department for Constitutional Affairs (2004)
[112]ibid p.5

The Committee has already recommended that the Minister should give a comprehensive response to the recommendations. Further, it recommended that if an inquiry specifies that the recommendations should be implemented by a public body, then, that body is under a statutory obligation to state whether they accept the recommendations and if so, they should introduce an implementation plan.[113] Additionally, the Committee recommended that in case the Ministers or public body do not accept the recommendations, they should give alternatives to the recommendations. If the recommendations are accepted, the responses should contain implementation plans and commitment to submit updates on implementation annually. The Government response to these observations by the Select Committee accepted the recommendations although the Act is yet to be amended.[114]

5.4 Main differences between Kenya's Commissions of Inquiry Act and the UK's Inquiries Act

In light of the above discussions, there are differences between Kenya's Commissions of Inquiry Act and the UK's Inquiries Act in responding to devolution, accountability, leadership and integrity and independence of inquiries. This section summarizes them in various themes.

5.4.0 Appointing Authority

In Kenya, the appointing authority is the President while in United Kingdom, the Inquiries Act mandates the ministers of both the national and devolved governments to form inquiries depending on whether functions are devolved or not.

[113]Government of United Kingdom, Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative scrutiny Report of Session 2013–14, The Stationery Office Limited p. 85
[114] Ibid p. 85

5.4.1 Inquiries and Devolution

The UK law empowers both levels of government to appoint inquiries to inquire into issues within their competency and strictly prohibits an inquiry by the national government into a function that is devolved. In case the function is shared between the two levels, the ministers in the two levels must consult in the formation of such an inquiry. Additionally, two devolved units may form a joint inquiry should the issue at hand touch on two or more devolved units.

In Kenya, the Act as framed covers both levels of government with appointing powers given to the President. As was argued in the previous chapter, this is unconstitutional as it would amount to control and subordination of county governments and other independent commissions by the President.

5.4.2 Political expediency prevention

5.4.2.0 Liability Imputation

The United Kingdom Act prohibits liability imputation unless its incidental to the fulfillment of the inquiries' substantive ToRs. This allows the other trial and investigatory processes to be complete. It is also an important provision to minimize use of CIs as political expediency tools. In Kenya, the Act does not limit the powers of an inquiry as to liability imputation. In fact, as was demonstrated in chapter two, many of the CIs imputed liability on individuals.

5.4.2.1 Inquiry Suspension powers

The Ministers in the United Kingdom in consultation with the chairperson of the inquiry may suspend the inquiry to allow investigations by others state agencies or allow a court trial process to proceed. In such circumstances, the Minister must give written reasons for the suspension and table them to the relevant legislature. The suspension allows other suitable processes to be used

to solve the problem at hand. In Kenya, the Act does not provide for the exercise of such powers. However, the President can terminate an inquiry without reasons and without checks.

5.4.3 Formation of an inquiry

In the United Kingdom, the Minister proposing to form an inquiry must consult with the Prime Minister and the proposed chairperson of the inquiry. The Minister must table before the relevant legislature the proposed chair and the size of the proposed inquiry. In Kenya, the President is the sole actor as he issues a commission and gazettes the appointment without involvement of other stakeholders.

5.4.4 Formulation of Terms of Reference and subsequent amendment

In the United Kingdom, the Minister in consultation with the proposed chair formulate the terms of reference. The terms must also be submitted to the relevant legislature. In case of amendments to the ToRs, the minister should consult the chair of the inquiry. The consultations are aimed at achieving objectivity in formulation of ToRs. In Kenya, the President has the exclusive powers of formulating the ToRs. He also exercises unfettered powers in amendment of the ToRs.

5.4.5 Composition and qualifications of the commissioners

In Kenya, the Act does not prescribe any qualifications. In the UK, the Minister appoints the chairperson of the panel. In the appointment of the other members of the panel, the Minister must consult the chair. The UK Act requires the Minister to ensure the inquiry has the expertise and should ensure a balance considering the ToRs. The Minister may appoint to the inquiry an assessor who is an expert in the issue under inquiry. The Act prohibits the members from have a conflict of interest and should avoid the conflict during the inquiry process otherwise they should resign

The Kenyan Act does not prohibit or restrict appointment of judges as commissioners. In United Kingdom, in case the Minister proposes to appoint a judge into the inquiry, he must consult the head of the court in which the judge practices.

5.4.6 Termination of the appointment of a commissioner

In Kenya, the termination of the services of a member is at the full discretion of the President. The President can terminate the appointment at any time of the inquiry without accountability measures in exercise of this rather wide and drastic power. Conversely in UK, the Minister may terminate the services of a commissioner but must first consult the chair and give the affected commissioner an opportunity to be heard. The affected member may also request that other panel members be consulted in which case the Minister must consider their representations. Additionally, in case the Minister is to terminate the services of the chair, he must notify the relevant legislature.

5.4.7 Termination of the inquiry

In Kenya, the term of the inquiry comes to the end upon expiration of the term specified in the appointment. The President may, however, terminate an inquiry without reasons and without being accountable to any institution. In United Kingdom, the term comes to an end after delivery of the report to the Minister and upon notification that the inquiry has fulfilled all the ToRs. The Minister may also terminate the inquiry but must consult the chair. He must also give written reasons for the termination and table the reasons and termination notice in the relevant legislature

5.4.8 Inquiry Report Publication

The Kenyan law requires the commission to submit the report to the President and the National Assembly. In the United Kingdom, the chair or the Minister is responsible for the publication of

the inquiry report to the public and should submit the report to the relevant legislature. Additionally, the Minister should furnish the core participants of the inquiries with the report.

5.4.9 Courts intervention

In Kenya, the courts have been reluctant to intervene in the inquiry. This may be seen in the *Moraa* case where the court declined to review the ToRs on the basis that it's only the President who is mandated to formulate them. In the UK, all the powers exercisable under the the UK law are amenable to judicial review. In fact, the public can petition for the formation of an inquiry and should the Minister decline, the petitioners can invoke the Judicial Review process.

5.5 Conclusion

This chapter has examined the UK's experience with inquiries in the post-2005 since the enactment of Inquiries Act, 2005. The chapter has argued that UK's legal regime governing inquiries contains provisions that assist in guaranteeing independent inquiries, respects the devolved units, contain accountability and transparency mechanisms that Kenya can adopt in reviewing her inquiries framework.

Generally, this chapter finds that formation of inquiries in the UK is a widely consultative affair involving the Prime/First Minister, proposed chairpersons, and respective legislature and in the event that the proposed appointee of an inquiry is a judge, the head of the court in which that judge adjudicates. The intention of this consultative process is to first ensure that the inquiries are formed only in warranted circumstances. Secondly, in the process of formulating the ToRs, the consultation ensures objective scope of the inquiries. Third, in consultation the head of court stations, it is intended to ensure that judges are not dragged into political issues which would taint their image and reputations.

Further, the UK law incorporated limitations on the formation of inquiries making them secondary tools and not the government's way of escaping, postponing accountability or cooling the public concerns. This is majorly through the incorporation of suspension to allow completion of court trials and non-liability imputation provisions.

The UK Act contains provisions that guarantee the independence of the inquiries right from the composition, formulation of the terms of reference the term and the chair's increased role as discussed above. The process of removal of a panel member and the termination of the inquiry also involves the chair, the ministers and the legislature. These requirements prevent misuse of powers and guarantees independence of the inquiry. The Act also guarantees publication of reports by requiring the Minister or the chair to publish the report to the public and table the reports to the relevant legislature and to disclose it to core participants.[115] However, the Act exempts sensitive information from such publication but contains clear criteria on what amounts to sensitive information.[116] This may be compared with Kenyan situation where there is no such limitation when the commission is submitting the report to the National Assembly.[117] Further, this chapter found that UK law respects the devolved system by providing the devolved units to form inquiries about matters within their competency their and limiting national government power to issue inquiries in devolved functions.[118] Finally, the analysis has also found out that even though the UK does not have recommendation's implementation procedures, the UK government is considering the incorporation of such provisions in the Act.

[115] Inquiries Act, 2005 s 25
[116] Inquiries Act, 2005 s 25 (4-7)
[117] Commissions of Inquiry Act s 7
[118] Inquiries Act, 2005 s 27-34

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.0 Introduction and Research findings

This study examined the incongruencies between the Commissions of Inquiries Act and the Constitution of Kenya, 2010. The research argues that despite the promulgation of the Constitution of Kenya, 2010 that heralded a new constitutional dispensation with far-reaching consequences on the governance structures of the country, the Commissions of Inquiry Act has remained unreviewed and in various aspects contradicts the letter and spirit of the Constitution presents a challenge to their utilization.

In investigating the research problem, this study hypothesized that the Act contradicts the Constitution in various aspects. Using the historical research method, the research has characterized the efficiency of various commissions demonstrating that pre-2010 commissions reflected the old constitutional dispensation courtesy of the Act. This method also assisted the research in locating the research problem to 2010 upon promulgation of the Constitution where the Act has remained unchanged reflecting the pre-2010 constitutional order. Further, using doctrinal research method that requires critical analyses of policies and laws using reasoning power to note differences, contradictions and various impacts of laws, this research has proven in chapter two and three that indeed the Act contradicts the Constitution in various ways.

This research also hypothesized that Kenya can learn several lessons from the UK inquiries regime including how to ensure the purposeful formation of inquiries, independence of commissions and reporting mechanism. Using comparative research methodology, this research has proven that indeed UK's regime is in many ways advanced and has addressed some of the problems Kenya has had with her CIs.

There are two underlying theories running through this study. Firstly, the rational institution theory that helps this study in arguing and proving that the structuring of an inquiry is almost determinative of its outcome. This was clearly demonstrated in Feetham and Carothers commissions. Additionally, given that the UK regime is materially different on how its structures inquiries, her legal regime has helped achieve significant results. Such structures include the independence of commissions, the objectivity of ToRs, limited powers on the appointing authority among others. To achieve accountability and transparency using CIs, it is therefore important to structure this institution rationally to avoid interference with various interest groups.

Secondly, this research utilizes critical legal studies theory in order to debunk, unearth power structures and interest groups hidden in the formal law, in this case, the Act under investigation. Through various examples, this research has demonstrated that the various provisions are coined to the advantage of the appointing authority. To demolish these power struggles, a review of the Act is necessarily by incorporating various accountability mechanisms and distributing power from the Presidency so as to align it with the Constitution.

In investigating the research problem, this research set up four questions and the study answered each of the questions, in a separate chapter. Chapter two answers the first question which basically required the genesis, historical and contextual background of various commissions in Kenya. The main argument in this chapter is that inquiries have always reflected the legal and political regime under which they are formed and in this case the pre-2010 regime. In answering this question, the study explored the various commissions and the changes in the Act in various regimes. It divided the regimes into colonial and the four presidential regimes Kenya has had. The research found that the commissions in Kenya started in 1912 with the enactment of the Commissions of Inquiries Ordinance. In order to appreciate how the commissions reflected the

political and legal context of various commissions, chapter two sought to characterize the effectiveness of various commissions using the purpose of the commissions, appointment process, inquiry process, reports disclosure and implementation of the commissions' recommendations. This chapter reveals that inquiries in the colonial period were used to entrench colonialism. In Jomo Kenyatta's Presidency, the inquiries save for the Marriage and Succession Commissions were used as tools of centralizing power. In Moi's era, the commissions were majorly used as political tools reflecting the imperial Presidency. In Kibaki's time, this research found mixed outcomes; some commissions such as the Ndung'u, Kligler and Waki commissions in the positive side. However, the contexts within which these three inquiries were formed must be appreciated and was discussed extensively in chapter two. On the other hand commissions such as Bosire, Artur Brothers have a tainted history. In Uhuru Kenyatta's regime, the research found out the no inquiries have been formed. Notably, the research also revealed that President Kenyatta's regime has often used task forces as investigatory and policy-making institutions. However, there are incessant calls for the formation of various commissions in various instances. Finally, this chapter found that the concentration of powers under the Act without relative checks has seen the misuse of powers under the Act. This may be seen in Ouko, Akuwumi, Koech and Gitari Commissions.

The third chapter responded to the second question which basically asked the legal, policy and institutional framework as applied and interpreted by the courts. This chapter examined the various international and regional legal and policy instruments that call for good governance as CIs assist in achieving this goal. Nationally, the chapter explored the Constitution, Fair Administrative Action Act, 2015, Leadership and Integrity Act, 2012, Public Ethics Officer's Act, 2001 and the Commissions of Inquiry Act. The chapter extensively analyzed the

Commissions of Inquiry Act as applied and interpreted by courts. In the same vein, the chapter noted how various powers under the Act were misused particularly because of lack of accountability mechanisms. The chapter also noted that the Act lacks accountability mechanism, concentrates powers in the Presidency and has loopholes that may allow interference of the inquiries' work.

Chapter four responded to the third research question which required the research to demonstrate how and to what extent the Act is incongruent with the Constitution both in letter and spirit. The main argument in this chapter was that as currently structured, the Act contradicts in various ways with the Constitution presenting a challenge to their utilization. The chapter choose various discursive issues. On devolution, the chapter revealed that as the Act allows the President to form inquiries on any public officer or officer, if these powers were to be exercised on county governments, it would amount to the interference of the independence of the county governments as it would make the President a superintendent over the counties and their officers which has no place under the Constitution. Given that the appointing powers are bestowed on the President and appointing inquiries in to conduct of county governments is unconstitutional, this leaves the CIs out of the reach of the county governments. Furthermore, the chapter also noted that public offices as conceptualized in the Constitution and other statutes include independent commissions and offices. Given autonomy of these commissions, instituting an inquiry into their conduct by the President directly would amount to the subordination of these commissions to the authority of the President. In any case, the Constitution under Article 251 already sets out a clear procedure on how to inquire into the conduct of any of the commissioners and independent office holders.

Importantly, the chapter also found out that the Act lacks accountability mechanisms. The powers are concentrated in the Presidency without checks on these powers. Similarly, as structured, the commissions under the Act are prone to interference by the appointing authority in that he/she can appoint, revoke an inquiry and set the ToRs without checks on these powers. To guarantee the commissions' effectiveness, the structure of the commissions must guarantee their independence. The report disclosure is also limited to the President and the National Assembly without the requirement for publication to the public. This greatly affects the transparency of such commissions.

The Act also does not envisage public participation in the inquiry process. As such, the public is reduced to mere spectators. Such an approach does not have a place in light of Article 10 of the Constitution that incorporates public participation as a core value of governance. The Act also fails to provide for the affirmative action or the two-thirds gender principle. This principle has a well-documented history and is a mandatory requirement for any appointive or elective body. Inquiries being appointive public bodies, the Act must provide for the incorporation of this important principle.

Finally, the Act does not prescribe the qualifications of the commissioners. This has resulted in the appointment of persons with interests in the commissions as evident in Akuwumi Commission. However, the Constitution prescribes leadership and integrity principles on any persons occupying public offices. Such principles include honesty, impartiality, competency and the duty to avoid conflict of interest. The Act must be reviewed in this respect.

The research dedicated chapter five into answering the fourth question that basically asked the legal and institutional framework on inquiries in the United Kingdom and the lessons that Kenya

learn can learn in the process of aligning its Act with the Constitution. The main argument in this chapter was that the UK has a more advanced and successful inquiries' regime i.e Inquiries Act, 2005 and in many aspects is the opposite of Kenya's situation. This chapter explored the various types of inquiries in the UK and dedicated most of the energy in analyzing the Inquiries Act, 2003. From the analysis, it is clear that UK's inquiries are a consultative affair involving stakeholders such as Prime/First Minister, chairpersons of the inquiries, ministers and the legislatures. Further, the inquiries in the UK enjoy independence in their work and the Act has particularly elevated the position of the chairperson while diminishing the responsibility of the appointing authority. For instance, the minister cannot terminate the appointment of an inquiry member without giving him/her an opportunity to be heard and in consultation with the chair and other panel members. To terminate services of a chair, the Act requires the Minister to obtain the consent of the relevant legislature. In this respect, the Act contains checks on the exercise of powers by the ministers further guaranteeing the independence of the inquiries.

The chapter also found out that in an effort to ensure that inquiries are only formed in warranting circumstances, the UK regime allows for the suspension of inquiries to allow court trials to be concluded. Additionally, the Act also prohibits imputation of liability on person save in incidental cases. This prevents appointments of inquiries with political intentions and bad motives. Essentially, as a matter of practice, the UK government only forms inquiries in instances where the existing legal framework is inadequate to address the situation.

To avoid dragging judicial officers into political issues which in turn taints their reputation and perception, the UK Act requires the ministers to consult the head of various courts that the proposed judge adjudicates. Essentially, the consultation is intended to ensure that judges only engage in non-political inquiries. Relatedly, UK government has already accepted a proposal to

seek the consent of the head judges instead of mere consultations. This guards the reputation of the judge and the judiciary.

The UK has a devolved system of governance. In this respect, the Act empowers the various ministers of devolved units to appoint inquiries into matters within the devolved units' competency. It also prohibits the formation of inquiries by the national government on functions that are devolved unless with consent and consultation of devolved units. In drafting ToRs, the ministers are required to involve the chairpersons of the inquiries and to inform the relevant legislatures. This ensures rational and objective inquiries.

Importantly, the UK Act requires the Minister or the chair to publish the report of inquiries to the public. However, some information may be omitted due to security concerns among reasons. The Act also makes it mandatory for the Minister or the chair to release the report to the core participants and gives a detailed list of core participants. Further, the report must be presented to the relevant legislature. Termination of inquiries is also a carefully checked process that requires the Minister to consult the chairperson and to give detailed reasons for the termination. The UK also provides for judicial review on the exercise of any power under the Act.

Finally, the chapter revealed that the UK is considering introducing a mechanism to guarantee implementation of the recommendations of the findings of inquiries. Such mechanisms include requiring the ministers to notify the relevant legislatures whether they accept the recommendations or not. If they do, it becomes a statutory duty to implement them and if not, the minister must provide reasonable alternatives to the recommendations. This research argues that incorporation of these provisions in the Kenyan law would assist in achieving Article 10 provisions.

6.1 Recommendations

Based on the above findings, this research makes various recommendations. The research divides the recommendations into immediate, short term, medium term and long-term. Cumulatively, these recommendations will go a long way in not only aligning the Act with the Constitution but also make CIs transparent, accountable and effective tools of governance.

Immediate Recommendations

This research recommends immediate amendment of the Act to provide for the powers of county Governors to form commissions. Notably, county governments don't have policy and investigatory institutions and CIs are a great opportunity for them. This amendment would allow county governments to utilize the commissions of inquiry as investigative and policy making tools. As the amendment would have an impact on functioning of the county governments, the National Assembly and the Senate should move with haste to remedy the situation.

Short-term recommendations

The Parliament should amend the Act to substitute Presidential powers to form inquiry with Cabinet secretaries. This amendment allows more flexibility in formation, scrutiny and public participation in the inquiry process. The initiation of inquiries at the ministerial level also allows the formation of inquiries in function specific in the ministry. Given the staffing of ministry is largely with technocrats, objective formulation of terms of reference is likely to be achieved.

Medium-term recommendations

(i) Inclusiveness in inquiry process

Given the huge impact and far reaching consequences of an inquiry process particularly in the policy development, inquiry formation should be an inclusive process. The Parliament should review the Act to provide for the involvement of stakeholders in the inquiry formation. Such stakeholders should include the President, Cabinet, or county executive, Parliament and the county assemblies. The inclusive process would guarantee objectivity in formulation of the terms of reference, an objective appointment of commissioners. The legislature's involvement is an important check on exercise of these powers.

The amendments should also introduce mandatory consultation with the chairperson on any matter regarding the inquiry including the appointment of members, termination of the inquiry, amendment of ToRs and a notification to the relevant legislatures in any matter. These amendments will guarantee the independence of inquiries. The involvement of the chair at all terms ensures no action is taken that would negatively prejudice the commission's work and subsequent notification to relevant legislatures enhances accountability and transparency of exercise of powers under the Act. Additionally, it helps prevent arbitrary actions.

(ii) National Values and Principles of governance

The Constitution in mandatory terms enjoins everyone in interpreting and applying any law, policy and actions. In this regard, Parliament should review the Act to introduce mechanisms of achieving two thirds gender principle in appointment of inquiries. This aligns the Act with the Constitution giving effect to the equality principle under Article 27 and ensures that both men

and women participate in inquiry processes. This is particularly useful in the policy-making inquiries.

In providing for accountability in the inquiry process, the Parliament should provide for mechanism to check the exercise of the powers under the Act. In this regard, the Act should provide for the reporting of appointment of commissions, appointments, termination and generally any act on the inquiry process to be reported to the relevant legislature.

The Act should also be amended to include the public participation mechanisms. Such mechanism would ensure that the public views on the formation, inquiry process and making of recommendations particularly on the policy based inquiries are taken into account. The public participation mechanisms should also include the right of the public to petition for the formation of an inquiry and if the minister were to decline the petition, the minister should give written reasons to the petitioners. This implies that the petitioners can commence judicial review proceedings on the decisions. The overall impact of this recommendation is that even if the government were to be reluctant to form an inquiry in warranted circumstances, inquiries would still be formed through the public petitions.

(iii) Leadership and integrity provisions

The Parliament should review the Act and introduce the leadership and integrity provisions as well as other qualifications. Principles such as honesty, impartiality, duty to avoid conflict of interest, competency and expertise will ensure the appointees meet chapter six of the Constitution. Additionally, the expertise requirement will ensure a faithful, full and impartial inquiry. Such requirements would not only comply with the Constitution but also assist in ensuring that the commissioners make a full and faithful inquiry.

(iv) Suspension and termination of inquiries

Parliament should amend the Act and introduce inquiry suspension powers by the appointing authorities to allow trial process and prohibit imputation of liability on persons. This amendment ensures that inquiries are not maliciously used to malign individuals. Secondly, it ensures that inquiries are formed only in instances when other legal mechanisms are inadequate to address the situation. This introduces objectivity in commissioning inquiries.

(v) Appointment of judges as commissioners.

The Act should be amended to exclude sitting judges from being commissioners in any inquiry completely. The amendment will prevent the involvement of sitting judges in political issues which damages the reputation of the judiciary and specific judges. Although the UK position requires consultation, Kenya's political environment is that literally anything can be turned into a political issue.

(vi) Inquiry's reports disclosure

The Parliament should introduce a requirement for the relevant Minister or Governor to publish findings of commissions in addition to submitting them to the National Assembly in the case of national government and county assembly in county governments. In case the information is to be in recanted form due to security or other public interest issues this determination must be made by Minister or Governor, chairperson of the inquiry and a representative from CAJ. The amendment will ensure that the public gets information about the various issues under inquiries' investigations.

(vii) Implementation of inquiry's recommendations

Given the low implementation level of the recommendations of inquiries, Parliament should introduce recommendations implementation provisions by requiring the Cabinet Secretaries and the Governor should notify the respective legislatures whether they accept the recommendations of inquiries or not and if they do, it becomes a statutory obligation. If they don't, they should present alternatives to the recommendations.

There should also be a parliamentary mechanism of following up on the implementation of recommendations. The provision will guarantee that the findings of the commissions are acted upon either by adopting the recommendations or presenting reasonable alternatives to the recommendations.

(viii) Sensitization on the role of court in the inquiry process

The Constitution places the Judiciary as the ultimate arbiter of disputes and protector of the Constitution. Accordingly, exercise of any powers under any law including the Act should be amenable to courts' intervention. Given the attitude displayed by the court in *Moraa* case, there is a need to sensitize judges on their role in ensuring that an inquiry achieves the principles and objects of the Constitution. The Court is an indispensible institution in ensuring that power is properly exercised.

Long-term recommendations

To comprehensively address work of commissions of inquiry, the Cabinet should develop and adopt a policy framework on commissions of inquiry. The policy should contain the rationale for inquiries, instances when they may be commissioned and funding mechanisms of inquiries. Such

a policy would go a long way in providing for the sensitization of government and the public in general on the usefulness of commissions of inquiry. The policy framework should also clearly outline the processes and consideration of suitability of inquiries in various instances.

In the end, rethinking and revising the structure of CIs and appropriately amending the Act will not only conform to the Constitution but also make CIs transparent, accountable and effective tools of governance.

6.2 Further Areas of research

This study has examined the inconsistencies between the commissions of inquiry legal framework and the Constitution of Kenya, 2010. The study has also recommended various measures to address the inconsistencies and making CIs more effective in inquiry process. Future work in this area include studying critically the reasons for reduction of CIs in Kenya and the increased trend of forming task forces and other institutions instead of CIs. Study in these areas would go long way in studying the possibility of merging the emerging institutions and the commissions of inquiry.

BIBLIOGRAPHY
Books

Bamforth, Nicholas, and Peter Leyland, (eds) *Accountability in the contemporary constitution* (Oxford University Press 2013)

Beer, Jason *Public Inquiries* Oxford University Press, 2011

Clauser Monica *et al*. (eds), *Good Governance in Multiethnic Communities: Conditions, instruments, best practices, ways to achieve and measure good governance at the local level* (Ethnocultural Diversity Resource Center and the King Baudouin Foundation 2007)

Cohen, David William, ES A. Odhiambo, *The risks of knowledge: investigations into the death of the Hon. Minister John Robert Ouko in Kenya, 1990* (Ohio University Press, 2004)

Dilley, Marjorie Ruth. *British policy in Kenya colony*, (Psychology Press, 1966)

Gitari, David M, *Troubled But Not Destroyed: Autobiography of Dr. David M. Gitari, Retired Archbishop of the Anglican Church of Kenya* (Isaac publishing 2014)

Graham, John, Timothy Wynne Plumptre, and Bruce Amos, *Principles for good governance in the 21st Century* (Ottawa: Institute on governance, 2003)

Hornsby, Charles, *Kenya: A history since independence* (IB Tauris, 2013)

Inwood, Gregory J., and Carolyn M. Johns, (eds) *Commissions of inquiry and policy change: A comparative analysis* (University of Toronto Press, 2014)

J.C. Carothers, *The Psychology of Mau Mau* (Government Printer 1954)

Joe Khamisi, *Looters and Grabbers 54 Years of Corruption and Plunder by the Elite, 1963-2017* (Jodey Book Publishers 2018)

Joshua Toulmin Smith, *'Government by Commissions Illegal and Pernicious: The Nature and Effects of All Commissions of Inquiry and Other Crown-appointed Commissions. The Constitutional Principles of Taxation; and the Rights, Duties, and Importance of Local Self-government* (1st Edn, London, S. Sweet, 1849)

Katiba Institute, *Fair Administrative Action under Article 47 of the Constitution* (Katiba Institute 2018)

Keys, Mary M *Aquinas, Aristotle, and the promise of the common good* (Cambridge University Press, 2006)

Kings, Graham. "Proverbial, Intrinsic, and Dynamic Authorities: A Case Study on Scripture and Mission in the Dioceses of Mount Kenya East and Kirinyaga" (1996) 24, no. 4 Missiology 493

Lea, David, and Annamarie Rowe (eds) *A political chronology of Africa* Vol 4 (Taylor & Francis, 2001)

Maxon, Robert M. *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (Fairleigh Dickinson Univ Press, 1993)

Maxon, Robert M., *Struggle for Kenya: The Loss and Reassertion of Imperial Initiative, 1912-1923* (1993 Fairleigh Dickinson Univ Press)

Mbote, Patricia Kameri, and Migai Akech, *Kenya: Justice Sector and the Rule of Law* (The Open Society Initiative for Eastern Africa 2011)

McCulloch, Jock, *Colonial Psychiatry and the African Mind* (Cambridge University Press, 1995)

MigaiAkech, *Administrative Law***,** (Strathmore University Press, 435 (2017)

Morgan, W. T. W., 'The'white highlands' of Kenya." (1963) 129, no. 2, the Geographical Journal 140

Morton Andrew, *Moi: The making of an African statesman* (Michael O'Mara Books, 1998)

Musyoka, William, *Law of succession* (African Books Collective, 2006)

Ojienda, Tom, and Katarina Juma, Professional Ethics: A Kenyan Perspective, (LawAfrica Publishing Ltd 2011)

Okia, Opolot. *Communal Labor in Colonial Kenya: The Legitimization of Coercion, 1912–1930* (Springer, 2012)

Okoth-Ogendo, H. W. O, *Tenants of the Crown* (ACTS Press, African Centre for Technology Studies 1991)

Riley, Patrick, *Will and political legitimacy: A critical exposition of social contract theory in Hobbes, Locke, Rousseau, Kant, and Hegel* (Harvard University Press, 1 Jan 1982)

Roberts, A., *Blacked Out: Government Secrecy in the Information Age* (1st edn Cambridge University Press 2006),

Throup, David, Charles Hornsby, *Multi-party politics in Kenya: the Kenyatta & Moi states & the triumph of the system in the 1992 election* (Ohio University Press, 1998)

Book Chapters

A. Thomson, 'Critical approaches to law: who needs legal theory?', in I. Grigg-Spall, and E Ireland (eds) The Critical Lawyers' Handbook (London: Pluto Press, 1992)

Journal Articles

Adam, "Reckoning schemes of legitimation: On commissions of inquiry as power/knowledge forms." (1990) 3, no. 1 Journal of Historical Sociology 1

Adar, Korwa G., Isaac M. Munya, 'Human Rights Abuse in Kenya under Daniel Arap Moi, 1978' (2001) 5, no. 1 African Studies Quarterly 1

Africa Centre for Open Governance (AfriCOG) 'All that glitters? An appraisal of the Goldenberg Report' (2011) AfriCOG

Albert K. Mwenda, 'Devolution in Kenya: Prospects, Challenges and the Future Research Paper Series No. 24 Institute of Economic Affairs, Nairobi

Anony 'KADU, *KADU Election Policy 1963: Uhuru Na Majimbo Sasa!'* (Nairobi: Kenya African Democratic Union 1963)

Ashforth, A., 'Reckoning schemes of legitimation: On Commissions of Inquiry as Power/Knowledge Forms' (1990) 3(1) Journal of Historical Sociology 1

Aucoin, Peter. 'Contributions of commissions of inquiry to policy analysis: An evaluation.' (1989) 197 Dalhousie LJ 12

Bauhr, Monika, and Marcia Grimes. "What is government transparency?" (2012) 16 *QoG Working Paper Series* 16

Ben E. Kipkorir “Descent from Cherang'any Hills: Memoirs of A Reluctant Academic” (2010) 2 Journal of Colonialism & Colonial History 11

Caleb Mackatiani et al, “Development of Education in Kenya: Influence of the Political Factor Beyond 2015 MDGs” (2016) Vol.7, No.11, Journal of Education and Practice 55

Calvert, R.L., ‘The Rational Choice Theory of Institutions: Implications for Design’ [1995] *43* Institutional design, 63

Dimino, Michael R ‘Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians’ (2003) 21, no. 2 Yale Law & Policy Review, 301

Dunn, John ‘The concept of trust in the politics of John Locke’ (1984) Philosophy in history: Essays on the historiography of philosophy, 279

Frank Esser et al., "Comparative Research Methods" (2017) the International Encyclopedia of Communication Research Methods

Freeman, Samuel, ‘Constitutional Democracy and the Legitimacy of Judicial Review’ (1990) 9 no. 4Law and Philosophy 327

Gomery, J.H., ‘The Pros and Cons of Commissions of Inquiry’ (2005) 51 McGill LJ, 783

Home, Robert. "Colonial township laws and urban governance in Kenya" (2012) 56, no. 2 Journal of African Law 175

Huffman, James L. ‘A fish out of water: the public trust doctrine in a constitutional democracy’ (1988) 19 Envtl.L 527

Jack Simson, “Public Inquiries: non-statutory commissions of inquiry” (2016) Briefing Paper Number 02599

Johnson, R. et al., "Toward a definition of mixed methods research" (2007) 1, no. 2 Journal of mixed methods research 112-133

Kahneman, D. and Tversky, A., ‘Prospect theory: An analysis of Declion under risk’ (1979) Vol. 47, No. 2. Econometrica, 263

KANU, *What a KANU Government Offers You* (Nairobi: Kenya African National Union, 1963)

Kennedy, *“Cost-reduction theory as legitimation”* (1981) 90 Yale LJ 1275

Kenya National Human Rights Commission (KNHRC), ‘Lest We Forget: The faces of Impunity in Kenya' (2011) Kenya Human Rights Commission 1

Kenya National Human Rights Commission, ‘Lest We Forget: The faces of Impunity in Kenya’ (2011) Kenya Human Rights Commission

Kindiki, Kithure, “The emerging jurisprudence on Kenya’s constitutional review law." (2007) no. 153, 1 Kenya law review: 153-187

Klopp, Jacqueline M., and Odenda Lumumba, ‘Reform and counter-reform in Kenya's land governance’ (2017) 44, no. 154 Review of African Political Economy 577

Konrad-Adenauer-Stiftung , ‘Kriegler and Waki Reports Summarized Version Revised Edition’ (2009) Primark Ventures

Lewis, Carol W. ‘In pursuit of the public interest’ (2006) 66, no. 5 Public Administration Review, 694

Lindberg I. Staffan ‘Accountability: the core concept and its subtypes’ (2009) Africa Power and Politics Programme Working Paper 1

Lord Justice Beatson, ‘Should Judges Chair Public Inquiries?’ (2005) 121 Law Quarterly Review 221)

Machetti, Elena, “Critical Reflections upon Australia's Royal Commission into Aboriginal Deaths in Custody” (2005) 103 Macquarie LJ 5

Mackenzie Valley Environmental Impact Review Board, ‘Reference Bulletin: Operational Interpretation of Key Terminology’ (2006) Yellowknife

Mak'Ochieng, Murej ‘The African and Kenyan Media as the Political Public Sphere’ (1996) Volume 22 Issue 2 South African Journal for Communication Theory and Research, 23

Malenya, Francis Likoye ‘Students, Violent Protests and the Process of Self-Realization in Kenyan Secondary Schools’ Journal of International Cooperation in Education 18, No. 2 (2016) 67

Marcy R, ‘A Culture of Secrecy: The Government Versus the People's Right to Know’ (1999) No. 2 Rhetoric & Public Affairs 361

Maria Nzomo, "Women in Political Leadership in Kenya: Access, Agenda Setting & Accountability" (2014) Institute of Diplomacy & International Studies, University of Nairobi.

Marx and F.M, ‘Commissions of Inquiry in Germany' (1936) 30(6) The American Political Science Review 1134

Marx and F.M, ‘Commissions of Inquiry in Germany' (1936) 30(6) The American Political Science Review 1134

Milovanovic Dragan, ‘Review Essay: Critical Legal Studies and the Assault on the Bastion’ (1988) no. 1 (31) 15 Social Justice 161

Murunga, Godwin R., Shadrack W. Nasong'o, ‘Bent on self-destruction: The Kibaki regime in Kenya’ (2006) 24, no. 1: Journal of Contemporary African Studies 1

Nagorcka, F., Stanton, M. and Wilson, M., ‘Stranded between Partisanship and the Truth-A Comparative Analysis of Legal Ethics in the Adversarial and Inquisitorial Systems of Justice’ (2005) 29 Melb. UL Rev.448

Oetken, J. Paul. "Form and Substance in Critical Legal Studies" (1991) 100, no. 7 The Yale Law Journal 2209 D.

Ostrom, E., ‘A behavioural approach to the rational choice theory of collective action: Presidential address, American Political Science Association, 1997' (1998) *92*(1) American political science review, 1

Park, A. E. W., ‘Royal Commission on Tribunals of Inquiry’ (1967) 30, no. 4 the Modern Law Review 426

Patricia K. Mbote, Nkatha Kabira, "Separating the Baby from the Bath Water: Women’s Rights And The Politics of Constitution-Making in Kenya." (2008) no. 1, 14 East African Journal of Peace and Human Rights 1

Peter A. and Rosemary T., ‘Political Science and the Three New Institutionalisms' (1996) XLIV Political Studies, 936

Press, Robert M, ‘Peaceful Resistance: Advancing Human Rights and Civil Liberties’ (2006) Aldershot, U. K.: Ashgate 1

Roderick Alexander Macdonald, ‘An Analysis of the Forms and Functions of Independent Commissions of Inquiry (Royal Commission) in Canada’ (2011) McGill Faculty of Law Montreal, Quebec July 1

Ronoh, Geoffrey. "Public Participation Process in the Devolved System of Governance in Kenya” (2017) Vol. V, Issue 11, November International Journal of Economics, Commerce and Management United Kingdom

Rowe, M and McAllister, L. ‘The Role of Commissions of Commissions of Inquiry in the Policy Process’ (2006) 21(4) Public Policy and Administration 99

Salim I. Ali et al., “Legal Research of Doctrinal and Non-Doctrinal “(2017) Volume 4(1) International Journal of Trend in Research and Development

Samuel Kimeu ‘Corruption as a challenge to global ethics: the role of Transparency Ethics’ (2014) 10:2 International, Journal of Global 231

Sarkar, J.S., ‘Commissions of Inquiry: Practice and Principle with up to Date Case Laws and Commentaries’ [1990] APH Publishing

Shenhav, Y. A. and Gabay, N., "Managing Political Conflicts: The Sociology of State Commissions of Inquiry in Israel." Israel Studies, (2001) vol. 6 no. 1, Project MUSE 126

Sihanya, B., “The presidency and public authority in Kenya's new constitutional order” (2011) Society for International Development (SID), Regional Office for East & Southern Africa

Sihanya, Bernard, ‘Constitutional implementation in Kenya, 2010-2015: Challenges and prospects’ [2012] Nairobi: Friedrich-Ebert-Stiftung

Sulitzeanu-Kenan, R, ‘Reflection in the Shadow of Blame: When do Politicians Appoint Commissions of Inquiry?’ (2010) 40(3) British Journal of Political Science 613

Sulitzeanu-Kenan, R, “Reflection in the Shadow of Blame: When do Politicians Appoint Commissions of Inquiry?” (2010) 40(3) British Journal of Political Science, 613

Tamarkin, Mordechai. "Recent developments in Kenyan politics: The fall of Charles Njonjo." (1983) 3, no. 1-2: Journal of Contemporary African Studies 59

Tamarkin, Mordechai. ‘From Kenyatta to Moi: the anatomy of a peaceful transition of power’ (1979) no. 3: 26 Africa Today 21

Unger, R. Mangabeira "The Critical Legal Studies Movement" (1983) 96, no 3 Harvard Law Review: 561

Unger, Roberto Mangabeira. "The Critical Legal Studies Movement" (1983) 96, no. 3 Harvard Law Review 561

Wheeler, Chris. "The public interest we know it's important, but do we know what it means." (2006) No. 48 AIAL Forum Australian Institute of Administrative Law, p. 12.

William H. Moore, “Executive Commissions of Inquiry” (1913) Vol. 13, No. 6 Columbia Law Review, 500

Winterton, George ‘Judges as Royal Commissioners’ (1987) 10 UNSWLJ

Woodhouse, Diana, Matrix Churchill, 'A Case Study in Judicial Inquiries' (1995) 48 no. 1 Parliamentary Affairs 24 108

Yash Pal Ghai 'Devolution: Restructuring the Kenyan state,' (2008) Vol. No. 2, Journal of Eastern African Studies, Routledge Publishers

Theses

Ann P. Munro, 'The Land Tenure Revolution in Kenya, 1951- 1959: Legal and political Implications' (MA University of Nairobi 1959)

Charles O. Omondi, 'Towards Constitutional Legitimacy : A Study of The Principles and Processes of Constitutional Development and Constitution Making in Kenya from Colonial Times to 2010' (PhD thesis University Of Nairobi 2013)

Coray, M. Simon, 'The Kenya Land Commission 1932-34 and the Kikuyu' (PhD Thesis, University of California 1973)

Godfrey Gitahi Kariuki, Lancaster Constitutional Negotiation Process and its Impact on Foreign Relations of Post-Colonial Kenya, 1960-1970' (PhD thesis University of Nairobi 2015)

J. Mativo, 'The Role of Law in Urban Planning in Kenya: Towards Norms of Good Urban Governance' (LL.M, University of Nairobi, 2015)

Kirya, Monica T, 'Performing "good governance: commissions of inquiry and the fight against corruption in Uganda' (PhD thesis, University of Warwick 2011)

Mckeachie, Jessica, 'Recovering the Promise of Public Truth: Juridification and the Loss of Purpose in Public Inquiries' (LL.M York University 2014)

Muthu H.M, 'Kenya's Bill of Rights and its Implications on Kenya's Ability to Apply the International Bill of Rights' (MA thesis, University of Nairobi 2013)

Shilaho W. Kwatemba, 'Ethnicity and Political Pluralism n Kenya'Conflict Resolution in Kenya: Taking Stock of a Political Crisis' (PhD University of the Witwatersrand, Johannesburg, on 18 July 2008)

Simiyu, E.Chiloba, 'An Inquiry into Commissions of Inquiry' (Masters Dissertation, Central European University, 2008)

Online Sources

Ababu Namwamba, 'Westgate inquiry is a waste of time…everything is obvious'<https://www.standardmedia.co.ke/article/2000094979/westgate-inquiry-is-a-waste-of-time-everything-is-obvious> *Standard* (Nairobi 6 October 2013) accessed on 20 February 2018

Admin "The Rise and Fall of sir Charles Njonjo" *Diaspora Messager* (Nairobi Jan 23, 2013) <https://diasporamessenger.com/2013/01/the-rise-and-fall-of-sir-charles-njonjo/> accessed 29 August 2018

Ano. 'Ombudsman asks Uhuru to form a commission of inquiry to address extrajudicial killings' *Hivi Sasa* (Nairobi 2016) <https://hivisasa.com/posts/ombudsman-asks-uhuru-to-form-commission-of-inquiry-to-address-extrajudicial-killings> accessed July 31, 2018

Ano., 'Land of the Kikuyu', *African Magazine* (Nairobi 2008) <http://www.theeastafrican.co.ke/magazine/434746-484122-dbhllp/index.html> accessed on 26 March 2018

Anon., ‘Commission of inquiry that never was' *Daily Nation* (Nairobi 20 September 2014) <https://www.nation.co.ke/news/Commission-of-inquiry-that-never-was/1056-2460374-4rowhx/index.html> accessed July 31, 2018

Anon., ‘Founding principles of a Constitution' (*The Zibambwen*, 2010) <http://www.thezimbabwean.co/2010/07/founding-principles-of-a-constitution/> accessed July 25, 2018

Anon., “The Review and Appeal Process” (*Workers Compensation Board*, Alberta April 3 2010) <https://www.wcb.ab.ca/assets/pdfs/public/policy/manual/printable_pdfs/g2.pdf accessed July 25, 2018

Ash Pal Ghai And Jill Cottrell Ghai, ‘The vision of Chapter Six of the 2010 Constitution' (the Star, November 5, 2016)<https://www.the-star.co.ke/news/2016/11/05/the-vision-of-chapter-six-of-the-2010-constitution_c1448708> accessed April 26, 2018

Bernard Momanyi, “Saitoti family claims foul play in probe” *Capital News* (Nairobi June 26, 2012) <http://www.capitalfm.co.ke/news/2012/06/saitoti-family-claims-foul-play-in-probe/> accessed September 3, 2018

British Online Archives ‘Kenya under Colonial Rule, in Government Reports, 1907-1964’ <https://microform.digital/boa/collections/72/kenya-under-colonial-rule-in-government-reports-1907-1964> accessed 29 August

Citizen TV ‘Commission of inquiry into Westgate Attack’ (2013) <https://www.youtube.com/watch?v=jmgkwwxzmg4&t=82s> accessed on 20 February 2018

Committee of Experts on Constitutional Review Report, 2009 https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf accessed September 3, 2018

Constitution of Kenya Review Commission "Civic Education for the Referendum CKRC Curriculum" <http://katibainstitute.org/Archives/images/CKRC/CK/Special%20Working%20Documents/The%20CE%20Curriculum.pdf> accessed August 29, 2018

Cyrus Ombati 'Anne Waiguru wants President Uhuru to form a commission of inquiry to investigate Josephine Kabura's affidavit' Standard Digital (April 24, 2015) <https://www.standardmedia.co.ke/article/2000199444/anne-waiguru-wants-president-uhuru-to-form-commission-of-inquiry-to-investigate-josephine-kabura-s-affidavit> accessed April 26, 2018

Dave Opiyo, 'President's dilemma in naming commission to probe Westgate attack' *Daily Nation* (Nairobi October 26,2013) < https://www.nation.co.ke/news/politics/-commission-to-probe-westgate-attack/1064-2048548-k3krbf/index.html > accessed September 3, 2018

David Ochami 'Deportation of Arturs was a conspiracy' *Standard Digital* (Nairobi March 2 2009) <https://www.standardmedia.co.ke/article/1144007879/deportation-of-arturs-was-a-conspiracy> accessed September 3, 2018

Eliud Kibii 'Commissions or Omissions of Inquiry? Why Kenya has failed to Address Historical and Other Injustices' Elephant (Nairobi, April 5, 2018) < https://www.theelephant.info/features/2018/04/05/commissions-or-omissions-of-inquiry-why-kenya-has-failed-to-address-historical-and-other-injustices/> accessed April 26, 2018

Eman Omari, Ngei Suspended over Maize Scam, *Nation Media* (Nairobi Sunday July 21 2013) <*https://www.nation.co.ke/lifestyle/dn2/ngei-suspended-over-maize-scam/957860-1922204-f7io0tz/index.html* > accessed on 26 March 2018

Ezekiel M. Mwenzwa, 'Transparency and Accountability in Kenya: A Review of the Institutional Framework for Public Service Delivery' (2015) <https://karuspace.karu.ac.ke/bitstream/handle/20.500.12092/1909/transparency%20and%20accountability%20in%20kenya%20a%20review%20of%20the%20institutional%20framework%20for%20public%20service%20delivery.pdf?sequence=1&isallowed=y> accessed 28 August 2018

Hassan Galana "Views and news on peace, justice and reconciliation in Africa" *Africa News* (Nairobi August 1999) available <http://web.peacelink.it/afrinews/41_issue/p1.html> accessed 28 August 2018

Jacktone Ambuka, 'I Oppose Commission of Inquiry into Westgate Massacre' *Diaspora Messenger* (Nairobi, 2 October 2013) <http://diasporamessenger.com/2013/10/i-oppose-commission-of-inquiry-into-westgate-massacre/> accessed on 20 February 2018

Jonathan P. K., 'The Judicial Hierarchy: A Review Essay' an essay prepared for Oxford Research Encyclopedia of Politics <http://www.princeton.edu/~jkastell/judicialhierarchyoxford/kastellec_oxford_review_essay.pdf > access July 25, 2018

Kipchumba Some, "Artur brother claims Kibaki knew about 'the Standard' raid" *Standard Digital* (Nairobi 27 November 2010) <https://www.standardmedia.co.ke/business/article/2000023383/artur-brother-claims-kibaki-knew-about-the-standard-raid> accessed 28 August 28, 2018

Laban Wanambisi, “Eurocopter in trouble over leaked report” *Capital News* (Nairobi September 7, 2012) https://www.capitalfm.co.ke/news/2012/09/eurocopter-in-trouble-over-leaked-report/ accessed September 3, 2018

Macharia Gaitho, ‘Westgate probe: Could it be Uhuru doesn’t want to embarrass the military?’ *Daily Nation (*Nairobi, 2013) <https://www.nation.co.ke/oped/opinion/Westgate-probe--Uhuru-doesnt-want-to-embarrass-military/440808-2050906-n0phe6/index.html> accessed April 26, 2018

Marlys Edwardh, Jill Copeland ‘A Delicate Balance: Rights of the Criminal Accused in the Context of Public Inquiries’ http://goldblattpartners.com/wp-content/uploads/00397683.pdf accessed on May 2, 2018

Michael C., ‘Form commission of inquiry into sugar saga, Mudavadi tells Uhuru’ *Standard* (Nairobi 2018) <https://www.standardmedia.co.ke/article/2001285344/form-commission-of-inquiry-into-sugar-saga-mudavadi-tells-uhuru> accessed July 31, 2018

New York City Police Department, Analysis of Al-Shabaab’s Attack at the Westgate Mall in Nairobi, Kenya (New York Police Department November 1, 2013) http://allafrica.com/download/resource/main/main/idatcs/00071990:38c422c2c9053c64f0874e4f6d2c55c1.pdf accessed 24 February 2018

NTV ‘KNCHR demands publication of report on 2012/13 Tana River clashes’ <https://ntv.nation.co.ke/news/national/2725528-3445576-hyfrv4z/index.html> accessed July 31

Nzau Musau ‘Report yet to be released one year after Saitoti crash’ Star News (Nairobi, January 11,2013) <https://www.the-star.co.ke/news/2013/06/11/report-yet-to-be-released-one-year-after-saitoti-crash_c786336> September 3, 2018

Owate N. Wambayi , ‘Ministry of Education Science and Technology National Council For Science and Technology, Unit Cost Of Basic Education – Kenya’ <https://oris.nacosti.go.ke/modules/library/publications/research_reports/nacosti-dl-rr-1051.pdf> accessed July 31, 2018

P.L.O Lumumba, ‘The Trial of Integrity, Katiba Institute’ (Katiba 2014) <http://www.katibainstitute.org/the-trial-of-integrity-in-kenya/>accessed July 25, 2018

Pravin Bowry ‘An inquiry into commissions of inquiry’ *Standard Digital* (Nairobi, 13 January 2010) <https://www.standardmedia.co.ke/article/2000000823/an-inquiry-into-commissions-of-inquiry> accessed 24 February 2018

Refworld Kenya, ‘Status of Akiwumi Report’ <http://www.refworld.org/docid/3ae6ad65a4.html> accessed July 31, 2018

Roderick Macleod, ‘Parking a hot potato: Are commissions of inquiry (in) effective?’ *ENCA* (Capetown 16 August 2013) <http://www.enca.com/opinion/parking-hot-potato-are-commissions-inquiry-ineffective> accessed 4 December 2017

The Constitution of Kenya Review Report, 2005 http://www.katibainstitute.org/archives/images/ckrc%20final%20report accessed September 3, 2018

The Standard Saturday Team, 'Saitoti's death was preventable, report concludes' <https://www.standardmedia.co.ke/article/2000081925/saitoti-s-death-was-preventable-report-concludes> accessed September 3, 2018

UK Ministerial Code (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_ministerial_code_january_2018__final___3_.pdf> accessed on May 3, 2018

Wambugu Kanyi 'Nyokabi wants a commission of inquiry to probe terror attacks' *The Star* (Nairobi, April 10, 2015) <https://www.the-star.co.ke/news/2015/04/10/nyokabi-wants-commission-of-inquiry-to-probe-terror-attacks_c1116101> accessed September 3, 2018

Conference Papers

Ben Sihanya, 'Constitutional Commissions in Kenya Experiences, Challenges, and Lessons' (Conference on State Implementation of the Constitution since 2010 Laico Regency, November 20, 2013)

Ben Sihanya, 'The role of the Judiciary in the accountability and governance of the devolved Government structure' (Presentation to the Institute of Certified Public Accountants of Kenya (ICPAK) 20th Economic Symposium at the Hilton Hotel, Nairobi, 2012)

Sven T. Siefken *et. al* 'The Governance of Policy Advice: Regulation of Advisory Commissions and Councils in Germany and The Netherlands' (1st International Conference on Public Policy 'Comparing Policy Advisory Systems' France June 26 – 28, 2013)

Government of Kenya

Government Printer, Commission of Inquiry into the Accident involving Aircraft Registration 5Y-CDT Type AS 350 B3e Report 2012

Government Printer, Judicial Commission of Inquiry into the Ethnic Violence in Tana River, Tana North and Tana Delta Districts, 2013

Government Printer, Commission of Inquiry into the Petition to Suspend Makueni County**,** Gazette Notice Number 1557 of 2015

Government Printer, Judicial Commission of Inquiry into the Goldenberg Affair, (2005)

Government Printer, Annual Report of the Colonies, East Africa Protectorate, Kenya, 1912-13

Government Printer, Kenya Land Commission 1933 Report

Government Printer, Annual Report of the Colonies, Kenya, 1920-21

Government Printer, Annual Report of the Colonies, Kenya, 1923

Government Printer, Report of the Local Government Commission 1927 Volume II

Government Printer, Report of the Kenya Maize Commission, 1966

Government Printer, Gazette Notice No. 100? of. 22nd March 1966

Government Printer, Report of the Local Government Commission

Government Printer, Gazette Notice No. 2749 of 1983

Government Printer, Kenya National Assembly Official Record (Hansard) 5 Dec 1996

Government Printer, Gazette Notice 2694 Published May 10 1994

Government Printer, Commission of Inquiry to Examine the Building Laws, By-Laws and Regulations Existing

Government Printer, Report of the Commission of Inquiry into the Land Law System of Kenya

Government Printer, Gazette Notice 1237 and 1238 of 2003,

Government Printer, Commission of Inquiry into the Illegal/Irregular Allocation of Public Land

Government Printer, Gazette Notice 6217 of 2008

Government Printer, Kenya National Assembly Official Record (Hansard) 29 Jul 2009

Government Printer, Kenya National Assembly Official Record (Hansard) Tuesday, 8th June, 2010

Government of the United Kingdom

Government of United Kingdom, Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative scrutiny Report of Session 2013–14, The Stationery Office Limited

Government of the United Kingdom Salmon Commission: Royal Commission on Tribunals of Inquiry 1966 Report

Government of the United Kingdom Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, 2014

Government of the United Kingdom Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005, 2014

Parliamentary Reports

Parliament of Kenya Deb, 25 Nov 2010, Vol P, Col 8

Parliament of Kenya Deb 29 Jul 2009, Column 4561

Parliament of Kenya Deb, Tuesday19, 8 June, 2010

Parliament of Kenya Deb, 12 February 1970, Vol XIX Col.203

Parliament of Kenya Deb, Parliament of Kenya, 22 September 1972, Vol XXVII Col 406

Parliament of Kenya Deb, 25 April, 2001, Col 580

Parliament of Kenya 29 July 2009, Col. 21

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