



# COMMISSIONS OR OMISSIONS OF INQUIRY? Why Kenya has failed to address historical and other injustices

By Eliud Kibii



Kenya experienced a protracted electoral period after the unprecedented nullification of the August 8 presidential election last year. After the Supreme Court gave its detailed ruling on September 20, the opposition leader Raila Odinga stated that if there were no reforms in the Independent Electoral and Boundaries Commission (IEBC), the repeat election ordered by the Supreme Court in 60 days would not go ahead.

A majority of the Supreme Court judges said that the electoral agency had failed, neglected or refused to conduct the elections in the manner and dictates of the Constitution. Raila, therefore, argued, that the commission had to effect changes and punish those within its ranks who oversaw the illegalities and the irregularities in the August 8 presidential election.

Speaking in Kajiado County on September 10, Raila said his team was ready for the October 17 (that's the initial date the IEBC gave) repeat presidential polls but insisted that they must be managed by a different team from the one accused of bungling the previous election. Later he started the anti-polls campaign under the mantra, "No reforms, No elections".

One of the ways we have attempted to seek solutions to the issues facing Kenya, such as ethnic violence, marginalisation, electoral injustice, corruption and historical injustices, has been through commissions of inquiry. What became of them? Were they not effective or is it that their recommendations have not been taken seriously?

What changed? Kenya was in uncharted waters and the power struggle was escalating. Mistrust got to unmanageable levels. For Jubilee, President Uhuru Kenyatta's party, it was not possible to get "meat from their mouth".

Raila's camp felt that without changes in the IEBC, the repeat polls would be rigged anyway. So why participate with a predetermined winner? The drama escalated when Raila withdrew his candidature from the repeat 26 October polls on October 10.

Why not use commissions of inquiry recommendations to solve the country's problems? This was the Big Question in various platforms, especially on television talk shows, until the now much-talked about handshake between Uhuru and Raila on March 9 at the former's Harambee House office.

But it is irritating because it ignores that we, as a country, have on several occasions asked ourselves this question and sought an answer to it through commissions of inquiry. Secondly, the assumption that all is well because the two leaders came together without a well structured dialogue framework does not help in solving the underlying issues.

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### **Commissions of inquiry in Kenya**

Commissions of inquiry are ad hoc advisory bodies set up by the government to obtain information. In their work, they are expected to assess the facts and make recommendations to the government. Their primary function is to inform governments. They have been classified into two groups — based on the methods used to ascertain the facts. The first category of commissions are those charged with gathering information for policy formulation or review or to assess the functionality of a public entity. These are investigatory inquiries, and they play the same function as a researcher. Examples include the 1998 Commission of Inquiry into the Education System of Kenya, chaired by Davy Koech, which investigated the appropriateness of Kenya's education system.

According to a report by journalist Dennis Onsaringo of the *Standard* last year, Oyugi was the mastermind of Ouko's murder. "He was the trigger man, but the PS was not working alone," he quotes Troon, who when asked whether the then president, Daniel arap Moi, knew who killed Ouko, quipped: "He is the president and his foreign affairs minister is murdered. What do you think?"

The second category comprises those charged with ascertaining the facts of a particular matter or question. They are inquisitorial inquiries. They investigate facts surrounding allegations of wrongdoing. The inquiry into the conduct of Justice Philip Tunoi, which didn't conclude after he resigned, is a good example.

The Commissions of Inquiry Act guides the establishment of commissions of inquiry. Based on this

law, the President can, whenever he considers it advisable, appoint a commission to inquire into the conduct of any individual, institution or matter.

However, it is important to note that despite the Commissions of Inquiry Amendment Act (2009) and the fact that the President appoints tribunals and commissions of inquiry, the former don't present their findings to Parliament. For example, a tribunal investigating Justice Joseph Mutava directly recommended to President Uhuru Kenyatta that the judge be removed from office for misconduct.

The Commissions of Inquiry Amendment (2009), which gives oversight authority over these commissions to the National Assembly, states: "It shall be the duty of a commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and on completion of the inquiry, to report to the President and to the National Assembly, in writing, the result of the inquiry and the reasons for the conclusions arrived at."

The key words I pick from this amendment are "full, faithful and impartial inquiry". These are the adjectives that the National Assembly bound the commissions of inquiry with. Surprisingly, if we go by past reports, the same does not apply to Parliament in pushing for their implementation, even after this amendment.

The mover of the amendment Bill, John Olago Aluoch, the then Kisumu Town MP, noted that in the history of our country, numerous inquiries had been commissioned by the President under the provisions of Section 3 of Commissions of Inquiry Act, and based on Section 7 of that Act, the reports were presented to the President. As a result — certainly due to vested interests — the contents of these reports and their proposals have for decades remained unknown to the public. This is despite the fact that these inquiries were constituted to probe matters that were public in nature, in the "interest of the public" and funded by taxpayers' money.

In his support for the aforementioned amendment of Section 7 of the Commissions of Inquiry Act in June 2010, Budalang'i MP Ababu Namwamba said, "When you look at the history of these commissions, you see wastage of funds to the extent that you get a sneaky feeling that some of them may have been set up for no reason other than to act as cash cows."

So, to ensure transparency of the commissions, and to fix this anomaly, Aluoch proposed the amendment to the aforementioned Section 7 that the reports be submitted to Parliament too, where they would be debated by the people's representatives. However, we still haven't seen much change with regards to pushing for its implementation. On the contrary, in some cases, MPs have taken sides on whether to debate a report. For example, when it came to the Truth Justice and Reconciliation Commission (TJRC) Report, legislators took political sides report is yet to be debated, despite numerous attempts.

Some of the important commissions of inquiry that have been set up over the years include: the Kenya Maize Commission; the Commission on the Law of Marriage and Divorce; the Commission of Inquiry on the Law of Insurance, popularly known as the Hancock Commission; the Judicial Commission Appointed to Inquire into allegations involving Charles Njonjo; the Ouko Commission of Inquiry (1990-91); the Akiwumi Commission into Ethnic Violence; the Judicial Commission of Inquiry into the Goldenberg Affair; the Commission on Higher Education, also known as the David Koech Commission; the Commission of Inquiry into the Land Law Systems of Kenya (Njonjo Land

Commission) and the Commission of Inquiry on Post-Election Violence (Waki Commission). We also had the Krigler Commission, the Inquiry into the Death of Former Cabinet Minister George Saitoti and the Truth Justice and Reconciliation Commission, which examined historical injustices in Kenya since independence and came up with recommendations on how they might be addressed.

### **Commissions of inquiry in other countries**

#### **SOUTH AFRICA**

Between 1995 and 2002, South Africa's Truth and Reconciliation Commission looked into crimes committed during the apartheid regime and made its report public. The commission investigated gross human rights violations that were perpetrated by the state and its agencies between 1960 and 1994, including abductions, killings, and torture. The TRC had an annual budget of \$18 million. According to the United States Institute of Peace, the report was fully endorsed by the government. President Nelson Mandela apologised to all the victims on behalf of the state. And in 2006, the government established an agency to monitor the implementation of the TRC's recommendations, especially on reparations and exhumations. Challenges in reparation, however, persist to date.

#### **ENGLAND**

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

However, Tor Butler-Cole, in her 2004 article in the *Telegraph*, says that the excessive costs and the lengthy durations of public inquiries are the arguments most commonly cited against them. The Bristol Royal Infirmary Inquiry, for example, cost an estimated £14 million, the BSE Inquiry around £27 million.

However, Butler-Cole argues that the economic costs of a public inquiry can be overlooked if the inquiry brings about catharsis, confidence and knowledge. "It has been argued that despite these good intentions, public inquiries do not in fact lead to improvements: There are few formal mechanisms for following up the findings and recommendations of inquiries. Many of the problems identified by inquiries are cultural and demand changes in attitudes, values, beliefs, and behaviours which are difficult to prescribe in any set of recommendations."

### **Commissions are not always about uncovering the truth**

The Ouko Commission of Inquiry was formed to establish the truth behind the brutal murder of Kenya's Foreign Affairs Minister Robert Ouko on February 13, 1990. The murder case, perhaps the most intriguing in Kenyan history, remained unsolved after the commission was disbanded midstream. A second attempt into the probe in 2010 didn't do any better after the report was rejected by Parliament on the grounds of "a lack of unity, and disagreements within the committee".

An examination of past inquiries - how they were conducted or wound up and how their contents were hidden - points to the fact that commissions of inquiry are often used as tools by the government to create an impression that it cares when it doesn't. The intention is to use the commission as a cover-up so that people can "forget and move on".

In his report, the lead investigator John Troon from Scotland Yard said that Dr. Ouko's murder was triggered and actualised by a corruption report he was compiling, in which prominent people,

including cabinet ministers, were adversely implicated. He handed over the report to the government. Interestingly, the key suspect in the murder was Internal Security Permanent Secretary Hezekiah Oyugi.

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How then did we expect such a commission to produce anything? Was it, in fact, a cover up?

The story of the Parliamentary Select Committee investigating the murder of former Nyandarua North MP JM Kariuki, paints a clearer picture. The Committee's report implicated the Interior Security Minister Mbiyu Koinange, senior police officers, the Director of CID Ignatius Iriga Nderi, the head of the General Service Unit Ben Gethi, Arthur Wanyoike Thungu (President Jomo Kenyatta's most trusted bodyguard), Patrick Shaw and senior administrative officers and politicians. According to Charse Honsby's *Kenya: A History Since Independence*, Nderi refused to cooperate, and Koinange declined to respond to the committee's summons. Waruhiu Itote, Kenyatta's intelligence adviser, who also headed the National Youth Service, threatened to shoot anyone who summoned him to testify.

None of the people mentioned in the Committee's report were investigated or punished.

A colleague of mine, who is also a veteran journalist, told me the story of what actually happened. Upon completion of the hearings and compilation of the report, Elijah Mwangale, who headed the Parliamentary Select Committee, accompanied by Starehe MP Charles Rubia and Lurambi North MP Buridi Nabwera, took a copy of the document wrapped in the national flag to President Kenyatta at State House. They took photos and proceeded inside to discuss "the damn thing", as Kenyatta called it, before tabling it in Parliament that afternoon. Rubia recounts the President saying, "If you include my bodyguard Wanyoike Thungu, and you include my Minister of State, Mbiyu Koinange, why don't you include me there as well?"

The Big Man was obviously not happy that his men were mentioned, and that clearly pointed at who then was behind the murder of JM. (Mbiyu Koinange had adversely been mentioned in the committee's hearings.)

"But, sorry Mr. President, your minister has been mentioned because of what we have heard. But what can we do as a committee now?" said.

"Alright, if you can remove my minister's name from that list, you can publish the damn thing!" responded the president.

And that's how the 38-page committee report was doctored.

The government still maintains the case is still open and that any Kenyan who might have more information can produce it. But justice delayed is justice denied, and for the family of JM, and many other Kenyans who have been affected by unresolved injustices, that remains the case.

The Commission of Inquiry on the Law of Insurance, also known as the Hancox Commission, was established in October 1986 by President Daniel arap Moi to look into the insurance industry. Its only member was Justice Allan Robin Winston Hancox, assisted by Mary Ang'awa, who is now a judge. It was never made public, and instead, was reportedly released to select insurance stakeholders. This certainly informs why the sector is captured by selected individuals/institutions.

Hancox was later appointed Chief Justice in 1989. (Moi has interests in the industry, among other sectors.)

Despite President Uhuru having received the 2,200-page TJRC report as soon as he assumed office during his first term, he is yet to officially make it public - although he did make a blanket apology during his State of the Nation address in March 2015, which was a key recommendation of the TJRC. The Judiciary also apologised. However, this apology did not extend to state security agencies that have continued to commit atrocities through brutality and killings, as we saw in the 2017 electioneering period.

In his support for the aforementioned amendment of Section 7 of the Commissions of Inquiry Act in June 2010, Budalang'i MP Ababu Namwamba said, "When you look at the history of these commissions, you see wastage of funds to the extent that you get a sneaky feeling that some of them may have been set up for no reason other than to act as cash cows."

A lot of financing goes into the establishment and running of these commissions. Although this writer was not able to access the figures at the State Law Office, you would need a considerably large amount of money for transport, security, administration support for commissioners, salaries, allowances and oversight of investigations.

The commissioners and the chairman are ostensibly paid huge salaries so that they are "not easy to bribe". Well, it could be that the salary itself acts as a form of bribery to cover up the very matter under investigation. As Pravin Bowry, an expert in court procedures and rules of evidence, noted in his "*An Inquiry into Commissions of Inquiry*" article in the *Standard* on January 13, 2010, often, commissions have been used to sideline and sidestep political issues and to defuse situations. "The elongation of proceedings always hurts the country. In contrast, in a commission of inquiry recently in England, thousands of relevant documents were posted on the Internet for the concerned and interested parties to peruse and make written observations and the inquiry was concluded within a month or so," he wrote.

An examination of past inquiries - how they were conducted or wound up and how their contents were hidden - points to the fact that commissions of inquiry are often used as tools by the government to create an impression that it cares when it doesn't. The intention is to use the commission as a cover-up so that people can "forget and move on". It has now become a cliché that these reports have not been implemented because of lack of political will. But do we really expect governments to find evidence against itself (it is the President who forms these commissions) and take itself to jail?

This is probably why Deputy President William Ruto, speaking at a rally in Mariakani, Kilifi County in July 2017, had the guts to say that the Jubilee government would not implement the Truth, Justice and Reconciliation Commission's recommendations because they would divide Kenyans by "re-opening old wounds". The TJRC, it is important to note, was established in the aftermath of the 2007-08 post-election violence and was tasked with inquiring into gross violations of human rights and historical injustices that occurred in Kenya between independence on December 12, 1963 and the date when the National Accord signed on February 28, 2008.

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have continued to commit atrocities through brutality and killings, as we saw in the 2017 electioneering period. Various agencies have relentlessly urged the president to make the report public and to effect its recommendations in the interest of promoting peace, justice and reconciliation.

The Krigler Commission, which was chaired by the South African judge Johann Krigler, made a raft of recommendations that included the setting up of an independent agency to manage elections and an integrated and secure tallying and data transmission system to allow computerised data entry and tallying at the constituency level. These were quite progressive recommendations, which we saw being undone by Parliament just before the August 8 general election and soon after the nullification of the presidential election. Krigler also warned against “too many electoral laws” that are too cumbersome to enforce and which allow for scapegoating.

The key to these recommendations was the implementation of Agenda Four of the National Accord, which was expected to look into long-term measures and solutions, such as constitutional, institutional and legal reforms, land reform, poverty and inequity, unemployment, particularly among the youth, consolidating national cohesion and unity, transparency and accountability and addressing impunity.

Just how independent is the Independent Electoral and Boundaries Commission? The Krigler report recommended that the electoral commissioner be non-partisan. However, the accounts of former Commissioner Roselyn Akombe and Chairman Wafula Chebukati in the run-up to the October 26 repeat election that some commissioners voted against certain decisions along partisan lines suggest otherwise.

The recommendation that Kenya should have an integrated and secure tallying and data transmission system wasn't really adhered to at the execution stage, and this was the basis of the August 8 election petition, which the opposition won. Even before the repeat polls, Parliament, with a Jubilee majority, amended this provision in the Electoral Laws Act.

The Ndung'u Land Commission's findings were aimed at reversing unlawful land-related actions and ensuring land reform through creating an enabling policy and legal framework. At the heart of the commission's report was the recommendation that all titles for illegally acquired land be cancelled and that such land be repossessed. How well or badly this was done is another story.

The report recommended that the plethora of provisions against the involvement of public servants in elections be consolidated into one provision in the consolidated electoral law that would also bar the use of any public financial and material resources by the candidates. Despite that having been done on paper, the government went ahead to use public resources and even intimidated chiefs in the Eastern region for not campaigning for the ruling party and threatened to revisit this if or when they won the elections. The government also used state resources to run commercials during the campaign period in blatant abuse of the law.

We also had the Akiwumi Commission that was to probe the tribal clashes since 1991 with a view to establishing the immediate and underlying causes of such clashes, action taken by the police and other law enforcement agencies with respect to any incidents of crime arising out of or committed in the course of the said tribal clashes, and where such action was inadequate or insufficient, the reasons for and the level of preparedness and the effectiveness of law enforcement agencies in controlling the said tribal clashes and in preventing the occurrence of such clashes in future. The

report was made public in 2002. It recommended that a number of politicians, local administration officials, and security and police officers to be investigated over their alleged roles in the clashes, which led to the deaths of more than 800 people and the displacement of some 130,000 between 1991 and 1994, according to the Commission. These recommendations were not acted on and so the country blew up in 2007/08.

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The Ndungu Commission made a far-reaching series of findings, which, if effected, could sort out the protracted land question. The findings ascribed responsibility for established wrongdoing to a number of individuals. It also made a series of recommendations intended to correct the wrongdoing; key among them was the proposal to have a task force consisting of specialists in land administration advising the Ministry of Lands on the revocation of illegally registered titles, repossession of land, measures to be taken regarding claims filed in courts, information retrieval systems for multiple purposes and the verification of registered titles. It is imperative in this regard to evaluate how the National Land Commission can better handle these functions.

These commissions clearly represent where we are and provides an answer to the question: "Which way forward for Kenya?"

As it appears, commissions of inquiry have not been successful in solving political problems in Kenya. Why so? Lack of political will. This is despite their findings, which, if incorporated in decision-making, could curb some of the problems this nation faces. The government should go back to these reports and implement their recommendations in the interest of the country.

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