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DEDICATION.

To my beloved Mother, Helidah and Siz, Connie. Your true love, care and guidance have made me what I am.

Also to my dear sisters. You are my inspiration. You have always been there for me.

ACKNOWLEDGEMENTS.

I express special thanks and gratitude to all those who made it possible for this work to materialize. Special mention goes to my Supervisor, Prof. J. B. Ojwang' for his assistance and scholarly guidance without which this work would not have attained this standard. However, all opinions expressed in this work are entirely my own. I also take full responsibility for all mistakes and errors present in it.

I also owe a lot to my friends and colleagues with whom we together trodded the academic path. I cannot omit to mention Ben, Ken, Victor, Dick, Carlos and C'aro Mrima. Their academic, moral and social support provided an enabling environment for putting up an intellectual foundation. The same applies to Mercy, she played a crucial part.

I would have a fogged conscience if I failed to mention Helen. Through her endurance and unparalleled effort, she reduced my otherwise ineligible hand-written draft - materials, into readable scripts. To you Helen, I am most grateful.

Finally, I extend my heartfelt gratitude to my siz, Connie and her husband who together equipped me with the prerequisite resources that saw this work to its completion.

May God Bless You All.

ABBREVIATIONS.

LAW REPORTS.

1.	A. C.	Appeal Cases.
2.	All. E. R.	All England Reports.
3.	Ch.	Chancery.
4.	Ch. D.	Chancery Division.
5.	K. B.	King's Bench.
6.	Q. B.	Queen's Bench.

PERIODICALS.

1.	A. L. J.	Australia Law Journal.
2.	C. L. R.	Columbia Law Review.
3.	E. A . L. J.	East African Law Journal.
4.	P. L.	Public Law.

TABLE OF CASES.

TABLE OF STATUTES.

1. The Constitution of Kenya.
2. The Commissions of Inquiry Act (Cap. 102).
3. The Evidence Act (Cap. 80).
4. The Penal Code (Cap. 63).

INTRODUCTION

In Kenya, Commissions of Inquiry are established under the Commissions of Inquiry Act (Cap. 102). This Act empowers the President to issue a commission for the purpose of inquiring into the conduct of any public officer or the conduct or management of any public body or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.[1] Upon completion of such inquiry, the commissioners are required to submit written reports to the President[2] and, where appropriate, make recommendations in the reports for any necessary action.

Commissions of inquiry have been set up to inquire into matters of administration, law making and allegations of misconduct.[3] There has also been issued a commission to investigate the circumstances surrounding the disappearance and subsequent death of a public servant and lately, a commission was mandated to inquire into a fatal air - crash.

Regarding administrative matters, we have examples of commissions such as the Coconut Commission (1914), the Education Commission (1919), the Teachers Salaries Commission (1961), the Economic Commission (1962), the Kenya Education Commission (1963) and the Agricultural Commission (1967).

On law making, there have been set up the following commissions:

(i) The Commission of Inquiry into the Law of Marriage and Divorce (1967);

(ii) the Commission on the Law of Succession (1967); and

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[1] S. 3(i) of the Commissions of Inquiry Act (Cap.102).

[2] Cap. 102, Ibid, S. 7(i).

[3] Ojwang, J.B, constitutional Development in Kenya: Institutional Adaption and social change (1990) P.186.

(iii) the Commission to inquire into the Law of Adoption (1974).

The Maize Commission of Inquiry (1963) and the Miller Commission [4] (1983) were founded on allegations of misconduct. The Ouko Commission (1990) [5] was set up to inquire into the circumstances surrounding the disappearance and subsequent death of Dr. Robert Ouko, former Minister for Foreign Affairs and International Cooperation. And the Marsabit Helicopter Crash Commission (1996) was issued for the purpose of investigating the plane - crash that killed all the people aboard including some civil servants in Marsabit district.

Where a Commission has submitted its report to the President, implementation of the report is greatly determined by the nature of the subject of inquiry. For instance, commission reports relating to matters of administration have attained a character as important aid to the task of governance. Because of this character, they are usually readily implemented.

On the other hand, Commission reports relating to the law making process have to obtain parliamentary approval before they can be implemented. However the importance of such reports cannot be overlooked. They facilitate the legislative function of law-making. Also because the inquiry is always in-depth and involves extensive research, the reports usually result in standardised and relevant legislation.

Reports of Commissions affecting individual conduct and happening of particular events are however rather problematic. Such inquiry usually affect prominent personalities in the public service.[6] And in most cases, at the background to the institution of the inquiry process there

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[4] A Judicial Commission appointed to inquire into allegations involving charles Mugane Njonjo.

[5] A Judicial Commission appointed to inquire into the circumstances surrounding and leading to the disappearance and subsequent death of Dr. Robert Ouko, former Minister for Foreign Affairs and International Cooperation.

[6] The Maize Commission involved a minister, the same applies to the Miller Commission. the Ouko commission was concerned with a minister's death.

would be some source of pressure such as popular demands or some administrative necessity.[7]

Past experience shows that the decision on whether and how to act on the report of such Commissions depends on the President. For example, the Maize Commission's report painted an unflattering picture of the administration (of the maize industry) under pressure and the activities of the responsible Minister. The Commission recommended that politicians should not be appointed to any board dealing with maize marketing and that the rule requiring ministers to disclose their business interests and put public duty before private interests should be applied more stringently.

Regarding the position taken by the government on this matter, Ghai and Mc Auslan observe thus:

> "In so far as the government accepted these recommendation, it did so in the narrowest possible manner. The Minister was not required to resign. He was relieved of his duties, but not of his office, for a short while before being transferred to the Ministry of Housing. Politicians were appointed to the new Maize and Produce Board and have continued to be appointed to other boards in all areas of administration, including in some cases to the chairmanship thereof."[8]

This is noted was against the Commission's recommendation as stated above. It should here be born in mind that it is the President who appoints Ministers and Members of parastatal and statutory boards.

Also, the Miller Commission [9] found most allegations against Charles Mugane Njonjo, some

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[7] Supra, note 3, P. 186.

[8] Ghai and Mc Auslan, Public law and political change in Kenya. (1970) p. 308.

[9] Supra, note 4.

of which amounted to serious offences, established. Despite this, President Moi pardoned Mr. Njonjo and no further action was made on the report. The most probable action here would have been criminal prosecution.

It has been said that whenever the subject matter dealt with is of urgent public importance, inquiry by a commission is the best possible way of overcoming the nation-wide crisis of confidence.[10] This fact flows from the nature and characteristics of commissions of inquiry.

First, commissioners to such commissions are usually persons of high standing and repute. Second , the procedure and rules of such commissions are usually simple and flexible. The commissions are not bound by strict rules of procedure. Third, their proceedings are normally held in public and in most cases their reports are published and made available to the public.

1.1) THE PROBLEM.

Commissions of inquiry are investigative. They are usually characterised by a lot of publicity. This publicity is regarded as an important quality of commissions.

While issuing a statement revoking the Ouko Commission , the President said thus:

> "... I am glad that its proceedings have been made public and therefore, the public are aware of how far the investigations had reached and the results of these investigations."[11]

The publicity of the proceedings of a commission is one of the means by which confidence is restored where such commission has been prompted by a nation - wide crisis of confidence. The inquiry procedure signifies the desire of the government not to hide

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[10] Segal z, "Tribunals of inquiry: A British invention ignored in Britain, Public law (1984) p 206 at P. 206.

[11] The statement was published in the Weekly Review, November 29, 1991. p. 4

anything from the public.

However, it has been established that commissions of inquiry "necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private and to the risk of having baseless allegations made against him. This may cause distress and an injured reputation."[12]

This is best illustrated by two examples. Firstly, in the Miller Commission, [13] Mr. Njonjo's private life was uncovered by the Commission. His association with some South African citizens was inquired into and generally everything that he did in his private life that the commissioners thought was germane to the Commission's terms of reference was adduced in evidence.

Secondly, in the Ouko Commission,[14] Mr. Biwott and Mr. Oyugi were held out as having had a hand in the late Minister's death. Upon termination of the proceedings of the Commission by the President, they were arrested only to be released due to lack of sufficient evidence.[15] The allegations against them made in the Commission were in the circumstances, therefore, baseless.

But because the allegations are usually serious [16], they obviously result in injured reputation. The effect is aggravated by the publicity that normally accompany the proceedings of such commissions.

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[12] See The report of the Royal Commission on Tribunals of inquiry. cmnd. 3121, (1966) para. 271.(Britain)

[13] Op. cit. note 4.

[14] op. cit note 5.

[15] See the Weekly Review, December 13 1991, pp 49-50.

[16] For example, some of the allegations against Mr. Njonjo in the Miller Commission could found a charge of treason.

This is illustrated by Njonjo's action after the report of the Miller Commission. He left active politics and up to now he is yet to rescind this decision.

From the foregoing, it is seen that the inquiry procedure ordinarily endangers the rights and interests of parties to the inquiry.

Further, the Commissions of Inquiry Act confers vast powers on the commissioners. They have the power to summon witnesses and examine them on oath. They can call for production of books, documents and other materials.[17] Yet a commission is not a court of law which though having similar powers, has adequate safeguards for the witnesses and parties.

The Act also gives protection to the commissioners. For instance, a commissioner is not liable for anything done in good faith while performing his functions.[18] He or she cannot be arrested or sued during the subsistence of a commission to which he is a commissioner.[19]

The consequence is that a party who is aggrieved by the acts or omissions of a commissioner or a commission cannot seek redress in a court of law.

It is submitted that the ability of a commission to acquire information with the aid of coercive powers added to the protection conferred upon persons in whom the powers are vested constitutes a serious threat to the rights and interests of parties. This threat is further aggravated by the fact that inquiries by commissions are generally expected to result in findings of "truth". The result is that their findings have a wide acceptance in the society.

It is upon this background that it is seen the need for further safeguards to be incorporated in the Commissions of Inquiry Act for the protection of witnesses and parties to a Commission

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[17] Cap 102, op. cit, S.10.

[18] Ibid S. 14

[19] Ibid. s. 15

of inquiry.

The question then is how best can a commission of inquiry fulfil its task of establishing the truth as speedily as possible without imperilling the basic rights of witnesses and parties?[20]

The object of this study is to present a case for inclusion of further safeguards for witnesses and parties in the Commissions of Inquiry Act.

In particular, the study will examine and critically analyze the provisions of the Commissions of Inquiry Act (Cap.102) in as far as it provides for protection of persons under inquiry, witnesses and other interested parties.

The aim of this examination will be to show the inadequacy of such statutory safeguards, thus the need for reform.

Because of the area of concern in this study, there will appear bias towards commissions of inquiry affecting allegations of misconduct, criminal conduct, acts or omissions. This does not however rule out reference to other types of commissions where the context permits.

We will therefore draw most of our examples form the proceedings of the following three commissions:

(i) The Maize Commission of Inquiry (1963);

(ii) The Miller Commission of Inquiry (1983);[21] and

(iii) The Ouko commission of inquiry (1990),[22]

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[20] op. cit, note 10.p.212.

[21] Supra , note 4.

[22] Supra, note 5.

The study will be accomplished in four chapters which will have a general format on the following lines.

Chapter 1 will contain a discussion on the nature of commissions of inquiry. In this chapter, there will be a definition of a commission of inquiry followed by a look at the types of commissions. This chapter will be concluded by a discussion of the historical origin of commissions.

In chapter 2, we will discuss the Legal and procedural aspects of commissions of inquiry. This discussion will be broken down into the following sub-headings:

(i) Legality of Commissions of inquiry;
(ii) the Power to appoint a Commission of inquiry;
(iii) the Powers of a Commission of inquiry;
(iv) Procedure and Rules of evidence of Commissions of inquiry;
(v) the requirement for public hearing; and
(vi) applicability of rules of natural justice to Commissions of inquiry.

In Chapter 3, we will examine the rights and interests of parties. Under this chapter, we will look at the statutory safeguards under the Commissions of Inquiry Act. This will also include an analysis of the shortcomings of such statutory safeguards.

Finally, we will draw a conclusion to this study and make recommendations for reform.

CHAPTER ONE

NATURE OF COMMISSIONS OF INQUIRY

2.1) Definition

Commissions of inquiry are special bodies which are set-up by the President to conduct inquiries into matters of public importance.[1] Their mandate is to conduct investigations and submit a report to the President.[2] The commission is regarded as an aspect of the administrative machinery of the government.

The Commissions of Inquiry Act (cap. 102) does not define a commission of inquiry. However, a description of a commission of inquiry can be infered from the provision of S. 3 of this Act. Under this section, a commission of inquiry is one issued by the President to inquire into the conduct of any public officer, or the conduct or management of any public body, or into any matter into which an inquiry is in the public interest.

The inquiry procedure offers a means by which the executive through the President can investigate a matter or a situation before taking a course of action. The essential duty of the commission is to report to the President. If an action needs to be taken, it is the President to do so and not the commission.

Commissions of inquiry are usually set up where a grave crisis of confidence has arisen and it is necessary to re- establish lost confidence[3] in the public. For instance, a commission may be set up to investigate and establish the facts with regard to alleged maladministration or other failings. However, the use of commissions is conceived as a procedure of last resort to be employed only when nothing else will serve to allay public disquiet. Such disquiet are usually based on sensational allegations, rumours and disasters.[4] These may be allegations of abuse of office, corruption and misconduct, rumours of involvements in criminal acts such as murder and occurrence of fatal accidents.

Commissions of inquiry are therefore seen to be appropriate in "rumoured instances of lapses

in accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal process but which require investigation to allay public anxiety".[5]

A look at the circumstances leading to the setting up of three past commissions of inquiry is supportive of the above statement.

First, the Maize Commission of Inquiry was appointed in 1965 to investigate the organization of the industry and allegations that there had been corruption and profiteering by individuals in its operation.[6] There had been widespread maize shortages in 1964-5. There were allegations of inefficiecy, corruption and unfair dealing by the Ministry of Cooperatives and Marketing and the Maize Marketing Board.[7]

Second , in July 1983, the President appointed a Commission[8] to inquire into allegations involving Mr. Charles Mugane Njonjo, Attorney General from 1963 to 1980, Member of Parliament and Minister of Constitutional Affairs from 1980 to 1983. The allegations were made in the aftermath of political commotions that had just come to ahead with an abortive coup attempt on 1st August 1982.[9] Njonjo was alleged to have been behind the coup attempt, among other allegations.[10]

Third, in October 1990, a Commission of inquiry was appointed to inquire into the circumstances leading to the disappearance and subsequent death of Dr. Robert Ouko, former Minister of Foreign Affairs and International Corporation. A Weekly Magazine described the situation following the Minister's mysterious death thus:

"There was widespread shock and outrage at Ouko's... death, not only in Kenya, but also elsewhere, since he was regarded as one of Africa's top diplomat. A government statement that seemed to suggest that Ouko had committed suicide provoked angry protest, especially from University students who demonstrated in the streets of Nairobi demanding the truth about the Minister's death".[11]

It was upon this background that the Ouko Commission of Inquiry was established. In

announcing the appointment of the Commission, the President stated:

> "It is the resolve of my government that all available legal avenues be invoked to help us determine this issue, which is of great concern and importance to all peace loving Kenyans, I have therefore given consideration to all available alternatives and come to the conclusion that the most effectual manner of proceedings further... is to appoint a judicial commission of inquiry."[12]

In other words, given the magnitude and nature of the issue at hand, a commission of inquiry was best suited to deal with it, amidst available alternatives.

One writer has correctly observed that one of the principal objectives of any government is or, indeed, should be good administration.

"... good administration depends not only on the provision of adequate safeguards against abuse of power by the executive but also on the existence of efficient government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society"[13].

The commission of inquiry is one of the means through which governments ensure and guarantee good administration. Indeed, it is one of the traditional devices for the control of the executive power. In Kenya, commissions of inquiry are a common feature of the administrative process.

Writing about commissions of inquiry, Professor Ojwang' observes thus:

> "Parallel to the bureaucratic machinery of government, a new crop of public bodies has emerged, the commissions. The great variety of commissions as regards their design, duration and purpose shows that commissions in this usage in public law is not a juristic category. It is merely an appellation of convenience which refers to an uncategorised lot of public bodies."[14]

Hence, commissions are basically machineries of administration.

The commissions control the executive power by keeping the administration within the law and disclosing cases of maladministration. In doing this, they discourage future misdeeds and help in recommending desirable changes.

2.2 Types of Commissions of Inquiry.

Commissions of inquiry set-up under the Commissions of Inquiry Act (cap 102) are ad-hoc. A means for a specific purpose. Thus such a commission has only a temporary existence which lasts while the assigned mission remains uncompleted.

Under the Commissions of Inquiry Act, there can be set up different types of inquiry depending on their subject matter.

There can be an inquiry into an alleged administrative scandal. For example, the Maize Commission of Inquiry (1965) was set-up following allegations of inefficiency, corruption and unfair dealing by the Ministry of Cooperatives and Marketing and Maize Marketing Board.[15]

A commission can also be established under the Act (cap. 102) to inquire into allegations of misconduct. This is illustrated by the setting up of the Miller Commission (1983) to inquire into the conduct of Mr. Charles M. Njonjo.

Further, there can be established an inquiry into the possibility or necessity for some new policy or reform to be introduced. Two such inquires were appointed in 1967 to investigate and propose reforms which would institute unified laws of Succession and Marriage and Divorce in Kenya.

In general, there can be an inquiry "into any matter into which an inquiry would, in the opinion of the President, be in the public interest ."[16] In other words, the issuance of a commission of inquiry under the Act in respect of a given matter is the prerogative of the

President. Commissions of inquiry under the Act are therefore not restricted to special matters. Each case is considered on its own merits, the peculiar circumstances and facts being taken into account.

It was in the exercise of the prerogative that the President appointed the Ouko Commission (1990).[17] He felt this was in the public interest. He saw the commission as "the most effectual manner of proceedings further. .."[18] on the road to the truth regarding the mysterious death of Dr. Robert Ouko, a former Cabinet Minister. Likewise, the setting up of the Marsabit Helicopter Crash Commission (1996) was in the public interest. It was in the public interest that the occurrence of such disasters is minimised. The Inquiry was seen as a means to this end. The commission would conduct thorough investigations into the crash and recommend preventive measures.

2.3 HISTORICAL ORIGIN OF COMMISSIONS OF INQUIRY

The concept of an independent commission of inquiry designed to probe matters of urgent public importance is a British contribution to the legal world.[19] The origin of commissions of inquiry is therefore to be traced by looking at the development of the Royal Commissions of Inquiry of Britain.

It is indisputable that success in action requires accurate and adequate knowledge of the subject to be dealt with.[20] The institution of commissions of inquiry is a means of gathering such knowledge.

The development of the commission of inquiry in Britain started in the form of Norman inquests.[21]

Because the king desired to be informed, he caused his Justices to make inquiry by sworn men, the jurors. The jurors would make presentation to the Justices of crimes and of other facts which the king desired to know or which the country desired to bring before him.[22]

The Justiceswere later to be renamed as Justices of Peace and were given statutory authority

to inquire. In case of offences, they were given powers to apprehend offenders and to hold them or bail them for trial at the Quarter Sessions or before the King's "commissions of goals delivery and oyer and terminer."[23]

Later, during the Conciliar government of the Tudors and Stuarts, there was a vast increase of the administrative and judicial duties of the Justices. In addition, the Star Chamber exercised powers of inquiry which in practice knew no limits save the discretion of the authority itself.[24] This is illustrated by the fact that however grievous may have been the intervention of the Star Chamber in matters cognizable in the common law courts or in private and domestic matters, belonging preferably to the forum domesticum, no one probably doubted its power to inquire into matters affecting the government and the state[25].

The issuance of commissions of inquiry in relation to miscellaneous matters which came before it was part of the regular procedure of the Star-Chamber.

Some examples of commissions so issued will suffice. These include the Commissions of Inclosures of 1517, the Commissions for the investigations of the Monasteries and the Court of High Commission for ecclesiastical causes[26].

It has been observed that perhaps " a scholarly treatise on the history of public inquiries would... start with the Domesday Surveys (Inclosures Commission of 1517).[27] The object of the Domesday Survey was to compile such a description of the holdings of the various classes of persons having rights in the land as would afford an adequate basis for the assessment of tax.

In the 19th century, royal commissions gained prominence[28]. This arose from practical experience. When it became impossible to provide for all details of government by an Act of parliament, inquiries were adopted as a kind of substitute, in the administrative sphere, for the parliamentary process which accompanied legislation. In the course of this process, parliamentary committees gave full hearings to persons affected who were often represented by counsel who called and examined witnesses before the committee. And when a more expeditions procedure had to be found, an administrative inquiry emerged the natural way

to give effect to the right to be heard.[29]

For instance, in the 19th century, we find the notable case of the Princess of Wales (afterwards Queen Caroline), Consort of George IV, as to whom in 1806, the crown issued a Commission. The Commission was to inquire into the allegations of misconduct made against her. The commission took evidence and the witnesses were examined by Sir. Samuel Comilly, the Attorney - General.[30]

However, it is as attendant on the comprehensive legislative scheme of the British Parliament that inquiries began to assume an importance which has eventually established them as an essential part of the machinery of modern government.

For example, in 1832, a royal commission was appointed to inquire into the operation of the poor laws and on its recommendations in its report was founded the great Poor Law Amendment Act of 1834. The Municipal Corporations Act of 1835 was also preceded by the investigations and report of a royal commission. Between 1832 and 1844, no fewer than 150 Royal Commissions of inquiry were at work.[31]

In 1888, a Special Commission Act was enacted. This Act was intended to govern the issuance of royal commissions. Under this Act, a special commission was constituted to inquire into allegations made against certain members of parliament and other persons.[32] The Special Commission Act was repealed in 1921 by the Tribunals of Inquiry (Evidence) Act. The Act was intended to create an effective machinery to inquire into matters of urgent public concern.[33]

The British Royal Commission has been described as the "ranking investigatory and advisory body of that country. It is the guide to what is and what should be, it is the implementation of the sovereign intent that right be done".[34]

THE HISTORY OF COMMISSIONS OF INQUIRY IN KENYA

Since, as noted above, the commission of inquiry is a British legal contribution to the legal

world, a treatise of the colonization process in Kenya will enable a clear understanding of the historical development of the Commission of Inquiry.

That Kenya is a former colony of Britain is trite fact. The declaration of a protectorate over what is now Kenya on 15th June 1895 marked the beginning of official British rule in this country.[35] This rule was to endure until 12th December 1963 when the country attained independence.

The colonial power used laws as a major tool to establish its presence and create the colonial society. In this regard, British laws which were well established were found readily applicable in Kenya. English laws formed the basis of the colonial legal system. The result was that the legal forms employed and the structures of government and administration which were established conformed to the pattern in Britain.

For the purposes of daily conduct of policy and administration, the colonial power established the Legislative Council for making the law and the Executive Council for implementing the law. But until after Kenya was accorded a colony status, the legislature was the same as the executive, in the person of the Commissioner or the Governor.[36] The white settlers also demanded the application of the English legal system in the colony as of right.[37]

It is no wonder then that the concept of commission of inquiry that was by 19th century deeply rooted in Britain actually found its way into the colonial and by extension, the independent Kenya's administrative system.

In Kenya, the first legislation governing commissions of inquiry was the Commissions of Inquiry Ordinance, No. 28 of 1912. The Ordinance was enacted by the Governor of the Protectorate with the advice and consent of the Legislative Council. It was an Ordinance to enable the Governor to issue commissions of inquiry with special powers.[38] The Governor was the chief officer of the protectorate. The designation was created by the 1905 Order-in-Council. Hitherto, the chief officer was referred to as the Commissioner. Article 2 of the Ordinance provides thus:

"It shall be lawful for the Governor whenever he shall deem it advisable, to issue a commission appointing one or more commissioners and authorising such commissioner, or any quorum of them, therein mentioned, to inquire into the conduct of any officer in the Public Service of the Protectorate, the conduct or management of any department of the public service or of any public or local institution, or into any matter in which an inquiry would, in the opinion of the Governor, be for public welfare..."

One of the attributes of a colony is the ability of the imperial parliament and the crown to legislate directly for the colony. The crown also has power of veto and disallowance and the local executive has to perform its functions in accordance with Royal instructions.[39]

The consequence is that where the imperial parliament and, or the crown felt that a given institution was important for the proper administration of a colony, they could enact a legislation to that effect. Thereafter, they could censure implementation of the statute's provisions in that colony by issuing Royal instructions to the local administrators.

Thus in Kenya after the enactment of the Commissions of Inquiry Ordinance, the Governor could be instructed to issue a commission by the crown to address a particular matter.

The practice of commission of inquiry during the colonial era was well established. The colonial administration utilised Commissions as fact - finding devices. They were used to obtain information before action was taken in respect of a particular matter.

The following examples signify this practice. The Kenya Land Commission (1929) was appointed to consider African grievances arising from past alienation of land to non-Africans and how to remedy them; what the present and the future African land needs were and how they could be met; and to consider the issue of the highlands. The report of this Commission was published in 1934.

Another commission was appointed in 1955 to enquire into methods for the selection of African representatives to the Legislative council.[40] The same year saw the appointment

of the East African Royal Commission to look into ways of land utilization and development in East African.[41]

Further, a commission was appointed in 1960 to conduct an inquiry and "report to the Sultan of Zanzibar and Her Majesty's Government jointly on the changes which are considered to be advisable in the 1895 Agreement relating to the Coastal Strip of Kenya, as a result of the Constitutional development in East Africa" [42] following agitation for some form of autonomy from the strip.

A commission was also appointed in 1962 to ascertain public opinion in the Northern Frontier District (NFD) regarding its future. The commission issued its report in December 1962. This commission was purely for fact - finding and was not required to make any recommendation for the government of the region.

The colonial era, as evident from the preceding paragraphs, was characterised by extensive use of the commission of inquiry as an administrative machinery. This practice laid a firm foundation for the development of the institution in the independent Kenya.

The Independence Order - in - Council provided for transitional matters, including continuance in force of all existing laws. Through this Order-in-Council, the Commissions of Inquiry Ordinance, no. 28 of 1912 became applicable in the post-independence Kenya as amended during the pre-independence period.

The Commissions of Inquiry Ordinance of 1912 became known as the Commissions of Inquiry Act through Legal Notice no. 2 of 1964 which declared all legislation, whatever its origin, an Act in Kenya.

The Constitutional Amendment Act of 1964 made Kenya a Sovereign Republic on 12th December 1964. Kenya, hence, ceased to be part of Her Majesty's Dominion. The office of the President, who was to be the head of both the State and the Government was established. The office of the Governor-General was accordingly abolished. Henceforth, the person vested with the power to issue a commission under the Commissions of Inquiry Act

is the Presidents, being the head of the Government.[43]

The current Commissions of Inquiry Act (Cap. 102) is a product of various amendments that have been effected to the original Ordinance since its enactment in 1912. It however remains the basis of the Commissions of Inquiry Act.

1. The commission of Inquiry Act (cap.102), the preamble.

2. Ibid

3. Rukwaro, G.K. "The case for An Ombudsman in Kenya " E.A.L.J. VOL. 9 (1973) P. 50.

4. Wade, Administrative Law (1988) p. 1001.

5. Halsbury's Laws of England, 4th Ed. vol. 8 para. 824, note 1.

6. See Ghai and Mc Auslan, Public Law and Political change in Kenya (1970) p. 306-7.

7. See Ibid, p. 273.

8. A judicial commission appointed to inquire into allegation involving charles Mugane Njonjo (chairman, Justice Miller).

9. See Ojwang, J.B. " Legislative Control of Executive power in Africa. New Insights" Verfassung and Recht in Ubersee (1986) p. 426.

10. See Supra, note 8, the report, Nairobi (1984).

11. The Weekly Review, December 21, 1990, P. 9.

12. See the weekly Review, October 5, 1990, P. 16. Emphasis mine.

13. Oluyede, p. "Redress of Grievances in Tanzania". Public Law (1975) p. 8.

14. Ojwang, J.B. constitutional Development in Kenya: institutional adaption and social changes (1990) p. 179.

15. See Ghai, op. cit,note 7.

16. The Act. op. cit. note. 1, s. 3 (1).

17. Judicial Commission of Inquiry to inquire into the circumstances surrounding and leading to the disappearance and subsequent death of Dr. Robert Ouko, former Minister for Foreign Affairs and International Cooperation. (Chairman - Gicheru, J.)

18. Supra, note. 12.

19. See Segal z, "Tribunals of inquiry: A British Invention Ignored in Britain" Public Law (1984) p.206.

20. Moore, H. W, "Executive Commissions of Inquiry", (CLR (1913) VOL.13, PART 2, P. 501.

21. Ibid

22. Ibid

23. Ibid

24. Ibid

25. Ibid

26. Ibid, p. 502.

27. Wraith and Lamb, Public Inquiries as an Instrument of Government quoted in Wade, op. cit. note 4, p. 958.

28. Wade, op, cit, note 4, p. 958.

29. Ibid.

30. See Moore, op. cit, note 20 p. 503.

31. Redlish and Hurst, English Local Governments, quoted in Wade, op cit. note 4, p. noted in Moore, op. cit. p. 503

32. Wade, op. cit. note 4.

33. Ibid

34. Hanser, C.J. (1965) Guide to Decision: The Royal commissions. preface ix.

35. Ghai, op. cit. note 6. p. 3.

36. Ibid, p. 35.

37. Ibid, P. 125.

38. The preamble of the Ordinance.

39. Supra, note. 35, p

40. See Report of the Commission (Nairobi - 1955).

41. The Report, (Cmnd 9475 (1955).

42. See the Commission's Report (cmnd 1585)

43. S. 3(1) of the Act (cap. 102).

CHAPTER TWO

THE LEGAL AND PROCEDURAL ASPECTS OF COMMISSIONS F INQUIRY

In chapter 1 above, we discussed the nature of commissions of inquiry generally. We also looked at their historical background.

The concern of this chapter is the legal an procedural aspects of commission of inquiry. In this discussion, we will be guided by both common law principles and statutory provisions.

This discussion will be divided into the following sub-titles:

(i) Legality of Commissions of Inquiry;

(ii) the Power to Appoint a Commission of Inquiry;

(iii) the Powers of a Commission of Inquiry;

(iv) Procedure and Rules of evidence of Commissions of Inquiry;

(v) the Requirement for Public Hearing; and

(vi) Applicability of Rules of Natural Justice to Commissions of Inquiry.

3·I) Legality of Commissions of Iquiry

In the first chapter, we noted that the practice of commissions of inquiry is well established in Kenya. But what is the constitutional and legal position of the commission of inquiry? We discus this issue below.

In this regard, the following questions will be looked into:

(i) What is the cnstitutional propriety of a commission of inquiry;

(ii) can a commission of inquiry be appointed to inquire into criminal conduct?; and

(iii) under what circumstances can a commission of inquiry be in contempt of a court of law.

The constitutional propriety and legality of the institution of commissions of inquiry has been questioned especially in Britain. On the contrary, the issue has not been raised in the Kenyan courts. The result is lack of case law in the matter. Because of this, our discussion will be aided by decided cases in other parts of the commonwealth and, where appropriate, other jurisdictions.

The issue of constitutionality and legality of commissions of inquiry was fiercely assailed in Britain in the middle of 19th century. During this time, the novel commissions were becoming frequent.[1]

For example, in 1850, four lawyers advised the University of Oxford that the Oxford University Commissions were illegal. Their reasoning was that the law provided a means of determining any abuses committed by them through the judiciary.[2]

In their considered opinion, the functions of the Oxford University Commissions, as enumerated in their terms of reference, amounted to an interference with the functions of the courts of law. That such practice could not be permitted in a society that cherishes the concepts of constitutionalism and separation of powers.

According to Scarlet,

> "the known and lawful manner of inquiry into the misconduct of a corporation or improper exercise of its franchise is by information in the court of the Kings Bench, which can only be granted upon some specific charge or redress some specific grievance".[3]

So that in his view, only the courts have the constitutional competence to undertake inquiries

into misconduct, the operations of a corporation or allegations of improper exercise of its franchise.

In this light, the Oxford University Commissions are therefore denounced as bringing into question out of the regular course of law the rights, property, franchise and conduct of the University and its members.

From the foregoing, it follows that an attempt to commit to commissions the power to compel attendance of witnesses or disclosure of facts is void. This is not merely on the ground that commissions are usurping the jurisdiction of legal tribunals but on a broader ground. This is the ground that "the crown cannot by its own authority compel persons to give information except in the regular course of administering justice, the course of which the crown cannot deter".[4]

The import of the above statement is that commissions of inquiry do not administer justice. For this reason, they have no legal authority to compel persons to give information to them.

The issue of legality of commissions also arose in CLOUGH V. LEAHY.[5] In this case, the government of New South Wales had issued a Royal commission to inquire into the formation, constitution and working of a particular union, to consider whether it was an evasion of two acts of parliament of New SouthWales, whether it hampered the Industrial Arbitration Court in doing justice in disputes arising in the pastoral industry and whether any alteration of the law was necessary in this connection. A witness was prosecuted for refusing to give evidence and a prohibition was sought from the Supreme Court in which the prosecution was taken.

The Court unanimously determined that the Commission was one to inquire into and report on a matter entirely within the jurisdiction of the Arbitration Court and thus an interference with the jurisdiction of the tribunal.

In the opinion of the court,

> 'the true object of any Royal commission is to cause an inquiry into questions of

public interest and for the public good, but no Royal commission should be advised by a Minister or can be legal which has for its object an inquiry into private matters or the subject of litigation between private parties and in which the public have no interest." [6]

The Royal commission was therefore both illegal and unconstitutional as an unjustified attempt to invade private interest and an usurpation of the jurisdiction of a court (the Industrial Arbitration Court) lawfully constituted to deal with the same matter.[7]

In the two examples discussed above, it is noted that the Commissions' mandate amounted to an interference with the functions of the court. They were mandated to inquire into issues that were properly within the jurisdiction of courts of law.

The Oxford University Commissions proposed to inquire into rights, property and conduct of the University and its members. On the other hand, the Royal commission considered in the CLOUGH CASE[8] was to inquire into and determine issues such as whether the Union was an evasion of two acts of parliament of New South Wales and whether an alteration of the law was necessary in connection with the Union. These were issues that were within the competence of the Industrial Arbitration Court. The Commissions were therefore beyond their constitutional limits.

But in the absence of excesses, the constitutional propriety of the commission of inquiry cannot be doubted. It traces its roots to the constitution. This is true both under the common law and statutory law.

At common law, issuance of a commission of inquiry is a prerogative of the crown. A prerogative has been defined thus:

It is "that pre-eminence which the sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity and comprehends all special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England.[9]

Kenya being a former colony of Britain, at independence all the prerogatives hitherto exercisable by Her Majesty, the Queen, were inherited by the Crown and posited on the President who is the head of state.

Talking about commission of inquiry, Miller, J. observes;

> "... inquiry has its birth in the Constitution of Kenya and ... the authority empowering... inquiry is of Royal commission status, as known and recognised in the Commonwealth.[10]

So that in Kenya, as indeed in other parts of the Commonwealth, the issuance of a commission of inquiry is the prerogative of the crown as embodied in the person of the President.

But where there is a defect in a prerogative, the statutory power of the crown is used to remedy that defect.[11] For example, the Crown has enacted the Commissions of Inquiry Act (cap 102) to govern commissions of inquiry. This statute supplements the prerogative power of the Crown to issue commissions of inquiry.

So that even though the crown has no prerogative to compel testimony except in courts of justice, as observed above, this limitation is removed by enacting a statute in that respect. In this case, the Commissions of Inquiry Act empowers Commissions to take evidence on oath,[12] summon witnesses[13] and punish for contempt of the commission.[14]

These powers have been seen to be necessary for effectually conducting such inquiry. Parliament, through an Act, authorises the conferment of the powers on commissions of inquiry. The powers cannot be conferred without the authority of Parliament.[15] But Parliament itself is a constitutional organ The conclusion then is that a commission issued under and governed by an Act of Parliament is constitutional.

Commissions are therefore a delegation by an Act of Parliament and, or of the common law whereby jurisdiction, power and authority is conferred to others.[16] Where such delegation is by an Act of Parliament, the commission is obliged to strictly act under the authority of

Parliament as embodied in the Act.

Writing about commissions of inquiry, Prof. Ojwang states that they should be treated as a class of public bodies charged with constitutional functions. [17] This is because, he further observes, their assumption of such a role and their mode of discharge have a bearing on the executive or the parliamentary domain as the case may be. In this sense, they cause a definite constitutional significance.[18]

Their functions will have a bearing on the executive domain where, for example, an inquiry is undertaken to determine implementation of a policy that is thought proper. On the other hand, their functions may have a bearing on the parliamentary domain where a commission is mandated to, among others, frame a law that is to be presented before parliament for debate.

The foregoing discussion reveals that the functions of commissions of inquiry have a bearing on the constitutional mandates of two traditional organs of the government: the executive and legislature. It is this functional nexus between the commission and the two organs of the government coupled with statutory authority that commissions of inquiry derive their constitutional propriety.

But under what circumstances can a commission of inquiry be illegal?

Regarding this issue, the general legal position is that a commission to hear and determine offences otherwise than in the proper courts of law is unlawful and could be met by prohibition order.

The reason for this legal position was pointed out by Balen, the Attorney General, in the Oxford University Commissions' case discussed above. He saw the scope of the Commissions as ad inquirendum merely and where necessary, the commissioners were to give orders that the offenders should be proceeded against in the ordinary course of justice.[19]

To this extent, a commission to inquire into matters touching the state and government of the realm, even though it involves inquiry into offences that may have been committed, is not

an usurpation of the functions of the courts or a violation of the rights of the subjects.

The Judicial commission appointed to inquire into allegations involving Charles Mugane Njonjo (the Miller Commission) provides a good illustration. This Commission was appointed to inquire into allegations that Njonjo conducted himself in a manner prejudicial to the state and calculated to cause alarm and despondency with a view to undermining the office of the Head of State of the Republic of Kenya and the image and performance of the Government thereof as by law established.[20] The terms of reference of the Commission contained matters touching on the state and government and some of the allegations amounted to criminal offences.[21]

The issue as to whether a commission is legally competent to inquire into criminal conduct of persons was also considered by the Austratilian High Court on appeal in CLOUGH V. LEAHY.[22] In its ruling, the court held that there is no rule of law which prohibits inquiries to private persons and no rule of law which makes an exception in the case of the executive government even though the matter inquired of be of a private nature or be of some matter of offence or right capable of being brought to adjudication.

In Israel, the Supreme court in ALON V. GOVERNMENT OF ISRAEL[23] laid down the principle that it might set aside a government decision to issue a commission of inquiry where there existed a danger of unwarranted inteference with the judicial powers or with the powers of the courts.

In this case, the Government of Israel had decided in March 1982 to set up a commission of inquiry to investigate the involvement of two persons in the murder of a Jewish leader, Harim Arlosoroff, which took place in 1933. The basis of the decision as stated in the resolution of the Government was the allegation published in a recent book that these two persons had been accessory to the murder. Both of them had been acquitted by the court in 1934. The petitioner claimed that the Commission of inquiry should be declared null and void as it aimed to investigate a matter which had been decided by the courts and involved a direct attack on final decisions.

The Supreme Court expressed the view that no such danger existed as the judgement had

been rendered too long ago and the circumstances were exceptional.

From the above discussion, it emerges that the issue as to whether a commission is illegal by reason of encroaching on the functions of the court is subjective. Each case is to be considered on its own merits having regard to its peculiar circumstances. But generally, an inquiry by a commission should not constitute on improper interference in the functions of the court.[24]

In order to uphold this requirement, the power of inquiry under the Commissions of Inquiry Act should be used sparingly. It should be limited to inquiry into matters of public concern that involve more than the question of whether or not a particular person has committed a particular crime.[25] Such questions should be the preserve of courts of law. A fortiori, a commission of inquiry should not be used as an alternative to criminal proceedings.

It has been observed that when used sparingly as suggested above, the appointment of a commission of inquiry to inquire into matters of public concern often allows matters to be investigated that would otherwise escape investigation altogether.[26] This is because the public concern goes beyond the mere commission of an offence. It may require an examination of causes and preventive measures.

We now consider the third issue; contempt of court by a commission of inquiry. Under what circumstances can this arise?

It has been stated that there would be no such contempt merely in the commission proceeding simultaneously with a litigation that was concerned with the same matter. There would also be no contempt in the commission calling before it witnesses and requiring them to give evidence when their evidence would also be the evidence required in the court of law.[27]

The reason for this appears to be the distinct differences between the two institutions. While the court's main preoccupation is the administration of justice, the primary concern of a commission of inquiry is to investigate with a view to accumulate information on a given subject matter. The court system may be said to be an end in itself. The commission of inquiry, on the other hand, acts as a conduit for further action by the President. Thus even

if they proceed simultaneously, there will not arise conflict of functions.

However, contempt may arise where, for instance, the commission publishes findings which would interfere with the administration of justice in the courts. The same applies where the commissioners make comments during the inquiry proceedings that are prejudicial to the administration of justice in the court. This applies where, in either case, the matter is sub-judice

We now proceed to look at the power of appointment of a commission of inquiry under the Commissionsof Inquiry Act below.

3.2) The Power to Appoint a Commission of Inquiry

The Commissions of Inquiry Act (cap.102) is the statute that provides for the appointment of commissions. Such commissions are appointed to inquire into and report their findings on matters of public nature as referred to them by the President. S.3(1) of the said Act confers the power of appointment. It provides:

> "The President whenever he considers it advisable so to do, may issue a commission under this Act appointing a commissioner or commissioners and authorising him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body or into any matter into which an inquiry would, in the opinion of the president, be in the public interest".

From this provision, it is seen that the Act entrenches the prerogative power of the crown to issue a commission of inquiry. It expressly vests the power of appointment of such commissions in the President who is the Head of State.

The above section also lists issues which may be inquired into by a commission so issued. However the inclusion of the phrase ".. or into any matter into which an inquiry would in the opinion of the President be in the public interest" means that the list was not intended to be exhaustive. In any event the section lists only two areas, namely: the conduct of any

public officer and conduct or management of any public body. But going by the wide and varietal nature of issues that appertain to the administration of the state, it could never have been the intention of the Legislature to provide an exhaustive list of circumstances that would warrant resort to the commission of inquiry procedure. The phase enables the President to set an inquiry, under the Commissions of Inquiry Act, into any matter.
Thus the power of appointment of such commissions, as is apparent in S. 3(1) is discretionary. The President may receive a recommendation from his Cabinet or Parliament for the issuance of a commission, but still, the final decision rests with him.

In issuing a commission, the President is also empowered in the above stated section to appoint a commmisoner or commissioners authorising him or them to undertake a given inquiry as he may refer to them.

3.3) The Powers of a Commission of Inquiry

The Commissions of Inquiry Act (cap 102) confers wide powers on a commission. Such powers are intended to aid the commissions in the discharge of their functions.

Firstly, the Act clothes such commissions with the powers of the High Court to summon witnesses and to call for the production of books, plans, and documents and to examine witnesses on oath.[28] The Miller Commission, for example, in exercising these powers issued summons to sixty two witnesses who personally testified on oath directly before the Commission.[29]

Secondly, an inquiry under the Commissions of Inquiry Act is deemed to be a judicial inquiry.[30] This enables for the protection of a commission and its proceedings under the Penal Code (cap. 63) chapter xi. Accordingly, false testimony before a commission and bribery of a witness is an offence punishable by seven years imprisonment.[31] Fabrication of evidence with intent to mislead a commission or knowingly making use of such fabricated evidence is also punishable by seven years imprisonment.[32] Further, to mislead an intending witness with a view to affecting his testimony and to destroy books or documents knowing that they may be required by a commission are punishable offences.[33]

Also, to do an act preventing a witness from attending or giving evidence to a commission is punishable by five years imprisonment.[34] Moreover, insult, interruption, defamation, direct or any wilful contempt of a commission is a punishable offence.[35]

The power of a commission to punish for contempt was vividly demonstrated in the Commission of Inquiry to inquire into the circumstances surrounding and leading to the disappearance and subsequent death of Dr. Robert J. Ouko, former Minister for Foreign Affairs and International Cooperation (the Ouko Commission). Mr. Mbajah, Ouko's brother, together with The Standard newspaper faced contempt charges following remarks which were attributed to him by the newspaper in its issue of 19th October, 1990 to the effect that Ouko's death was not " a passing cloud" as had been said publicly by some of the late Minister's colleagues within the overnment.[36] The Commission issued summons to both Mbajah and The standard requiring them to appear before the Commission and show cause why they should not be jailed for contempt following the remarks. Mbajah did not appear before the Commission. He disappeared the day before he was due to appear. The Editor-in-chief of the standard on their part appeared as per the summons. He duly apologised to the Commission where upon the charges were dismissed.

From the forgoing, it seems that the principle of the Commissions of Inquiry Act is to confer widest discretion in the President and in commissions. This is intended to avoid the unwarranted interruption of the inquiries by long drawn out legal proceedings.[37] On the other hand, the sanctioning of the law by penalties of so severe a kind is meant to deter even wealthy interests from opposing the course of inquiries.[38]

3.4) Procedure and Rules of Evidence of Commissions of Inquiry.

It has been observed that from the practical point of view, the effectiveness of commissions of inquiry has depended upon their power to compel testimony.[39] This again is the main distinguishing factor between commissions of inquiry and other investigatory bodies of the government, such as bureaucracy.

But because, as was also expressed in CLOUGH V. LEAHY,[40] Commissions do not have any power to call witnesses or to demand the production of documents, the source of such

power must be an Act of arliament. Thus, S. 10(1) of the Commissionsof Inquiry Act gives commissioners power to summon witnesses and to call for production of books, plans and documents.

Because of the purposes of commissions of inquiry under this Act, their proceedings are to a great extent inquisitional, as opposed to adversavial. But the whole question depends foremost on the nature of a particular inquiry.

For example, an inquiry into an alleged misconduct, abuse of office or an administrative scandal such as the Maize and the Miller Commissions [41] usually adopts a procedure of a hearing a kin to the adversarial. In the commissions, leading counsel assisting commission questioned witnesses and persons whose conduct were under investigation on behalf of the commission[42] and counsels representing these persons and other institutions were allowed the right of cross-examination.

On the other hand, an inquiry into the possibility or necessity for some new policy or reform to be introduced, such as the Commissions appointed in 1967 to investigate and propose reforms which would institute unified laws of succession and marriage and divorce in Kenya, usually a dopts a procedure that is rather inquisitional. The commisoners in these commissions questioned the witnesses themselves.[43]

Nonetheless, a commission of inquiry has been described as a master of its own procedure. Talking about a tribunal that basically resembles a commission of inquiry, Lord Denning, M.R. states:-

> A tribunal of this kind is a master of its own procedure... A tribunal is entitled to act on any material which is logically probative even though it is not evidence in a court of law."[44]

So that in conducting their proceedings, commissions of inquiry are not obliged to follow technical rules of evidence. Their procedure and rules of evidence are only to be determined by a totality of the nature of the subject of inquiry and the circumstances of any given situation. The main guiding principle being that so long as the material is logically

probative, they are entitled to work on it.[45]

Further, the court in R.V. DEPUTY INDUSTRIAL INJURIES COMMISSIONS., EXPARTE MOORE[46] held that proceedings before the Industrial Inquiries Commission were not governed by the strict rules of evidence applicable to an ordinary court trial. Since the basic characteristics are pari materia, the same applies to proceedings before a commission of inquiry.

Again in T.A.MILLER LTD, V. MINISTER FOR HOUSING AND LOCAL GOVERNMENT AND ANOTHER ,[47] the court held that a tribunal acting under a statutory authority is entitled, unless the statute provides to the contrary, to act on any material which is logically probative. In other words, there is no laid down, hard and fast rules of procedure. The governing instrument is therefore the statute which in our case is the commissions of Inquiry Act.

This position was further emphasised in RE HUSTON where it was held that an inquiry under the Public Inquiries Act is not to be governed by the strict rules of evidence. This is because it is not a trial of any individual but an inquiry into a matter affecting good government and in such an inquiry, for instance, hearsay evidence may lead to the discovery of matters of great public importance. If it does, the result justifes its admission.[48]

Being alive to this legal position, the Miller Commission reported thus:

> "While we were a judicial tribunal for the purpose of receiving and assessing the evidence adduced before us, we were not a trial court."[49]

It further reports:

"An inquiry as this, not being a trial of any individual, may go on what are called" fishing expendition"thereby permiting recepton of hearsay evidence as it may lead to the discovery of matters of great public importance. It if does, the result justifies its admission, if it does of, no injury has resulted".[50]

This departure from the normal court procedure is a product of practical experience. The task of commissions of inquiry to be effectively discharged requires extensive and flexible procedural rules and not the rigid limitations posited by the judicial process. "The rules of evidence are in some respects artificial and unsatisfactory and may require the exclusion of evidence which is reliable and credible."[51]

In view of this, Commissions of Inquiry Act confers a wide discretion on the commissioners to formulate their own rules limited only by the rather general and basic provisions of the Act and the terms of reference of a commission.

Exercising this power, the Miller and Ouko Commissions [52] made their own rules for the conduct and management of their respective proceedings of inquiry.[53]

The Miller Commission was also guided in its proceedings by the provisions of the Evidence Act (cap.80) governing the admission of relevant and hearsay evidence in so far as they were not excluded by the nature of inquiry being a probe.[54] Certain hearsay evidence were therefore admitted by the Commission and later accepted upon authentication by other evidence.[55]

The conclusion to be drawn from the above analysis is that commissions of inquiry are differentiated according to the nature of the subject of inquiry. It is the said nature of inquiry that will also determine to a great extent the procedural rules to be adopted by a commission. The procedure and rules of evidence so adopted should be adapted for the achievement of the mandates of a commission, thus the need for flexibility.

3.5 The Requirement for Public Hearing

S. 3(4) of the Commissions of Inquiry Act (cap 102) provides thus:

"A commission may direct that the public shall not be admitted to all or to any specified part of the proceedings of the inquiry and subject to any such direction, every inquiry shall be held in pubic.[56]"

A commission of inquiry and publicity always go along together. At the general level, the two are not mutually exclusive. From historical times, inquiries in the nature of commissions have always taken place in a blaze of publicity.[57]

The publicity that is always associated with a commission of inquiry has helped to mould its character and position in the society. A commission in the eyes of the common man is an embodiment of truth. Its appointment acts as an assurance that the truth will ultimately be revealed.

In this context, a commission of inquiry is seen as a solution of last resort, especially in circumstances of national crisis of confidence. Its findings are usually expected to restore public confidence in the government. It is realised that the public trust in commissions emanate from the fact that their proceedings are usually open to the public. The pubic therefore have no reason to suspect cover up.

Taken together, inquiry and publicity are seen as powerful weapons in coping with some of the most difficult characters of social life. Their application dispels distrust between the government and its citizens. It is in its own right the epitome of openness of the government to its citizens.

Publicity is important because as one advocate put it, "justice is a tree which flourishes only in the open.... in the glare of public scrutiny."[58]

Publicity therefore contributes to the quality of the end result of a commission; that is, its report. It contributes to its acceptability.

In view of this, the proceedings of a commission should never be held in camera except in exceptional circumstances. Practice has established two grounds as the only basis for the exclusion of the public from the proceedings of a commission of inquiry. These are :

(1) State security; and

(ii) prejudice to the Head of State.

However before such exclusions can be ordered, it must be proved that the testimony is or the proceedings as a whole are of such a nature that involves the security of the state or is prejudicial to the head of state.

Thus an attempt by Mr. Chunga, the leading counsel assisting the Ouko Commission [59] to have the testimony of Mr. K'Oyoo, one of the witnesses in the Commission, to be heard in camera was overruled by the commissioners.[60] Chunga did not proceed on the basis of the two grounds stated above. Instead, his argument was that K'Oyoo's testimony would be possibly alarming and likely to affect conduct of the proceedings. It is on the basis of the foregoing reasoning that the proceedings of most commissions of inquiry are always held in public. The proceedings of the Miller Commission [61] for example, were held in public in accordance with S. 3 (4) of the Commissions of Inquiry Act save only in one instance when the evidence was received in camera.[62]

The picture emerging from the above discussion is that public hearing is a fundamental aspect of commissions of inquiry. The rationale for this, as has been noted above, is found in the reasons behind the setting up of a commission of inquiry, its purposes and aims. Practically, public hearing cannot be dispensed with in the proceedings of a commission of inquiry under the Commissions of Inquiry Act. Such a move would be tantamount to an overhaul of the basic character of such commissions.

However, while importance of public hearing is apparent, the commissions should have the liberty to decide when to go in camera as the circumstances warrant. There should be no hard and fast rules regarding this issue. This is because it is only easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate the activities of those commissions.

Each commission therefore must be allowed to define its own rules of procedure regarding the conduct and management of its inquiry. This should be done having regard to the scope of the proceedings, the source of its jurisdiction and its objectives.

This is important because, as Sachs L.J. accurately sees it,

> "so many are the permutations and combinations which arise in an investigation that it seems.. quite plain that it is impractible and indeed ill advised to attempt to lay down a set of rules applicable to all[63] commissions at all times.

3.6 Applicability of Rules of Natural Justice

In its broadest sense, natural justice may mean simply " the natural sense of what is right and wrong"[64] and even in its technical sense, is now often equated with "fairness".[65] It has been said that the nomaric word "natural" adds nothing to this meaning "except perhaps a hint of nostalgia" and that "justice" is far form being a "natural" concept since the closer one goes to a state of nature, the less justice does one find.[66]

But in the realm of administrative law, natural justice is now a well defined concept. It comprises two fundamental rules of fair procedure; that a man may not be a judge in his own cause and that a man's defence must always be fairly heard.

These rules apply equality to both judicial and administrative powers.[67] This means that the rules are applicable to commissions of inquiry under the Commissionsof Inquiry Act.

An appointment of a commission should therefore not result in one man being a judge in his own cause. The nemo judex in- re sua rule should not be contravened. This rule as well as the audi alteram rule is intended to pre-empt bias. A commissioner is therefore disqualified from engaging in an inquiry in which he may be or may fairly be suspected to be biased. The guiding principle is that "Justice should not only be done, but should be manifestly and undoubtedly be seen to be done".[68]

Further, it is evident that an inquiry by the government into its own mis-deeds or ommissions would be entirely discredited by the public at large who would obviously suspect bias.[69] Obviously the government in this case would be a judge in its own cause.

To avoid this scenario and, further, in compliance with the nemo judex rule, it is vital that

membership of a commission of inquiry to investigate a matter of public importance should be limited to persons having no association with any political party especially the ruling party.

The second rule that a man's defence must always be fairly heard, (audi alterram partem) as has been noted above applies with equal force to commissions of inquiry.

It is fundamental to fair procedure that both sides should be heard. In every case, fair hearing must be an unbiased hearing.[70]

The need for due observance of the rules of natural justice by a commission of inquiry cannot be over emphasised. This need arises from the fact that the commissions have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some, they may condemn others, they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions.[71]

This is illustrated in the following examples. Firstly, the Miller Commission[72] found most of the allegations against Mr. Njonjo, the subject of the inquiry proved. Some of the allegations could found a criminal charge, including such of serious nature as treason[73] if established. Secondly, the proceedings in the Ouko Commission[74] culminated in the placing of murder charges against one, Mr. Anguka. [75] Seeing that their work may lead to such severe consequences, the commissioners are enjoined to act fairly by being guided by the rules of natural justice.

On natural justice, De Smith writes:

> " Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed so that they may be in a position; (a) to make representation on their own behalf; or (b) to appear at a hearing or inquiry (if one is held); and (c) to effectively prepare their own case and answer the case (if any) they have to meet."
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Therefore, a person may not be deprived of his legal status, his livelihood, his property or dismissed from his employment or his reputation ruined without being given notice of the allegations made against him altogether with adequate time to meet them.

The right to know the case which is made against you is paramount. This is because without it, the right to be heard is rendered nugatory. About this, Lord Dening MR. reasons:

"If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him and then he must be given a fair opportunity to correct or contradict them."[77]

Also, a question has a risen as to whether the right to be heard carries with it the right to legal representation before a commission. In other words, is a party entitled to an appearance by an agent?

At common law, every person who is sui juris has a right to appoint a agent to act on his behalf. Stirling J has outlined the law relating to appearance by an agent thus:

> "... in order to make out that a right conferred by a statute is to be exercised personally and not by agent, you must find something in the Act, either by way of express enactment or necessary implication, which limits the common law right of any person who is sui juris to appoint an agent to act on his behalf. Of course, the legislature may do so, but prima facie when there is nothing said about it, a person has the same right of appointing an agent for the purpose of exercising a statutory right as for any other purpose."[78]

Thus the right to legal representation before a commission of inquiry may only be excluded by an express statutory provision where one has a right to personal hearing.

Such representation ensures maximization of the right to be heard. It accords a fair hearing to the party. The truism of this contention arises from the fact that a party may be so nervous, inarticulate and unable to grapple with the technicalities and facts or to make proper

submissions. These are avoided by legal representation. Legal representation is even more important where a man's future and livelihood could be prejudiced. Here, it becomes absolutely necessary. Davies LJ expressed the same opinion in PETT.V. GREYHOUND RACING.[79]

It is noted, however, that legal representation before administrative tribunals is not a prerequisite of the audi alteram partem rule.[80] But in certain circumstances, it becomes a very important requirement. It therefore remains an issue to be determined on the basis of facts and circumstances of each tribunal. Such facts include the tribunals procedure, its composition and the effects of its decision.

For example, where a tribunal consists of legally qualified personnel or one party to the issue is legally represented, it is only sensible and fair that the other party be granted the same privilege. The same applies in cases where a large fine may be imposed or a man may be deprived of his livelihood or property or his office. In every such case, justice demands that the party be allowed legal representation.

The justification then for including legal representation as a requirement of natural justice is that circumstances can be envisaged where owing to lack of a representative, a party before a tribunal has been unable to do justice to himself. [81] And indeed this colloquial common place reflects the rationale of the claim that representation should be regarded an aspect of natural justice and indeed underlies the truism that sound law is evolved by subjecting the impression of common sense to the test of reason.[82]

A commission of inquiry is seen as one of the formalised version of fair hearing which is required by the common law according to the principles of natural justice. It does not displace natural justice[83] nor should it be seen to displace. It should be regarded rather as a framework within which natural justice can operate and supply the missing details. And further, the common law presumption that parliament intends power to be exercised fairly is all the stronger, where parliament itself has provided for a hearing by way of a commission of inquiry.

In conclusion, it should be noted that natural justice is a flexible principle. [84] As such, it

is not possible to lay down rigid rules as to when the principles of natural justice are to apply nor as to their scope and extent. Everything depends on the subject[85] matter. Therefore, "in the application of the concept of fair play.. their must be real flexibility."[86]

"The requirements.. "then", .. of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with" and so forth.[87]

Further still, "the rules of natural justice resting as it were upon statutory implication, must always be in conformity with the scheme of the Act and with the subject matter of the case"[88].

The Commissions of Inquiry Act provides expressly for the right to a hearing and the right to legal representation.

At S.S 3 (3)(a), it is provided that the commissioner shall conform with the following instructions:

(i) "That evidence adversely affecting the reputation of any person or tending to reflect in any way upon the character of any person shall not be received unless the commissioner is satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give that person prior warning of the general nature of the evidence, and that where no such warning has been given, the general nature of the evidence has been communicated to that person; and

(ii) That the person shall be given such opportunity as is reasonable and practible to be present, either in person or by his advocate, at the hearing of the evidence, to cross - examine any witness testifying there to and to adduce without unreasonable delay material evidence in his behalf in refutation of or otherwise in relation to the evidence..".

Accordingly, in the Ouko Commission,[89] when one of the witnesses, Mr. James K'Oyoo told the commissioners that he was ready to reveal the names of the late Minister's enemies,

the leading Counsel assisting the Commission, Mr. Bernard Chunga, applied to have the witness stood over to allow him time to serve notices on people who might be adversely affected by K'Oyoo's testimony.[90] One such notice was served on Hon. Mr. Biwott.

It is enough that such notice contains information showing only the general nature of the evidence to be adduced. It need not contain adequete information for that matter.[91]

This issue arose in the Ouko Commission. [92] In this instance, the dvocate representing Mr. Biwott, Mr. Kapila contended that the notice served on his client did not contain sufficient information.

In their verdict, the three commissioners, Justices Gicheru, Kwach and Akiwumi, explained that a notice is served to enable the person implicated to appear and for him or his advocate to cross- examine the witness giving adverse evidence and to adduce evidence in rebuttal. They further stated that with regard to the adequacy of the period of notice, it is inappropriate to lay down hard and fast rules. Each case must be considered on its merits. They held that the notice given to Kapila's client was adequate in the circumstances.

It is further seen that in line with S. 3 (3) (a) (ii) above stated, Hon. Mr. Biwott was represented at the Commission by a team of three advocates headed by Mr. Achoro Kapila upon his name being raised up in the inquiry. The dvocates, for example, cross-examined one of the witnesses, Mrs Randiek, who gave adverse evidence against Mr. Biwott with a view to discrediting her testimony.[93]

S. 12 of the Act further provides: " Any person whose conduct is the subject of inquiry under this Act or who is in any way implicated or concerned in any matter under inquiry shall be entitled to be represented by an advocate in the proceedings of the inquiry or any part thereof, and any other person who desires to be so represented may, by leave of the Commissioner, be so represented."

It is under this section that Mr. Njonjo who was the subject of inquiry in the Miller Commission [94] was represented by two Advocates. That is Mr. W.S. Deverell and Mr. P.K. Muite.[95] He was given unlimited right and opportunity to adduce material evidence

on his behalf in refutation of the allegations and evidence adduced before the Commission.[96]

In the Ouko Commission,[97] we see the late Dr. Ouko's family represented by Mr. Oraro in the Commission. The family was concerned with the matter under inquiry; that is, the death of one of their own. And by leave of the Ouko Commission,[98] the late Dr. Ouko's clan was represented in the Commission by Dr. Ouko Ombaka.

The above discussion reveals that the Commissions of Inquiry Act incorporates the audi alteram rule and that the practice of commissions in the country has always been in line with this rule as is illustrated in the examples given above.

1. Moore, W,H,"Executive Commissions of inquiry" Columbia Law Review Vol. 13 part 2, P. 500 at P 506.

2. Ibid

3. Quoted in Op. cit, note 1.

4. Op. cit, note 1.

5. (1914) 4 S R (N S W) 401.

6. Ibid, at p. 414 - 415.

7. Ibid, p. 417.

8. Halsbury's Laws of England, vol 7, 3rd Ed. Para 463.

9. Report of the judicial commission appointed to inquire into Allegations involving Charles Mugane. Njonjo, (Nairobi 1984) Appendix 'E' - Chairman's closing Address.

10. Supra, note 1, at p. 509.

11. Commissions of Inquiry Act, s.10(1),

12. Ibid.

13. Supra, note 11, S, 13(1) which incorporates provisions of chapter xi of the Penal Code (cap.63).

14. Bennet, A.L, commenting on a paper presented. by J.D Homes; "Royal Commissions", Australian law Journal Vol. 29(1955) p.261.

15. Moore, Op. cit. p. 517

16. Ojwang. J.B, Constitutional development in Kenya; Institutional Adaptation and social change (1990) p 180.

17.Ibid.

18. Moore, op. cit. p. 516.

19. Supra, note 9, Citation at P. (vii)

20. See for instance the terms of references (a) and (c), ibid.

21. (1904) 2 C.L.R. 39

22. (1982) (4) 36 P.O 449 (Hebrew). The judgement was reported at length in the Jerusalem Post, Feb. 27th 1983, P.5

23. Segal Z.V. "Tribunals of inquiry: a British invention ignored in Britain." Public Law (984) P. 206 at P. 210.

24. Menzies, D.I. commenting on a paper presented by J.D. Holmes, "Royal commissions" Australian Law Journal Vol 29 (1955) p. 254 at p. 264.

25. Ibid

26. Ibid, at p. 263

27. Supra, note. 11

28. Supra, note a, para.9.

29. Supra,

30. Penal Code (cap. 63 S108(1) as read together with S. 110 and s. 115 respectively.

31. Ibid, s. 113

32. Ibid, s. 115

33. Ibid, S.117

34. Ibid, S. 121

35. The weekly Review, Nov. 9th 1990, at p. 4

36. Moore, Op, cit. p. 509

37. Ibid.

38. Ibid, p. 507.

39. Supra, note 5.

40. The Maize Commission of inquiry appointed to investigate the organization of the maize industry and allegations that there had been corruption and profiteering in its operation. It was appointed in 1965, and

> Judicial commission appointed inquire into allegations involving Charles Mugane Njonjo (The Miller Commission) respectively.

41. Report of the Maize Commission, Ibid. See also Ghai, Y and Mc Auslan, Public law and political change in Kenya (1970) P. 273. As per the Miller Commission, see the report, Op cit. note 9, para. 9

42. See Ghai, op. cit, also ibid.

43. In T.A. MILLER LTD V. MINISTER FOR HOUSING AND LOCAL GOVERNMENT AND ANOTHER (1968)2 All E.R. 633 at P. 634.

44. Ibid

45. (1965) 1Q B. 456

46. Supra, note 43

47. (1922) DLR 444

48. Ibid, at P. 448

49. The Miller Commission, report, op. cit, note 9 para 14.

50. Ibid, para 15.

51. As per Person, LJ in R. V. Industrial Injuries, supra, note 45, at p. 484.

52. A Judicial Commission of inquiry appointed to inquire into the circumstances surrounding and leading to the disappearance and subsequent death of Dr. Robert Ouko, former Minister for Foreign Affairs and International Corporation,

53. On the Miller Commission, see the Report op. cit, appendix "A", "Rules and Procedure, on the Ouko Commission, See Gazette Notice of oct. 12th 1990.

54. Rreport,op. cit. note 9, para 14.

55. Ibid, para 16.

56. Emphasis mine.

57. Wade, Administrative law (1988), p. 1000.

58. Mr. Oraro, opposing Mr. Chunga's application to have the testimony of a witness in the Ouko Commission (Op. ct. note 52) heard in camera. See the Weekly Review, October 18 1991, p. 23.

59. Ouko commission, op. cit. note 52.

60. The Weekly Review, supra, note 58, p.21.

61. Op. cit. note 40

62. The Miller Commission, the report, op. cit. note 9, para 8

63. In RE PERGAMON PRESS LTD (C.A.) (1971) ch.388 at p. 404.

64. VOLLNET V. BARRETT (1855) 55 LJ Q B 39 at 41.

65. Wade, op. cit. note 57, p. 466

66. NORWEST HOLST LTD V. SECRETARY OF STATE FOR TRADE (1975) ch. 221, at 226 as per Ormood LJ.

67.Supra, note 65

68. As per Lord Artkin, LJ in R.V. SUSSEX JUSTICES, EXP. Mc CARTHY (1924) I.K.B 256 at P. 259.

69. Segal, op. cit, note 23, p. 206.

70. Wade, op. cit, note 57, p. 496

71. As per Lord Denning, MR. in RE PERGAMON, supra, note 63.

72. Supra,note 40.

73. See for instance reference (a), the report, op , cit, note 9.

74. Supra, note 52

75. The Weekly Review December 13h, 1991. p. 49.

76. De Smith, Judicial Review of Administrative Action (3rd Edition) p. 172.

77. In KANDA V. GOVERNMENT OF MALAYA (1962) A.C 322 at P. 327.

78. In JACKSON V. NAPPER, DE SCHMIDT'S TRADEMARK, (1887) 35 ch.D 162 at P. 172.

79. (1968) 2. All. E.R. 545.

80. Seepersad, C.P. "Fairness and Audi Alteram Partem", Public Law (1972) p. 252.

81. Alder, J.E," Representation Before Tribunal: "Public Law (1972)p 278 at p 281.

82. Vide in this connection the remarks of Lord Radcliffe on November 30th, 1955 in the Royal society of medicines Lloyd Robers Lecture, " How a lawyer Thinks" published in the Lancet, Jan 7, 1956.

83. Wade, op. cit, note 57, p. 963.

84. Ibid, p. 530.

85. Stated in R.V GAMING BOARD OF GREAT BRITAIN, EX PART BENAIM AND KHAIDA (1970) 2 QB 417 at p. 439

86. stateD in RE. PERGAMON PRESS LTD, Supra note 63, at P. 403.

87. So held in RUSSELL V. DUKE OF NORFOL (1949) All. 109 at 118, as per Turker L.J.

88. Wade, op. cit, note 57, p. 530.

89. Supra, note 52.

90. The Weekly Review, August 2nd 1991 at P. 11.

91. Supra, note 11, s. 3 (a) (i)

92. Supra, note 52, see also The Weekly Review August 16th 1991, P. 12.

93. The Weekly Review , ibid, p. 4

94. Supra, note 40

95. The Miller Commission report, op. cit, note 9 para 7.

96. Ibid, para 10.

97. Supra, note 52.

98. Ibid.

CHAPTER THREE

THE RIGHTS AND INTERESTS OF PARTIES.

The basic function of a commission of inquiry, as has been noted in chapter 1, is to undertake investigations on a subject matter and make a report. The report is then submitted to the President for further action. However, he is not obliged to act.

The consequence is that a commission of inquiry, even though it may present on its face some features of a judicial character, results in no enforceable judgement. It only leads to findings of fact which are not conclusive and expressions of opinion which are likely to become the subject of political debate[1].

Nonetheless, it has been ably affirmed that it is a good policy of governance that there should be commissions of inquiry. This arises from the fact that there are many matters upon which information is required by the government. The appointment of a commission of inquiry has emerged as the best method of obtaining such information.[2]

Being cognisant of this fact, the Salmon Commission[3] rejected various suggested alternatives to royal commissions stressing that some powerful and unrestricted means of inquiry must be available for use in emergencies[4]. Commissions do make very substantial contribution to the material upon which both the executive and parliament work in framing laws to give effect to the policy that is thought proper.

On the other hand, experience of commissions of inquiry has revealed the dangers to which a procedure of this kind is naturally prone.[5] The inquiry is generally inquisitional in character and usually takes place in a blaze of publicity.

The procedure obviously puts the rights and interests of witnesses and parties in jeopardy. The rights and interests become liable to be violated and injured respectively in the course

of the inquiry.

The proceedings of a commission may expose a party to a real detriment to his person, reputation or career either immediately or by placing him in jeopardy.[6] Very damaging allegations may be made against personsin the inquiry.[7]. Aman's future and livelihood may be prejudiced by the proceedings of the inquiry.[8]

For example, in the Ouko Commission, a witness told the Commission that the late Minister had told her that "talking about corruption is like talking against Biwott" in Kenya and that the late Minister had described Biwott as a dangerous man.[9] It can not be gainsaid that these allegations were very serious and damaging to the person of Mr. Biwott, taking into account the fact that he is a politician. A weekly magazine saw these allegations as amounting to the greatest political challenge to him. The allegations apparently soiled his reputation and standing in the Kenyan society.

Further, reports of commissions also expose the rights and interests of parties to the risk of violation and injury. Of this, Lord Denning says:

> The commissions "..have to make a report which may have wide repercussions. They may if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some, they may condemn others, they may ruin reputations and careers. Thier report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions".[10]

Accordingly, the danger is real. Such reports can truly interfere with the rights and interests of parties to a commission. This is clearly illustrated in the Miller Commission of inquiry. The report of this Commission contained findings of fact which were very damaging to Mr. Charles M. Njonjo, the subject of the inquiry.

For instance, the Commission found the allegation that Njonjo conducted himself in a manner prejudicial to the security of the state well established.[11] Further, the commission "

unhesitatingly express...opinion that Charles Mugane Njonjo conducted himself in a manner prejudicial to the Head of State, the Image of the President and the constitutionally established Government of the Republic of Kenya."[12]

As regards the allegation that Njonjo was a party to a conspiracy to overthrow, by unlawful means, the Government of the Republic of Kenya during the month of August 1982, or the concealment thereof, the commissioners stated thus:

> "We have stated that Njonjo was implicated in the illegal importation of arms in the build up of the cache in the Haryanto home and, as will be shown later, also in Mathemba's attempts to acquire arms and train personnel; the only reasonable conclusion we can reach is that these activities in which Njonjo was involved were part of conspiracies to overthrow, by unlawful means, the Government of the Republic of Kenya during the month of August 1982, and also the concealment thereof."[13]

The Commission further found that Njonjo attempted to make a corrupt payment to a Mr. Sifuna in order to induce him to join his (Njonjo's) camp thereby seeking political support and undermining the process of democracy[14] and that he misused his office as Minister with the object of seeking political support by releasing two prisoners.[15] These findings were with respect to the allegation that Njonjo misused his offices as an Attorney General and, or a Minister. [16]

These findings were serious and could result in criminal proceedings. Indeed Mr. Njonjo would have been subjected to such proceedings were it not for the President who pardoned him.

But still, the resulting damage to Njonjo's reputation was enormous. While before the work of the Commission Njonjo was a regular and a famous pubic figure, the reverse was true after the Commission completed and published its report. Njonjo abandoned active public life and he is yet to rescind this decision. The experience seems to have shattered all his

political dreams. Worse still, he has had to live with the stigma of the Commission's report to this day.

Also, the proceedings of the Ouko Commission exposed Jonah O. Anguka to criminal prosecutions. He was charged with the murder of the later Minister. The grounds for the criminal charge arose from the Commission.[17] The result was that Anguka lost his employment as a civil servant, perhaps the only source of livelihood for himself and his family. The whole process placed the future of Anguka at stake in view of the nature of the charge facing him.

The foregoing discussion reveals the dangers to which the entire spectrum of the procedure in the nature of commissions of inquiry is prone. The entire process imperils the rights and interests of parties and witnesses. The emerging truth then is that while the power of inquiry is itself beneficial, it can unquestionably do harm. But commissioners are under an obligation to ensure that fair play and justice is not only done, but is seen to be done.[18] The rights and interests of parties should not therefore be sacrificed at the altar of public interest.

Thus it is required protection of innocent people who may be involved with such inquiry. This is based on one of the fundamental principles of our laws that one is presumed innocent until proven guilty by a competent court of law. The rights and interest of the general public who are witnesses should be guarded. There should be put in place procedural safeguards. In doing this, however, care should be taken not to lose sight of the need to achieve the end envisaged in setting up a Commission.

Having this in mind, we now proceed to look at the safeguards under the Commissions of Inquiry Act for the protection of witnesses and parties to the inquiry.

4.1 THE STATUTORY SAFEGUARDS.

The Commissions of Inquiry Act (Cap.102) contains provisions for the protection of parties to the inquiry. These are safeguards intended to reduce the level of injustice to such parties

arising from the inquiry procedure. These provisions are spread out throughout the Act. A look at these provisions suffices.

First, S. 3 (3) states that "every Commission shall in a suitable case contains the following directions to be observed by the Commissioner or Commissioners:-

(a) That the commissioners shall conform with the following instructions:

(i) That evidence adversely affecting the reputation of any person, or tending to reflect in any way upon the character or conduct of any person, shall not be received unless the commissioner is satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give that person prior warning of the general nature of the evidence, and that where no such warning has been given, the general nature of the evidence has been communicated to that person,

(ii) That the person shall be given such opprtunity as is reasoanble and practible to be present either in person or by his advocate at the hearing of the evidence, to cross-examine any witness testifying thereto, and to adduce without unreasonalbe dealy material evidence in his behalf in refutation of or otherwise in relation to the evidence,

(iii) That hearsay evidence which adversely affects the reputation of any person or tends to reflect in any way upon the character or conduct of any person shall not be received,

(iv) That no expression of opinion shall be received in evidence of the character, conduct or motive of any person; except in so far as the commissioner considers it essential for ascertaining the truth of the matter into which he is commissioned to inquire to depart from these instructions; and

(b) That in the event of any such departure from these instructions, the commissioner

shall record his reasons therefor in the record of the inquiry, and shall report thereon with his reasons therefor in his report of the inquiry."

This section is intended to protect the reputation of persons generally. It seeks to exclude from the inquiry wild allegations that only serve to injure one's reputation without serving the end of such inquiry. Thus the section subjects such allegation to stringent test by way of cross-examination and an allowance for adducing evidence in rebuttal before such evidence could be received. And more important, the commissioners are enjoined not to receive such evidence unless it is relevant to the inquiry.

This section is seen to uphold the rules of natural justice, particulary the audi alteram partem rule. The rules of natural justice are therefore incorporated in the Act as a safeguard. This is further strengthened by the provision for the right to legal representation before a commission under S. 3 (3) (a) (ii).

Because of the unreliability of hearsay and opinion evidence, the section provides for their non-acceptance in an inquiry in S. (3) (a) (ii) and S. 3 (3) (a) (iv) respectively. The provision to sub. section 3(a) can be thought to water down the merits and importance of its provisions as it provides for departure from the said instructions. However, this fear is cured by sub S. 3 (b) which requires reasons to be given in the event of such departure.

Secondly, S. (3(4) provides that a commission may direct that the public shall not be admitted to all or any specified part of the proceedings of the inquiry. This provision therefore authorises holding the proceedings of an inquiry in camera. However, the commissioners have to satisfy themselves that this is desirable for the preservation of order, for due conduct of the inquiry or for the protection of the person, property or reputation of any witness in the inquiry or any person referred to in the course of the proceedings of the inquiry. For the same reasons, a commissioner may order that no person shall publish the name, address or photograph of any witness or person or any evidence or information which could lead to his identification. This is for the purposes of security and safety of such witnesses or persons.

Thirdly, S. 9 gives commissioners power to make rules for the conduct and management of the proceedings of the inquiry. It is my submission that this opportunity should and can effectively be utilized by commissioners to formulate such rules that incorporate adequate safeguards for the witnesses and parties to a commission.

Fourthly, S. 12 permits appearance by an advocate before the inquiry for any person implicated or concerned in any matter under inquiry. This ensures that such persons are adequately heard in their defence and their rights and interests accorded adequate protection throughout the inquiry period.

Further, S. (3) (2) provides against self-incrimination and extends all the privileges and immunities accorded to witnesses before the High Court to witnesses appearing in an inquiry. Such privileges and immunities would encourage witnesses to speak freely without fear of civil or criminal prosecution.[19]

S. 14 exempts a commissioner or a secretary to any commission from any civil action or suit for or in respect of any matter or thing done in due performance of his duty under a commission. And S. 15 exempts commissioners from arrest under civil process during the period of an inquiry. These provisions are intended to protect the commissioners to enable them discharge their functions properly They ensure expediency and guard against unwarranted disruption of the proceedings of an inquiry.

Finally, S. 19 gives the Minister power to make regulations for prescribing anything which by the Act is required to be prescribed, and generally for carrying out the purposes of the Act. It is again my submission that such regulations could be formulated in such a manner that the rights of witnesses are guaranteed and the interest of parties safeguarded. Such regulations could act as basic minimum standards to be observed by every commission issued under the Act. It should however be borne in mind that no such regulations have so far been made by the Minister.

The above discussion reveals that the Commissions of Inquiry Act contains safeguards for

witnesses and parties to a commission of inquiry. However, it remains to be seen whether these safeguards are adequate for their purpose. For this reason, we now look at the shortcomings of these safeguards.

4.2 THE SHORTCOMINGS OF THE STATUTORY SAFEGUARDS.

Though the Commissionsof Inquiry Act incorporates various safeguards for witnesses and parties, it is submitted that these are not adequate in the circumstances. The safeguards are riddled with limitations and qualifications that water down their effectiveness.

In the first place, the Act does not provide the qualifications of those who may be appointed as commissioners to a commission. Appointment is therefore not limited to the members of the judiciary who are judges.

This is a serious omission in our view notwithstanding that it has been the practice in this country to call upon the judiciary to carry out most commissions of inquiry where matters of great public importance are involved. [20] Such a provision would make this requirement more certain and mandatory.

The requirement that commissions of inquiry should be presided over by a judge is an important safeguard. The prestige of a judge is used in this case to set the seal of impartiality upon the entire process of the inquiry.[21] It is trite observation that the non-judicial mind sometimes involves itself in certain bias which one would not get in the case of a judge[22]. The Judge would usually use his skill and act with fairness and courage. The effect then of the failure to provide for this safeguard in the Act on the protection of the rights and interests of the parties can be imagined.

Further, the instructions enumerated under s. 3 (3) (a) are not mandatory. The decision as to whether or not to include them in a commission is discretionary and rests with the President who is the appointing authority. The phrase "in a suitable case" confers too wide a power. No guidelines are given as to when one could arrive at the conclusion that a given

case is a "suitable case" for the purposes of this provision so that the instructions could be included in a commission.

The truism of this argument is illustrated by the fact that the emerging practice seems to be that the above instructions are never included in commissions. So that in the Ouko Commission, for example, the instructions were not included.[23] I submit the this was a proper case for the inclusion of these instructions since due to the nature of the inquiry, the rights and interest of the parties were to be greatly prejudiced. The inevitable conclusion is that the provisions of S. 3 (3) (a) are rarely applied for the protection of the parties to commissions of inquiry.

In S. 9 of the Act, as a already stated above, the commissioners are given the power to formulate rules for the conduct and management of inquiry proceedings. Such rules so formulated could include proper safeguards for witnesses. However, this may not be forthcoming where a commission is presided over by lay persons. Such persons lack the expertise and experience necessary for formulating appropriate rules for the purposesof the inquiry, taking into account the need for protection of rights and interests of parties.

The Act at S.12 provides for legal representation of parties. But no provision is made for legal advice and representation to be paid for from public funds where one is incapable of paying for the same. For this safeguard to be complete and real, the state should provide legal representation to those parties who by reason of poverty, cannot pay for such services.

Further still, it is noted that the protection accorded to persons taking part is not uniform and complete. While the commissioners are highly protected, the secretaries and witnesses have some measure of protection while counsels assisting or appearing have no protection. Thus in the Ouko commission, Mr. George Oraro who was a counsel for the Ouko family was arrested at his hotel room shortly before the commission was dissolved.[24]

It is also found that the Minister has not made any regulations under S. 19 of the Act. The result is that there is no laid down framework of rules to be adhered to by commissions,

especially as regards safeguards that are to be accorded to parties. Various commissions follow their on rules and procedure thought appropriate in their circumstances. This practice does not auger well for the protection of parties and witnesses.

This being the position in the law regulating commissions of inquiry in Kenya, the need for reform is apparent. This is more so in the realm of rights and interests of all parties to inquiry proceedings.

1. Irvine, W. H. (Chief Justice) in his letter to the Attorney General (Australia) declining the request of the Government of Austratilia inviting one of the judges to be a royal commissioner to inquire into changes made in connection with the Warrnambours breakwater, quoted by D.I Menzies, A.L.J. vol. 29 (1955) at p 256.

2. Ibid, P. 263.

3. The British Royal commissioner on Tribunals of inquiry (Chairman, salmon, LJ)

4. See ibid, the report, cmnd 3121, (1966).

5. Wade, Administrative Law (1988) P. 1001,

6. Per Finer, M, Q.C. in RE PERGANION (1971) CL. 388 as . 392.

7. Supra, note 5.

8. See The Weekly Reviews, August 9th, 1991 P. 22

9. See The Weekly Review, August 9th, 1991 P. 22.

10. In **RE PERGAMON,** op. cit, note 6 at p. 379

11. See The report of the Judicial commission appointed to inquire into allegations involving charles Mugane Njonjo, (Nairobi 1984) Para. 63.

12. Ibid, para. 150.

13. Ibid.

14. Ibid, para. 273.

15. Ibid, para. 307.

16. See ibid, the report , terms of reference (c) under the 'Introduction' P. viii.

17. R V. ANGUKA, HC CR. CASE NO. 41 OF 1992, also see the Weekly Review, December, 13th 1991.

18. See Matthew. G. Muli's (Attorney General) opening address, the report op. cit. note vii, Appendix 'D"

19. Wade, op. cit. note 5, p. 1003

20. In the Miller Commission, all the three commissioners were judges. It was chaired by Miller, C.H.E.J and, in the Ouko Commission, the commissioners were Mr. Justice Evans Gicheru (chariman) Mr. Justice Richard Kwach and Mr. Justice Akilano Akiwumi.

21. Holmes, J.D. " Royal commisone" A.L.J. Vol. 29 (1955) p 253 at p. 256.

22. Bennett, A.L, commenting on Holmes paper, Ibid at P. 261.

23. See Gazette Notice No. 4586, 2nd October 1990 which issued the commission.

24. See The Weekly Review, November 29th 1991.

CONCLUSION AND RECOMMENDATIONS FOR REFORM

This study set out to investigate the rights and interests of parties to an inquiry established under the Commissions of Inquiry Act (cap. 102). In particular, it proposed to examine the safeguards for witnesses and parties as provided under the said Act and their limitations.

Towards this end, we began by looking at the nature of commissions of inquiry in Chapter 1. In this discussion, commissions of inquiry were generally described as commissions issued by the President under the Commiossions of Inquiry Act to investigate matters of public importance. It also emerged that the commission of inquiry, as an administrative institution developed in Britain. It found its way into Kenya through colonization and it is now a well established institution in this country.

In the second chapter, we were concerned with the Legal and procedural aspects of commissions of inquiry. The conclusion to be derived from this examination are as follows. First, that the constitutional prop riety of commissions of inquiry cannot be doubted. They trace their origin to the constitution. Second, that a commission can legally inquire into criminal conduct where it is properly constituted.

Third, that under normal circumstances, a commission of inquiry cannot be in contempt of court unless its actions amount to an interference with the adminstration of justice in the court.

Fourth, that the Commissions of Inquiry Act empowers the President to issue commissions. The President is also vested with the power to appoint commissioners and secretaries to such commissions so issued. This Act also clothes commissions with the powers of the High Court to summon witnesses and to call for the production of books, plans and documents. There is also the power to examine witnesses on oath. The Act further vests the commissions with various kinds of power such as the power to punish for contempt. These are intended to aid the commissions in the smooth discharge of their mandates.

Fifth, it was also clearly shown that commissions are masters of their own procedure. There is no legal requirement to abide by the technical rules of evidence and procedure normally

applicable in ordinary courts. This, as we saw in Chapter 2, is justified because of the peculiarity and diversity of commissions of inquiry. Rigid rules of procedure are apparently not appropriate in the circumstances.

Sixth, that because of the importance of publicity to inquiry procedure, the proceedings of commissions should always be held in public. Derogation from this requirement is only justified where there are circumstances involving public security or prejudice to the image of the President.

Finally, that the rules of natural justice are applicable to commissions of inquiry and must be observed by commissions. In any event, inquiries are part of the procedure for ensuring that administrative power is fairly and reasonably exercised. Inquiries therefore have the same purpose as the legal principles of natural justice. The statutory procedure under the Commissions of Inquiry Act is therefore only a framework within which the principles of natural justice operate to fill in details.

In Chapter 3, we examined the rights and interests of parties and witnesses to a commission of inquiry. In this regard, we looked at the safeguards provided for witnesses and parties under the Commissions of Inquiry Act. This was followed by an analysis of the limitations of the safeguards provided under this Act.

From this discussion, the conclusion to be derived is that while the Commissions of Inquiry Act provides for safeguards for witnesses and parties, the requirement for observance of such safeguards by commissions are in most cases not mandatory. Further, when taken together, the safeguards under this Act are not adequate to secure sufficient protection of witnesses and parties.

In the light of these, what suggestions may be offered?

It is suggested that the following changes may be made in the law to guarantee adequate protection to witnesses and parties to inquiry under the Commissions of Inquiry Act. The main objective here is to reduce as much as possible instances of injustice to witnesses and parties in the course of such an inquiry.

These are:

(a) Procedural changes;

(b) Changes regarding the power of appointment;

(c) Changes regarding the power to revoke; and

(d) Other changes that are regarded as necessary.

(a) Procedural changes

(i) At all times, the inquiry procedure should be used as a last resort. This is because, once instituted, inquisitorial public inquiry is not always easily controllable[1] . In addition, commissions should only be employed in exceptional occasions when there is something in the nature of a nation wide crisis of confidence.[2]

(ii) Before any person becomes involved in an inquiry, the commission must be satisfied that their are circumstances which affect him and which the commission proposes to investigate. This requirement is important because of the inherent uncontrollable nature of commissions, it is a preventive measure.

(iii) Where it is established that a person is a proper witnesses or a party to a given inquiry, then his or her legal expenses should normally be met out of public funds. This is important especially where a party is not able to afford the legal expenses.

But in adopting the second and third safeguards stated above[3], care should be taken to avoid the risk of expansion and complication of the investigatory process which exist.

They may be solved by dividing the inquiry into two stages.

(a) First Stage.

In this stage, the commission will be hearing witnesses and parties who it may have either summoned or expressed the desire to appear before it . The commission asks questions and

the witnesses and parties are given the opportunity to bring before the commission everything known to them. At this stage, no rights are afforded to the witnesses and parties. The proceedings are held in camera.

Once this stage is terminated, the commission takes time for consideration before the second stage commences.

(b) Second stage.

Here the commission issues a resolution concerning harm that might be caused to certain people as a result of the inquiry process and, or its results. The mere fact of not sending a notice to certain persons who appeared in the first stage is tantamount to an "acquittal" by the commission. The notice sent by the commission to a person tells him exactly how he might be harmed by findings, conclusions and recommendations of the commission and his or her rights as provided under the statute governing commissions of inquiry.[4]

(b) Changes regarding the power of appointment.

(i) The appointing authority should be non - political. This helps to secure public confidence in the members so appointed. It also ensures that investigations will not be motivated by political considerations.

In this connection, the Commission of Inquiry Act should be amended to provide that the power to appoint the chairperson and other members of a commission lies with the head of the judiciary, the Chief Justice.

(ii) The position of a commission's chairperson is crucial for the purposes of fairness. This is because of two reasons. First, the public will attach special importance to the qualities of the person holding this position. Second, the conduct of a commission of inquiry depends upon the quality and character of the commissioner or where they are more than one, the chairperson of the commission[5].

Because judges are person of high standing and repute, the law should be amended to reserve

this position to judges only. A judge can be relied upon to mitigate the dangers inherent in an inquiry procedure.

(c) Changes regarding the power to revoke a commission.

S 4(1) of the Commissions of Inquiry Act empowers the President to revoke a commission.

We suggest that this Section should be repealed. It can be abused as the Act does not set out guidelines and conditions as to when and how this power may be exercised.

Our considered opinion is that once a commission is appointed and accepted by a commissioner, the commissioner should go through the inquiry to the bitter end. This is because a commission is not usually appointed to inquire to the extent of whether or not there are sufficient evidence or grounds to commence criminal proceedings. A commission is usually appointed to enquire into the truth of certain allegations and, therefore, the commission should not stop or be terminated if it reaches appoint where it has accumulated sufficient evidence and grounds for criminal proceedings.

(d) Other necessary changes.

(i) It should be a policy and practice of the appointing authority that no commission is issued where this may result in an improper interference with the functions of the courts. Related to this, the authority should ensure that matters that can be referred to the courts are so referred. This is important because the courts offer individuals involved in the process a full range of safeguards which are not afforded in an inquisitional process.

(ii) In view of the importance of the instructions enumerated under S. 3 (3) (a) of the Commissions of Inquiry Act, as seen in chapter 3 above, they should be made mandatory so as to be contained in every commission that is issued.

(iii) The protection accorded to commissioners, secretaries and witness under the Commissions of Inquiry Act should also be extended mutatis mutandis to counsels in the commission. Such provisions would enhance the proper discharge of the counsels' functions.

In summary, it is hoped that this study has made it clear that an investigating machinery provided by statute is needed in any democracy. It has also noted that a commission of inquiry is the most desirable forum in which to investigate matters of urgent public importance. Such matters usually involve something into the nature of a nation-wide crisis of confidence. The risks to persons involved in the inquiry can and should be minimised by the law without hampering the effectiveness of the inquiry.

1. Wade, Administrative Law (1988) p. 1002.

2. This was also emphasised in the Report of the Royal Commission on Tribunals of Inquiry (chairman, salmon LJ). cmnd 3121 (1966).

3. These were some of the safeguards suggested by the Salmon Commission, Ibid, the report.

4. This procedure is applied by Israel law. See Segal. Z.V. 'Tribunals of inquiry. A British Invention ignored in Britain", Public law (1984) P. 206 at P. 212

5. As per Sir, John Lathan in his contribution to a discussion on J.D Holmes' paper titled "Royal Commissions", A.L.J. Vol. 29 (1955) p. 253 at p. 268.

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