

AN INQUIRY INTO COMMISSIONS OF INQUIRY

A Case Study of the Bosire Commission of Inquiry in Kenya

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Abstract

While governments have often established commissions of inquiry to respond to issues of public concern, critics have questioned their policy relevance. After assuming office in 2002, the Government of Kenya established commissions of inquiry to investigate into allegations of grand corruption cases associated with the previous regime. This was part of the Government's anti-corruption reform agenda. This study evaluates the extent to which these commissions have contributed to that agenda. The Bosire Inquiry is selected as a case study. An integrated framework of evaluation is also developed. Measured against the seven criteria in the framework i.e. rationale, purpose, process, quality of findings, quality of recommendations, implementation, and value-addition impact criteria, the results are surprisingly in favour of the Bosire Inquiry. This is contrary to public perceptions perpetuated by the media. Finally, the study underscores the importance of political will, timing, clarity of procedure, promptness on reporting, and a limit to judicial interventions, as crucial in determining the efficacy of investigatory inquiries.

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Dedication

The genuine whistle-blowers

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List of Abbreviations

BBC	British Broadcasting Corporation
CBK	Central Bank of Kenya
GDP	Gross Domestic Product
GIL	Goldenberg International Limited
GNU	Government of National Unity
GoK	Government of Kenya
IMF	International Monetary Fund
IRI	International Republican Institute
KACA	Kenya Anti-Corruption Commission
KANU	Kenya African National Unity
KCK	Kituo Cha Katiba
KENDA	Kenya National Development Alliance
Kshs	Kenya Shillings
MARS Group	Media Analysis and Research Group
NARC	National Rainbow Coalition
PAC	Parliamentary Accounts Committee
PNU	Party of National Unity
PPS	Presidential Press Service
TORs	Terms of References

Chapter 1. Introduction

Governments have used commissions of inquiry as tools for policy change. Indeed, some major reforms in different sectors of government have been preceded by commissions of inquiry. But the controversy around the policy efficacy of these commissions is not new both in the literature and the *body politic* of policy-making. The aim of this study is to explore how and to what extent these commissions have contributed to the anti-corruption reform process in Kenya since 2002.

In 2002, Kenya overwhelmingly elected a new government, the National Rainbow Coalition (NARC), on a platform of reform. These reforms were meant to sweep across the political and economic spheres. According to the Government's Strategy Paper, the reforms would address issues of governance and particularly the corruption (International Monetary Fund [IMF] 2005). It pledged to redress past and prevent future corruption (Otieno 2005; Logan *et.al.* 2007).

Subsequently, the Government established two commissions of inquiry to investigate into allegations of high-level corruption linked to the previous regime, the Kenya African National Union (KANU) that had just been deposed. They included the Bosire¹ and the Ndung'u Commissions of Inquiry. The move gave the Government an overwhelming approval rating of 85% on how it was handling corruption (Afrobarometer 2006).

The two commissions completed their respective tasks and submitted reports to the president, but the question of their efficacy still lingers. On one end, there are assertions of unjustified expenses (*e.g.* Ochieng 2003).² Cumulatively, an estimated US\$5.5 million was expended on the commissions (*see* The East African 2006). The same sceptics have also decried the inquiries as the easiest way to cool public anger over scandals by the political class and

¹ Also known as the Goldenberg Commission of Inquiry.

² The initial estimated budget for the Bosire Inquiry was at US\$34.6 million; prompting calls for the premature disbandment of the Inquiry (Ochieng 2003).

rewarding political cronies (*e.g.* Ibid). But on the other end, the Government has not failed to refer to the work of these commissions as indicators of its commitment on anti-corruption reform (*e.g.* Government of Kenya [GoK] 2006).

However, no objective evaluation has been done at the policy level or in the literature to ascertain the contribution of these commissions to the reform agenda. Some authors have concentrated on describing the findings of the commissions (*e.g.* Warutere 2005; Southall 2005). Others merely highlight the inquiries among the many Government anti-corruption initiatives (*e.g.* Otieno 2005). And yet others concentrate on a single aspect of the inquiries. For example, Scher (2005) looks at the Bosire Inquiry from the perspective of recovery of assets acquired through corruption. Furthermore, most of these studies were conducted before or immediately after the respective reports were submitted to the president. Thus, there is a time lag limitation that results in methodological bias for carrying out a fair evaluation.

While these studies are an eye opener into the debate on the inquiries, they are limited in evaluative value. Therefore, this study shifts the discourse towards an objective and detailed evaluation of the inquiries. Implicit in this objective, is the development of an appropriate evaluation framework. Moreover, the study seeks to draw policy lessons on the value of using inquiries in policy processes in Kenya and elsewhere.

Four questions are relevant: (1) what is the role of commissions of inquiry in policy processes? (2) What criteria can be used to measure the efficacy of inquiries? (3) How and to what extent did the inquiries contribute to the anti-corruption agenda in Kenya? (4) What policy implications and remaining challenges emerge from the evaluation?

These questions reflect the broad issues that emerge in the literature on inquiries and anti-corruption reform. First, there is an old assertion that “commissions of inquiry are ventures into the unknown” (Marx 1936, p.1134). That assertion continues even today. Second, even

if inquiries play a significant role in policy processes, there is no agreed upon criteria of evaluating their impact (Gilligan 2002; Rowe and McAllister 2006; Tepper 2004). Finally, there is the dilemma as to why “most anticorruption drives and investigations fail” (Sunder 2005, p.420). These issues demonstrate the conceptual roadmap that the study will navigate to the end.

1.1 Definition

In the absence of a precise definition of commissions of inquiry, this study adopts a more generic definition that refers to commissions as official *ad hoc* advisory bodies set up by governments to investigate into or advise on a matter that is of public concern (Rowe and McAllister 2006; Prasser 2005; Sulitzeanu-Kenan 2006; Brunton 2005; Zegart 2004; Torgovnik 1980; Law Commission 2007; Söderblom 2001). The broad definition encompasses public inquiries, judicial commissions, independent commissions, royal commissions or presidential commissions (*e.g.* Zegart 2004; Sulzner 1971; Elliot McGuinness 2002; Rowe and McAllister 2006; Söderblom 2001). However, the definition excludes *ad hoc* bodies such as task forces, special advisory committees, parliamentary inquiries and standing commissions. Furthermore, the terms “inquiries” and “commissions” will be used interchangeably.

1.2 Methodology and Limitations

The study uses the Bosire Commission of Inquiry (also the “Inquiry” or “Commission”) as a case study. None of the literature mentioned above uses a case study method to provide “a rich analysis” and detailed examination of any of the inquiries (*see* Salminen *et.al.* 2006, p.5). The selection of the Bosire Inquiry is motivated by the fact that it remains to be the most prominent and continues to attract a lot of public attention (Otieno 2005). Further, at least three years have elapsed since the Inquiry completed its task; a sufficient period to track some

of its policy outcomes. Finally, because of its “political importance” (Salminen *et.al.* 2006, p.5), the Inquiry provides an opportunity to examine how changes in the political space and policy ideas over a span of more than a decade have shaped the path of anti-corruption reform in Kenya (*see* Kingdon 1995).

The framework of evaluation will be an *integrated* framework based on a synthesis of the different criteria scattered in the literature. The limitation with using the framework is that it anticipates the long-term *impact* of inquiries which may not have been realised in *actual* terms. This is partly because the Inquiry itself is fairly recent, and partly because of the limitation of time and costs for carrying an out extensive study. However, the study adopts the *potential* impact as a complementary dimension to complement the *actual* impact (*see also* Browne 2007).

Document analysis is the main instrumentation. As such, the Bosire Report, other official documents and media reports were relevant. Unstructured elite interviews were also used for triangulation; providing second opinions and clarifications on positions that were ambiguous from the main data source.

1.3 Thesis Structure

What follows are the four main chapters of the thesis. Chapter two introduces both the conceptual aspects of inquiries and a literature review on their role in policy-making. Chapter three develops an integrated evaluation framework for purposes of the study. Chapter four presents and analyses the empirical findings on the case study using the integrated framework. Finally, the fifth chapter offers general conclusions, policy implications and challenges for further work arising from the study.

Chapter 2. Commissions of Inquiry and the Policy Process

It was pointed out that commissions of inquiry are official *ad hoc* advisory bodies set up by governments to investigate into or to advise on a matter that is of public concern. Originating from the British legal system in the 11th Century, commissions of inquiry have traversed and now are a common phenomenon in English former colonies and other democracies (see Fitzgerald 2001; Frankel 1999). Their spread is attributed to emerging challenges in managing complex systems in the social, economic and political spheres since the last century or so (Elliot and McGuinness 2002; Marx 1936; Frankel 1999; Rowe and McAllister 2006).

But why are inquiries ‘special’? What is their relevance in policy-making? On the former question, there is some unanimity in the literature on the basic tenets of inquiries. However, on the latter, the debate is much polarised. This chapter will review the literature on the nature of commissions and their role in policy processes.

2.1 Nature of Commissions of Inquiry

Normatively, commissions are created in response to controversy over a matter of public concern such as crisis, disaster, scandals, and when the ordinary administrative system is unable to address the issues effectively (Sulitzeanu-Kenan 2006; Elliot and McGuinness 2002; Fitzgerald 2001; Prasser 2005; Gilligan 2002; Salter 2003; Gosnell 1934). The preference for commissions is premised on the belief that they are apolitical, independent and impartial, hence, credible in executing their respective mandates (Elliot and McGuinness 2002; Söderblom 2001).

As extra-ordinary policy instruments, they are not part of the existing structures of government (Marchildon 2001; Gilligan 2002; Sulitzeanu-Kenan 2006). However, where the appointing authority prefers “a tight grip” on an inquiry for its own political legitimacy, that independence has been questioned (Boin *et. al.* 2006; Gilligan 2002). In fact, the New

Zealand Law Commission (2007) concludes that there is no official independence of inquiries as such other than the fact that they conduct their work independently.

Elliot and McGuiness (2002) also identify several biases that counter the assertion of impartiality of inquiries. For example, they point out existence of bias in the “political nature” of their appointment and “professional background of appointees;” bias in favour of quasi-judicial processes; bias in the “scope” of what should be investigated or not; bias in the “underlying purpose” of the inquiry; and, bias in the choice whether to implement recommendations or not (Elliot and McGuiness 2002, p. 16-21; Turner 1976). Although these biases exist, the emphasis should be placed on the presumed impartiality and not the actual, because the latter is not realistic.

Commissions also derive their credibility from the prestige status of their membership (Law Commission 2006; Gosnell 1934). As a result, their findings are potentially treated and supported as such (Hanser 1965; Sulitzeanu-Kenan 2006). Commending on the British royal commissions, Gosnell (1934) notes that men appointed to these commissions are distinguished fellows who “take them seriously” (p.87). That does not imply that the appointing authority will concede to whatever findings these commissions make.

In addition, inquiries discharge their mandate based on prescribed terms of reference (TORs) (Söderblom 2001; Gosnell 1934). The scope of the TORs may determine the nature of the findings (Elliot and McGuiness 2002). There are cases where inquiries have been challenged for overstepping their mandate or being superficial, perhaps because their TORs were too broad or too narrow (Marchildon 2001; Neill 1988; Gosnell 1934).

The procedure adopted by inquiries may vary but most of them will conduct their business in public (Law Commission 2007). The public nature of the process also adds credibility to the work of these commissions. While this may be so, the appointing authority is not under any

obligation to make the findings public, leave alone implementation (Centa and Macklem 2003; Law Commission 2007; Elliot and McGuinness 2002). It does not suggest, though, that the findings are never made public.

In conclusion, commissions are extra-ordinary official instruments whose utility is dependent on their credibility to carry out their functions objectively. This is due to their presumed independence and impartiality, prestige status of their membership and the public nature of the procedure in carrying out their prescribed mandate.

2.2 The Role of Commissions of Inquiry

Commenting on commissions, Zegart (2004) concludes that they are “better known than understood” (p. 389). It is not easy to find consensus on the role of commissions in policy-making. Also noticeable in the literature is that perceptions on commissions have more or less remained static in principle. A better approach is to review works that have attempted to classify the functions of commissions in systematic way.

Early writers such as Clokie and Robison (1937) observed that commissions perform the following specific functions: the formulation of legislative policy; inquiring into the activities of the administrative departments; and inquiring into social conditions. Although they also noted that commissions would be used for political ends, their emphasis was on the three normative functions of inquiries. This is a narrow perspective of the reality of inquiries (*see* Gilligan 2002). Later, other scholars have attempted to develop more inclusive frameworks.

To begin with, Sulzner (1971) categorised functions of commissions broadly into “problem-solving” functions, “because they seek affirmative solutions to problems,” and “conflict-management” functions, “because they are directed toward ameliorating the effects of problems” (p.439).” Subsequently, he identified three specific functions falling within the two categories to include formulation, support mobilisation and pacification functions.

On *policy formulation*, Sulzner observes that commissions generate useful data that guide decision-makers and serve as points of departure for policy action. This is a normative role that is widely accepted (*see* Frankel 1999; Gosnell 1934; Elliot and McGuiness 2002; McCamus 2003; Torgovnik 1980, p. 36; Salter 2003; Tepper 2004; Zegart 2004; Luck 2000).

The *Support mobilisation* function entails building consensus among key stakeholders. Commissions are “vital factors in the support-mobilization process that is intimately connected with the development of incremental policy and is basic to conflict-management” (Sulzner 1971, p.445). In such cases, a government may seek legitimisation of its pre-determined policy for its own political ends (*see* Gilligan 2002; Frankel 1999).

Lastly, Sulzner borrows from Murray Elderman (1964 cited in Sulzner 1971, p.445-446) the idea of *political pacification* in which he notes that inquiries can be used as a symbol of official concern (*also* Elliot and McGuiness 2002). Apparently, pacification may include what others have identified as: passing responsibility; forestalling criticisms; allocating blame to past regimes or the opposition; distracting attention; or just delaying a policy decision; seeking closure on an issue (*e.g.* Clokie and Robinson 1934; Frankel 1919; Centa and Macklem 2003; Sulitzeanu-Kenan 2006; Gilligan 2002; Elliot and McGuiness 2002).

Recently, Zegart (2004) has identified three functions of commissions falling either in the proactive or reactive form. First, there is the proactive *agenda setting function* in which the appointing authority seeks to draw attention and public support for its new policy. In the reactive agenda-setting, the government seeks “to control political damage, defuse the issue to allow political passions to cool, deflect blame, or provide some sort of official administration response when the public demands it” (Zegart 2004, p. 375).

Second, Zegart identifies *information commissions* as those that seek to provide information to policy-makers. A proactive information commission is meant to generate new information

on a policy problem. Accordingly, “these commissions are meant to get in front of a policy problem, anticipating future developments and possible responses” (Zegart 2004, p.376). In their reactive form, information commissions are meant to assess what went wrong, investigate past policy failures and make recommendation for the future (Zegart 2004). Thus, they facilitate policy learning to forestall similar problems in future (*also* Sulitzeanu-Kenan 2006; Centa and Macklem 2003; Elliot and McGuinness 2002).

Zegart’s third category is what he calls *political constellation* commissions. The aim of these commissions is to deal with political opposition by fostering “consensus, compromise and cooperation on a policy domain” (Zegart 2004, p. 376). He however does not develop a substantive distinction between the proactive and reactive political constellation commissions but notes that they are aimed at breaking through log-jams (Ibid).

Clearly, from both Zegart and Sulzner one can see two factors that drive the appointment of commissions: their policy relevance to the issue at hand; and, political instrumentation motive (*see* Gilligan 2002). There are a lot of similarities between the two authors and they are differentiated only by their conceptual orientation. However, Zegart creates an impression that the functions are mutually exclusive. As correctly observed by Sulzner, that is not always the case. In the end, the two authors complement each other.

Lastly, Salter (2003) sees inquiries as vehicles for: truth-seeking; justice-seeking; policy-seeking; and, value-debate. *Truth-seeking* inquiries are interested in the truth of an event and it does not matter whether the recommendations are adopted or not. *Justice-seeking* inquiries are concerned with “identifying points of wrong-doing, dispute resolution and dealing with interest group conflicts” (Salter 2003, p. 194). Inherent in the justice-seeking venture, is the creation of “winners and losers” and the possibility that “systemic problems” may never be addressed (Ibid, 195). *Policy-making* inquiries are those expected to make recommendations

on an issue under investigation. Lastly, the *value-debate* inquiries seek to initiate debate on general principles where unsolicited evidence from various interests is taken up.

It is not immediately clear from Salter's classification whether these roles are mutually exclusive or interrelated. It is quite unlikely that commissions are established for just one of these roles. Further, unlike Sulzner and Zegart, Salter does not make the political motivation obvious. It appears that he is also interested in the normative role and considers conflicting interests as part and parcel of the inquiry process.

Some literature have also emphasised the point that inquiries transcend the political process into the social sphere to influence social behaviour generally (*e.g.* Le Dain 1973 cited in Brunton 2005). As such, inquiries can be used to transform public perceptions and attitudes on issues (Centa and Macklem 2003); to act as cathartic to victims of disaster (Peay 1996); to engender a sense of public contribution to solutions through public participation (Brunton 2005); and as ideological vehicles for power ascendancy (*see* Frankel 1999, p.20). Notice that the social function of inquiries can only be discerned constructively and comes out as an *indirect* role as opposed to the direct role. Further, while it is closely related to political instrumentation role, the latter can be deliberate while the former results in the cause.

All these authors provide salient information on the role of inquiries in the body politic of policy-making. In summing up, the New Zealand Law Commission (2007) lists the role of inquiries as follows: establishing the facts; learning from events; catharsis or therapeutic exposure of victims; public reassurance; accountability, blame, and retribution; political considerations. The authors also demonstrate how the perceptions about inquiries have not changed much over the years.

To this end, this study contends that inquiries can be catalysts for policy change. But they are also not immune from the policy dilemmas resulting from the problems and political

environment in which they occur. As a result, the issue of their efficacy in the desired policy area must be examined. It is within this context that the study ventures into evaluating the Kenyan commissions of inquiry on anti-corruption and to identify the scope of their contribution to the reform agenda. To do so, the study will develop an appropriate evaluation framework.

2.3 Conclusion

This chapter considered critical literature on the nature and role of commissions of inquiry in policy-making. It is apparent that while commissions can be catalysts for change, their establishment can be motivated by political interests. Thus, the debate on their efficacy will keep coming. But for purposes of this study, the next chapter will develop an evaluation framework to be used in examining the policy relevance of the commission of inquiry selected for this study.

Chapter 3. A Framework of Evaluation

Some have conceded that it would not be appropriate to prescribe a yardstick for measuring the efficacy of inquiries (Campbell 2003). On the contrary, this study contends that it is actually possible to develop an overarching evaluation framework for inquiries. This chapter endeavours to develop an integrated framework of evaluation based on existing criteria scattered in the literature. First, three broad criteria: implementation, function and quality of output criteria are reviewed. Second, the chapter generates seven criteria based on a sequential logic from the pre-inquiry to post-inquiry phases.

3.1 Evaluating Commissions of Inquiry

3.1.1 Function Criterion

Based on his typology, Zegart (2004) proposes that commissions should be judged on whether they perform their intended functions or not. He does not however proceed to test his suggestion. Nonetheless, his proposal is plausible if one is able to identify the function of the inquiry beforehand. While some functions of inquiries are expressed in the terms of reference, the underlying functions such as deflecting blame or diffusing the problem are not easily determined. In spite of these limitations, the function criterion is useful and will be modified accordingly to suit the purpose of this study.

3.1.2 Quality of Output Criterion

According to this criterion, the success of a commission of inquiry is dependent on the quality of its report and recommendations. Some suggest that a good report is one that can be traced in public debates; results in new legislations and institutions; receives widespread public recognition and acceptance; withstands scrutiny; and cause substantive policy changes (Tepper 2004; Parker and Dekker 2008). But does one arrive at such an outcome?

A number of factors may be taken into consideration. First, it is the nature of the recommendations and their political feasibility (Tepper 2004; Torgovnik 1980). The recommendations must be specific, based on credible information, relevant to the problem, and able to meet the practical needs of policy-makers (Ibid). Both Tepper (2004) and Torgovnik (1980) stress that politically feasible recommendations are those that seek incremental changes as opposed to major changes. It is however, argued here that political feasibility should not be the only dimension. Feasibility in terms of cost of the proposals must be considered (*see* Gosnell 1934; Glazer 2003). Furthermore, pursuing politically feasible recommendations alone may raise questions on a commission's credibility. Therefore, a commission must be able to distinguish political feasibility from pure political interests.

Justice Campbell (2003) considers the following as relevant considerations for a good report: whether the report gives to the public significant facts; whether it identifies the significant issues; whether it covers all problems; whether the recommendations are doable and whether they would prevent a similar problem; and whether the report is complete, clear and fair. In principle, the list is more comprehensive when considering the quality of the output, but it could also be improved.

3.1.3 Implementation Criterion

Implementation of recommendations may be in the form of new legislations, institutions, sanctions or any other policy action by the government (Brunton 2005; Gosnell 1934). Commissions must be conscious on how they interpret and formulate proposals because it has a bearing on the chances of implementation (Torgovnik 1980).

Critics will point out failure where recommendations are not implemented immediately or in actual terms. Although important, focusing on immediate implementation may misrepresent an inquiry (Brunton 2005). Failure to focus on the long-range tangible effects of commissions may undermine their valuable contribution in the policy process (Sulzner 1971; Gosnell 193;

Rowe and McAllister 2006). The re-emergence of the issues addressed by the inquiry on the political agenda confirms the longer-term value of inquiries (Rowe and McAllister 2006; Tepper 2004; Wolanin 1975).

Another issue is whether ‘implementation’ refers to the letter or the spirit of the recommendation (Brunton 2005). In certain cases, policy-makers have implemented recommendations far beyond those proposed by a commission while in others only the form and not the substance have been implemented (Ibid). In the former case, one is inclined to conclude that the inquiry was of significant value more than in the latter.

Moreover, all recommendations are not equal, and therefore cannot be judged equally (Brunton 2005). Rejection of the most important recommendations may render the whole exercise irrelevant (Rowe and McAllister 2006). As a result, “a simple count of recommendations accepted would not accurately reflect the situations” (ibid, p. 109).

The following questions emerge from the analysis of this criterion: how many recommendations are implemented? Are they implemented in form or substance? Are those implemented the most salient or less salient? What is their long-term value-addition impact? Even so, none of the authors have applied the criterion by taking all these dimensions into consideration.

Although the three main criteria have been suggested in the literature, they have not been consolidated into a single framework. An integrated and comprehensive framework is therefore proposed under part 3.2.

3.2 An Integrated Evaluation Framework

The integrated framework is conceptualised from a sequential perspective. It takes the pre-inquiry, inquiry and post-inquiry phases, as the roadmap that defines the scope of the

evaluation. The relevant criteria and corresponding dimensions (sub-criteria) are identified at each phase.

3.2.1 Pre-inquiry phase

In the pre-inquiry phase, the main criterion is the *rationale* for the inquiry. It is one way of determining the intended purpose of the inquiry. As such, instrumental factors leading to the establishment of an inquiry are assessed.

Accordingly, Kingdon's (1995) model of agenda-setting is useful in determining the need for an inquiry. He argues that agenda-setting is an interaction of three streams: problems, policy and politics. In the problem stream, issues are so identified based on indicators, feedback or crisis. The policy stream entails policy ideas that often float around. Finally, the political stream constitutes changes in government, national mood or organised political forces. It is the confluence of at least two of the streams that policy windows open for an issue to be on the agenda (*also* Tepper 2004). By adopting this model, it is easier to establish the specific factors that justify the need for an inquiry.

3.2.2 Inquiry Phase

In this phase, four criteria are proposed: the purpose, process, quality of the findings and recommendations. First, the *purpose* of the inquiry is expressed in the TORs; thus, its mandate. The scope and content of the TORs should be relevant to the rationale.³ They should not be too broad or narrow (*see* Elliot and McGuinness 2002).

Second, the *process* criterion is important in evaluation because it can determine the end results of an inquiry. The criterion entails issues of representation, public participation and access to information, quality of the testimony received and the atmosphere through which the inquiry was conducted (Zegart 2004; Law Commission 2007; Mansbridge *et.al.* 2006). These

³ Relevance is defined as the degree to which an intervention has the potential of meeting its objectives; whether intervention sufficiently addresses the problem in question (*see* Hatcher and Shah 2000)

dimensions engender values such as attitude change, consensus-building, democracy and accountability, and determining the quality of outputs, among others (e.g. Zegart 2004; Law Commission 2007; Sulzner 1971; Mansbridge *et.al.* 2006).

The *quality of findings* and *quality of recommendations* criteria are based on the quality of output criteria already discussed in 3.1.2. The important dimensions are: relevance including adequacy; credibility; clarity and non-ambiguousness; political support, feasibility (politically and cost); and potential impact (incremental or major changes) (*see* Parker and Dekker 2008; Tepper 2004; Torgovnik 1980; Campbell 2003; Gosnell 1934; Glazer 2003).

3.2.3 Post-inquiry Phase

In the post-inquiry phase, the concern is on the impact of the inquiry where the *implementation* and the *value-addition impact* criteria are used. As for the implementation criterion, the key dimensions are those already identified in 3.1.3. They include: what proposals are implemented? Are they implemented in form or substance? Are they the most salient or not? It should be pointed out here that implementation has much to do with the appointing authority than an inquiry. But if recommendations are implemented, credit goes to the inquiry. Therefore, it is plausible to consider implementation as an indicator for success or failure of the inquiry.

The *value-addition impact* criterion incorporates the broad and longer-term influence of inquiries (Rowe and McAllister 2006). It is also based on what was referred to in chapter two as the social or indirect influence of inquiries. The sub-criteria include changes in behaviour and attitudes (Centa and Macklem 2003); emergence of new knowledge and advocacy coalitions (Lindquist 2001; Tepper 2004); engendering social values such as democracy and accountability (Law Commission 2007; Centa and Macklem 2003); and recurrence of the public debate on issue (Rowe and McAllister 2006; Tepper 2004; Tutchings 1979; Miller and McKinney 1993; Marx 1934). Some of these impacts are hard to measure in the short term.

Therefore, where appropriate, the framework will adopt *potential* impact to complement *actual* impact dimension (*see also* Browne 2007).

In sum, seven criteria have been identified: rationale; purpose; process; quality of the findings; quality of the recommendations; implementation; and, value-addition impact criteria. See **Table 1**.

Table 1: An Integrated Evaluation Framework

PHASE	CRITERION	SUB-CRITERION	EVALUATION QUESTION
Pre-inquiry	Rationale	<ul style="list-style-type: none"> • <i>Problem stream</i> • <i>Policy stream</i> • <i>Political stream</i> 	<ul style="list-style-type: none"> • <i>Why the need for an inquiry?</i>
Inquiry	Purpose	<ul style="list-style-type: none"> • <i>Mandate</i> • <i>Relevance</i> 	<ul style="list-style-type: none"> • <i>What was the mandate?</i> • <i>Were TORs relevant?</i>
	Process	<ul style="list-style-type: none"> • <i>Representation</i> • <i>Participation/accessibility</i> • <i>Testimony</i> • <i>Atmosphere</i> 	<ul style="list-style-type: none"> • <i>Were all interests represented?</i> • <i>Was there public participation/access?</i> • <i>Was relevant testimony received?</i> • <i>Was the atmosphere conducive?</i>
	Quality: findings	<ul style="list-style-type: none"> • <i>Relevance/adequacy</i> • <i>Political support</i> • <i>Credibility</i> 	<ul style="list-style-type: none"> • <i>Were they relevant to the issues?</i> • <i>Were they received and accepted widely?</i> • <i>Did they receive wide recognition and acceptance?</i> • <i>Did they withstand scrutiny?</i>
	Quality: Recommendations	<ul style="list-style-type: none"> • <i>Relevance</i> • <i>Clarity</i> • <i>Potential impact</i> • <i>Feasibility – cost/political</i> 	<ul style="list-style-type: none"> • <i>Are they relevant to the issues?</i> • <i>Are they clear and non-ambiguous?</i> • <i>Did they seek incremental or major changes?</i> • <i>Are they feasible?</i> • <i>Did they receive wide recognition and acceptance?</i>
Post-inquiry	Implementation	<ul style="list-style-type: none"> • <i>Proposals implemented</i> • <i>Extent of implementation</i> 	<ul style="list-style-type: none"> • <i>Any proposals implemented?</i> • <i>Implemented in form or substance?</i> • <i>Are they the most salient or not?</i>
	Value-addition	<ul style="list-style-type: none"> • <i>Behaviour/attitude change</i> • <i>New knowledge and advocacy coalitions</i> • <i>Engendered social values</i> • <i>Public debate</i> 	<ul style="list-style-type: none"> • <i>Any change in behaviour/attitudes?</i> • <i>Any social values attributed?</i> • <i>Any new knowledge and advocacy coalitions?</i> • <i>Any recurrent public debate on the issues?</i>

3.3 Conclusion

In the absence of consensus on the criteria for evaluating inquiries, this chapter has proposed an integrated evaluation framework. In the subsequent chapter, the framework is used to answer the research question posed at the beginning of the thesis.

Chapter 4. The Bosire Commission of Inquiry in Kenya

The Government of Kenya established two inquiries in 2003 to investigate financial scandals (infamously known as the “Goldenberg affair”); and, alleged illegal allocation of public land, respectively. But how and to what extent did these inquiries contribute to the anti-corruption reform agenda? To answer this question, the Bosire Inquiry on the Goldenberg affair has been selected as a case study.⁴ The chapter begins with a brief background to anti-corruption reforms in Kenya and a synopsis of the Goldenberg affair. It then proceeds to present and analyse empirical data based on the integrated framework of evaluation from the preceding chapter. At the end of each criterion, an evaluative statement is made on the findings. A summary of evaluation is presented at the end of the chapter.

4.1 Anti-Corruption Reforms in Kenya: Background

4.1.1 Social, Economic and Political Context

Calls for economic and political reforms in Kenya commenced in the early 1990s driven by the Washington Consensus, with donors as the main drivers of reform (Were *et.al.* 2005; Murunga 2004). In this period, the government reluctantly initiated economic liberalisation policies and re-introduced multiparty democracy (Brown and Kaiser 2007). Despite these reforms, the country’s real GDP in 1997-2001 averaged at 1.2 % and by 2000, 56% of the population was living below the poverty line (Were *et.al.* 2005).

In 1992, the independence party, Kenya National African Union (KANU) under President Moi, came under threat following the re-introduction of multiparty politics. KANU had been in power for over three decades. While opposition parties had a chance to dislodge Moi from power, he went on to win in two successive elections against a divided opposition (Were *et.al.* 2005). In later years, Moi’s tenure was characterised by political patronage, clientelism,

⁴ See the introductory chapter on the rationale for selecting the Bosire Inquiry.

curtailed freedom of the press and expression, disrespect for the rule of law and impunity (Murunga 2004).

Following the 2002 general elections, KANU suffered a resounding defeat from the Opposition, the National Rainbow Coalition [NARC] (Otieno 2005). Unlike before, opposition parties rallied around one presidential candidate, Mr. Mwai Kibaki, under a coalition arrangement. NARC did not only form government, but it also won a majority of 125 out of the 210 seats in parliament under Kenya's semi-presidential system (Wolf *et.al.* 2004). Immediately after the elections, Kenyans were rated the most optimistic people in the world with 87%, according to the 2003 Steadman-Gallup survey (Ibid). Two reasons could explain the euphoria: first, it was the satisfaction derived from a democratic defeat of KANU after four decades of going unchallenged, and second is what Wolf *et.al.* (2004) explain as high expectations of the new coalition government.

According to NARC's reform agenda, economic recovery, employment and wealth creation were the ultimate goal for its first five years in office (IMF 2005). Both past and present corruption was among the main issues NARC grappled with. Major corruption cases had been in the limelight during the KANU regime, but they were not adequately addressed. Then, Kenya was ranked 96th out of 102 most corrupt countries in world with a Corruption Perception Index of 1.9 (Afrobarometer 2006).

The NARC Government undertook a number of anti-corruption reforms as soon as it assumed leadership. It established the Kenya Anti-corruption Commission (KACA) and initiated other law reforms. Further, it established a tribunal to investigate the conduct of judges allegedly involved in judicial misconduct (Otieno 2005). Additionally, President Kibaki appointed two commissions of inquiry to investigate grand financial scandals and illegal allocation of public land associated with the KANU regime, respectively.

However, during its mid-term, the Coalition Government collapsed following misunderstandings over power-sharing agreement among the Coalition Partners. In search for political legitimacy to govern, President Kibaki formed the Government of National Unity (GNU) that included, ironically, members of the Opposition Party, KANU. This political realignment continued from 2005 until 2007, when President Kibaki sought re-election. As the political scene was changing, so was the discourse on anti-corruption reforms.

4.1.2 A Synopsis of the Goldenberg Affair⁵

In the early 1990s, two individuals, Kamlesh Pattni and James Kanyotu formed a company called Goldenberg International Limited (GIL). Pattni was a 25-year-old businessman at the time, while Kanyotu was the Director of Intelligence with the Kenya Police Force. Pattni conceived a business scheme that would involve GIL's monopoly to export gold and diamond to the world market in order to earn foreign exchange for the country. Curiously, Kenya did not have any known diamonds or sufficient gold for substantive export business.

Pattni sought approvals for his proposal from the Ministry of Finance and the Central Bank of Kenya (CBK) to the effect that GIL would receive export compensation⁶ from the Government of Kenya, for foreign exchange earned as a result of the export. Following the approvals, CBK transferred millions of dollars as export compensation to GIL for alleged export of gold and diamond.

Some time in 1992, two junior officers within CBK raised an alarm over what they concluded were irregular payments made to GIL by CBK. Consequently, the Parliamentary Accounts Committee (PAC) launched investigations into GIL's business scheme. But the PAC gave GIL a clean bill of health. In the meantime, the CBK whistle-blowers were dismissed.

⁵ See the Bosire Report (GoK 2005) generally for details.

⁶ The legal compensation limit was 20% at the time, but with GIL's scheme, it was raised to 35 %.

The PAC findings were not satisfactory to many observers. As a result of donor pressure, the government commenced both criminal and civil litigation in GIL-related cases. At least 50 court cases relating to GIL have been reported. Most of cases were not conclusively dealt with by the Government. While the negative effects of GIL on the economy were obvious, the dealings of GIL remained a mystery for over a decade.

4.2 Evaluating the Bosire Inquiry

4.2.1 Rationale Criterion

Kingdon's model of agenda-setting is applied to establish the rationale of the inquiry. In the problem stream, it is observed that through the Goldenberg scheme the country lost between US\$600 million – US\$1 billion (10% of the GDP at the time) whose negative effects continued to be felt a decade later (Warutere 2005). The laxity of the KANU government to deal with the case strained donor relations, leading to the suspension of aid assistance to Kenya at a time when poverty was high and the economic performance lowest in history (Were *et.al.* 2005). Furthermore, the governance system was so intricately involved in the scandal that it could not solve it wilfully. In his remarks the Attorney General noted:

“One can think of no other matter which has engaged the time of all organs of Government; the Executive, the Legislature and the Judiciary, as much as the Goldenberg affair. Nothing in the public perception has come to epitomize corruption as the Goldenberg affair. The evils of corruption and the devastating negative effects of the society are well known” (Appendix D in GoK 2005).

The competence of the justice system was questionable. Thus, the scandal was a manifestation of systemic corruption and a failed system of governance.

In the policy stream, several ideas existed on how to handle the scandal. But it was NARC's Manifesto and subsequent Economic Strategy Paper that prioritised wider reforms including handling past corruption (IMF 2005). Legal opportunities also existed that the President could

exploit in his capacity as the President.⁷ Through the political stream, the dramatic change in government in 2002 opened a policy window to address the Goldenberg affair once and for all (Warutere 2005). Then, the public mood was ecstatic, with 82% of Kenyans demanding for full investigation into past corruption cases (Wolf *et.al.* 2004). Consequently, President established the Goldenberg Judicial Commission of Inquiry to investigate into the complex financial scandal. The Inquiry was headed by Justice Elkana Bosire, hence the ‘Bosire Inquiry.’

Evidently, the rationale of the Inquiry was based on the fact that the problem of corruption was systemic as exemplified by the Goldenberg affair. The ordinary mechanisms of accountability had failed to respond adequately, and therefore, the political chance provided an alternative mechanism to deal with the case. From this perspective, the Inquiry was a justified mechanism to begin the process of dealing with the case.

4.2.2 Purpose Criterion

Here, the mandate and the relevance of the TORs to rationale are considered.⁸ At the initial stage, the Inquiry was required to investigate into the origins and implementation of the export compensation scheme by GIL; alleged irregular payments of export compensation and other fictitious foreign exchange dealings by GIL; and to establish those responsible for the scandal. This far, the Inquiry was only for fact-finding.

However, the TORs were expanded five months later. In this instance, the Inquiry was to investigate into all other financial frauds related to GIL; effects of Goldenberg cases on the administration of justice; trace assets related to the Goldenberg affair; and establish the detrimental effects of the scandal on Kenya’s economy. In addition, the Commission was required to recommend prosecution; policy actions that would prevent and eradicate such

⁷ See Commissions of Inquiry Act (Chapter 102, Laws of Kenya).

⁸ Detailed TOR contained in Gazette Notices Nos.1237 and 1238 (GoK 2003a); Nos. 5134 (2003b).

scandal; reimbursement or compensation to the Government; and any other policy action that would deal conclusively with the scandal. Noting that the Goldenberg scam was like an octopus, the Attorney General stressed:

“The tentacles of the octopus have to be cut. That is why, among your terms of reference, there is a general power under which you can make recommendations on any policy or action that may conclusively deal with the Goldenberg affair” (Appendix D in GoK 2005).

The Attorney General himself was not spared either. The Law Society of Kenya wanted the Inquiry to investigate into his failure to effectively prosecute the Goldenberg cases (Appendix E in GoK 2005). Thus, the mandate was wide in scope and the Inquiry was expected to touch on every strand of the Goldenberg affair.

Taken together, the ultimate purpose was to establish facts on past policy failures in relation to the Goldenberg affair, allocate responsibility, and make policy recommendations that would close the case. Subsequently, the TORs were relevant to the rationale of the Inquiry. At that point in time, the Inquiry was an expression of the Government’s good intention for handling past corruption.

4.2.3 Process Criterion

Four dimensions proposed for the process criterion include representation, participation and accessibility, quality of the testimony, and the atmosphere of working.

First, representation is reflected in the procedure and membership of the Inquiry. In the first instance, the Inquiry followed a quasi-judicial procedure in which witnesses gave evidence and were cross-examined. Only persons deemed to have evidence on the Goldenberg affair were called upon to testify in person or writing.

The membership of the Inquiry comprised of the Appellate Judge, Justice Elkana Bosire, who served as chairman; High Court Judge Justice Daniel Aganyanya; and Peter Le Pelley. However, Justice Aganyanya was replaced by Nzamba Kitonga, following allegations of

corruption against him.⁹ The two judges had served during the KANU regime. Le Pelley and Kitonga were lawyers in the private practice who had achieved the status of Senior Counsel¹⁰. In addition, four other lawyers were appointed as assisting counsels. Among the four, Dr. Kamau Kuria and Dr. John Khaminwa were acclaimed human rights advocates, who had allegedly suffered for their activism during the KANU regime. Also included was a representative of the Kenyan Bar.

By relying on the quasi-judicial process where judges and senior lawyers were in charge of the proceedings, the Government was affirming that the issue at hand required some professional expertise devoid of diverse interests. Therefore, representation of various interests was not an issue.

Second, public participation and accessibility to the proceedings were an important part of the Inquiry. The hearings were held in the capital Nairobi. They were open to the public with the British Broadcasting Corporation (BBC 2003) describing them as “a big crowd puller” (online). A number of schools also took advantage of the openness of the proceedings to organise learning tours at the Inquiry.

Further, there was an impressive media coverage and analysis of the proceedings from the beginning to the end. Notable was the live TV coverage by the state-owned Kenya Broadcasting Corporation (KBC), which has a national coverage.¹¹ The media would replay the day’s proceedings later in the evening so that more people would have a chance to watch the events at the Inquiry.

⁹ The judge was however cleared of charges and reinstated and now serves as a High Court judge.

¹⁰ Senior Counsel is equivalent to the status of Queen’s Counsel in the United Kingdom.

¹¹ During the KANU regime, KBC was mostly used for state propaganda.

Nonetheless, there were occasions when the Commission barred the media from publishing certain information during the hearings.¹² For example, the media was furious when the Inquiry barred it from publishing Pattni's List of Shame" of those who benefited from Goldenberg proceeds (*e.g.* Kodi 2004). But such incidences were few and the Inquiry scored very on accessibility and participation.

Third, the evidence received by the Commission relied on personal testimonies and documentary evidence. Out of the 1500 persons adversely mentioned, 102 witnesses testified. However, some prime suspects did not testify in person but gave formal statements through their lawyers (Warutere 2005). Among them was retired President Moi and his then Vice-President, Prof. Goerge Saitoti.

Controversy arose as to whether Moi and his counterparts should testify in person or not.¹³ The Commission was of the view that it was not a must for all adversely mentioned witnesses to testify (GoK 2005). On the contrary, the High Court ruled that the Commission ought to compel all adversely mentioned persons to give evidence before it wound up its sittings (Appendix J in GoK 2005). The Court of Appeal overruled the High Court's decision partly because it would have been difficult for the Inquiry to complete its task in good time (Appendix K in GoK 2005). The Court of Appeal decision did not go well with critics. They questioned the Court's impartiality by suggesting that it acted under undue influence of some "people who were untouchable" (Scher 2005, p.23).

It remains unsolved as to whether the failure to compel Moi and others to testify compromised the credibility of the evidence before the Commission. The Commission was satisfied by the evidence before it, but some civil society groups felt that the failure of

¹² The law allows the Commission leeway to hear certain evidence in camera. This is so if the evidence is likely to be prejudicial to a person.

¹³ The dispute ended up in litigation by civil society demanding that Moi and others should appear before the Commission.

President Moi to testify in person indicates that the whole truth on Goldenberg affair may never be known (KCK 2005). However, others have observed that had the Commission summoned the 1500 possible witnesses, the process would have been longer, costly and “bound to be open to manipulation” (Scher 2005, p.24). In the end, the evidence received passed the minimum threshold of relevance and credibility.

The last consideration on the process criteria is the atmosphere in which the Inquiry worked. The hearings were conducted for almost three hundred days (Mail and Guardian 2005). Over the period, the Inquiry wallowed through a credibility test. For instance, the Inquiry was thrown into disarray and abruptly adjourned the proceedings because the then Vice-Chairman, Justice Aganyanya, had been suspended following an investigation into malpractice in the judiciary (BBC 2003). Later in February 2004, one of the witnesses, Muzahim Mohammed, levelled allegations of bribery against the Chairman of the Commission and attacked the integrity of other commissioners and counsel at the Inquiry (Oluoch 2004). The hearings were again temporarily adjourned in what seemed to have been an orchestrated circus to interfere with the proceedings.¹⁴

Objections and litigation on either the validity or the procedure of the Inquiry were also experienced. At least six cases were filed in court against the Commission; some by the prime suspects and others by pressure groups. There were fears that some prime suspects wanted to scuttle the process (KCK 2005). These resulted into delays and cast doubt on whether the Inquiry would accomplish its mandate.

Further, Dr. Kuria used the President’s name to cast doubt on the credibility of some Commissioners as capable of manipulating the Inquiry (Kuria 2003). In yet another case, Assisting Counsels suspected Commissioners of protecting certain individuals while

¹⁴ The onus of prove remained on Mr. Muzahim Mohammed who had made sundry allegations against most officials at the Inquiry; allegations that were not substantiated.

Commissioners accused them of carrying out an agenda contrary that of the Commission (*see* GoK 2005 paragraph 32). When Dr Kuria demanded the resignation of the Chairman on allegations of interference in their duty as assisting counsels, there was public outrage directed at both the Assisting Counsels and Government (*e.g.* The East African 2004). In spite of the tense atmosphere, the Commission managed to complete the hearings. Conceivably, it was the resilience of the Chairman of the Inquiry and the overall ‘political mood’ that kept the Inquiry going.

In sum, the process criterion indicates that representation was not an issue at the time. However, public participation (albeit passive) and accessibility to the proceedings was the most impressive. The quality of the testimony received was relevant and somewhat sufficient for the task, except that not everyone could be satisfied. In terms of the atmosphere, the Inquiry faced hurdles that threatened its credibility; hence, its mandate, were it not for its leadership and public outcry. In general, the process of the Inquiry was satisfactory.

4.2.4 Quality of the Findings Criterion

Against this criterion, the measurement dimensions are: relevance; political support; and whether they are credible enough to withstand scrutiny.

First, the relevance of the report is assessed in light of the purpose of the Inquiry. Among the many findings, the Inquiry established that the Goldenberg affair revolved around business deals that included export compensation, pre-shipment finance, retention accounts, cheque kiting, and outright theft (GoK 2005). It quantified a loss of over Kshs. 27 billion (US\$ 376 million) most of which was stashed in foreign banks (Ibid). The Inquiry acknowledged its

incapacity to establish the actual amount in those foreign accounts and recommended further investigations (Ibid).¹⁵.

At least 14 keys suspects, most of whom were former senior government officials including the former Vice-President, Prof. George Saitoti were implicated. Contrary to popular opinion, the Inquiry stated that it was not in a position to determine the role played by retired President Moi in the scam. Hence, it passed the Moi issue over to the Attorney General for further investigations. Moi's lawyer later declared:

"They have not found him to have participated in any criminal activity. He may have made political mistakes. He may have led his minister of finance to mismanage the economy. [But] I'm not aware of any law he broke, and Judge Bosire would have said so if he found it" (Vasagar 2006, online).

Elsewhere, an independent panel had reviewed the evidence presented at the Inquiry and was convinced of Moi's culpability (KCK 2005; Scher 2005).¹⁶

According to other sources, the decision not to implicate Moi was purely on political grounds (e.g. Ochieng 2003). A KANU politician warned:

"Can you imagine what will happen in this country if the government decides to humiliate Mr Moi in court, like a common criminal?...There will be chaos. People will die to protect Mr Moi's dignity (Taylor 2005, online).

The cautionary tone was also reflected among some Government Ministers and other prominent opinion leaders (Ibid; Ochieng 2003). This was before the Inquiry completed its report. Externally, it was evident that there was political motivation not to prosecute Moi, but the Commission thought otherwise.¹⁷ It remains unclear how such mood influenced the findings of the Commission.

Generally, the findings were aligned to the TORs and relevant to the problem in question. They revealed important information on corruption and policy failures in

¹⁵ It was logistically not possible for the Commission to do so. But the Government contracted Kroll Associates to do the exercise independent of the Inquiry (see Lacey 2003).

¹⁶ The independent panel was consulted by Kituo Cha Katiba, to carry out an independent assessment of the evidence. It comprised of accomplished judges from Uganda and Tanzania (see KCK 2005).

¹⁷ The Commission itself stated that it "conducted the inquiry faithfully, impartially" (see GoK 2005, para. 818).

Kenya (*see* KCK 2005). The Government Spokesman also pointed to the fact that the information “publicly revealed in the commission would not have been revealed in any other form of investigation” (Mutua 2005, online).

The second consideration is whether the findings received wide political support necessary for implementation. On receiving the Report, President Kibaki emphasised on its importance and pledged to implement it immediately (Presidential Press Service [PPS] 2006). Donors, civil society groups and political parties continue to advocate for its immediate implementation. However, not everyone supported the report. There are some who viewed it as “witch-hunting and bias *against members of the former regime, KANU*” (*see* Mutua 2006, online, emphasis mine).

Notably, elections were only two years away when the Report was handed in. The Opposition was gaining support as a result of public dissatisfaction of Government’s performance. Here, the Moi factor came into play. It became politically prudent to advocate for the Report, but not to be heard to vilify the retired President.¹⁸ Already, the GNU had incorporated members of KANU. It was evident that Government’s good will on the Report would wane.¹⁹ Even so, civil society groups continued to support the Report (*e.g.* MARS Group). In sum, the political support for the Report wavered from time to time, but the debate was sustained through civil society activism.

The third dimension is whether the findings were credible enough to withstand scrutiny. It took almost a year since the Inquiry completed its hearings to submit its findings. There were concerns about possible interference in the findings of the report (Ngotho

¹⁸ This trend continued even during the 2007 election campaigns where parties flip-flopped from one position to another depending on the mood of the voters.

¹⁹ When it became evident that Kibaki’s political support had been threatened by the collapse of the Coalition Government, he sought an alliance with the former president who had always enjoyed a support from his ethnic bloc in the Rift Valley Province. Kibaki appointed Moi as Peace Ambassador to Southern Sudan.

2005). This was a major credibility test considering the anxiety that had engulfed the political space.

However, since the Report was submitted, not many reservations have been made on the findings except on blame attribution. Almost all prime suspects commenced litigation to challenge the findings of the Report. This saw Prof. George Saitoti exonerated by the Constitutional Court when it expunged some paragraphs from the Report (*see Republic vs. Commission of Inquiry 2006*). The argument by the Court was that Saitoti had already been discharged by Parliament; hence, the Commission was in error to implicate him (*Ibid*). This was an anti-climax for the Commission and the Government at large (*Standing 2006*). The decision has been termed a wrong precedent in the fight against corruption in Kenya (*Mwangi 2006*). In the meantime, the other cases are pending in court.

In conclusion, it can be stated that the Commission made relevant findings that matched the TORs, and any lapses are remediable. While the Report has not fared well on credibility, the findings are not irrelevant as portrayed by the media. Finally, although, the political support has wavered within Government, the debate has been sustained by civil society activism.

4.2.5 Quality of the Recommendations Criterion

The Commission proceeded to make recommendations on the various issues it had identified. They are assessed against: relevance, clarity, feasibility, potential impact and political support. The following are some of the recommendations:

- Prosecution of at least 14 suspects it had implicated;
- The Attorney General to determine what action is to be taken against President Moi;
- Reforms with regard to formation, supervision, lending and liquidation of banks;
- The Auditor General to audit the Central Bank of Kenya;

- Enactment of the Proceeds of Crimes law to recover stolen monies in foreign banks;
- Enactment of the Witness Protection law to protect whistle blowers.

First, on relevance, the Inquiry will be criticised more for what it did not recommend, than on what it did recommend. The list of recommendations shows that they were relevant to the issues identified. However, they were not adequate in response to all the issues identified. For example, the Inquiry did not make any recommendations on the issue of ‘political banking,’ while there was evidence linking the scandal to party politics and campaigns.

Further, during his submission, Dr. Khaminwa alluded to the fact that those found to be corrupt should not hold political office (The East African Standard 2005). Not long after the Report, Pattni rose to become the party chairman of the Kenya National Development Alliance (KENDA). In 2007, he unsuccessfully sought a parliamentary seat on a KENDA ticket (*see* Gaitho 2007).²⁰ Commenting on the issue, the former anti-corruption advisor to the president, John Githong’o observes:

“[In] 2004 [Pattni] was in Kamiti Prison facing all manner of corruption related charges. That he is a political leader today is indicative of the collapse of the political reform project of the Kibaki administration” (The Standard 2007, online).

The Commission also observed that the Attorney General and the Judiciary showed some ineffectiveness on how they handled Goldenberg cases. However, the Commission took a very legalistic view by concluding that no offence had been committed by the respective officials. Taken together, the Inquiry either took a narrow view of its TORs or it underestimated the nature of corruption.

Second, in terms of clarity, it can be noted that most recommendations were specific to the specific issues. For instance, the recommendation for prosecution was specific on whom to prosecute; on legislative framework, it was specific on the law to be pursued; and also specific on which areas needed further investigations.

²⁰ In the 2007 parliamentary party nominations, KENDA received the second highest number of nominated aspirants (Gaitho 2007).

The third test is on the potential impact of the recommendations. The legislative recommendations such as laws on the protection of whistle blowers and on proceeds of crime would merely be facilitative of the existing framework of the criminal justice system. Other recommendations sought to build on the existing institutional framework and would involve amendments to the existing institutional framework. Thus, most recommendations were characteristic of incremental changes. Apparently, the Inquiry avoided recommendations with major political implications.

However, from the news analysis, the prosecution of Prof. Saitoti, a member of Kibaki's cabinet, was touted as a major step by Government. It was a strong indicator of its commitment to implement the Report (GoK 2006). In the same vein, his eventual acquittal was a blow to the Government (Standing 2006). This was only for while before he was reappointed to the Cabinet (Ochieng 2006).

Fourth, on feasibility, the recommendations were well within the means and political capacity for implementation. Most of them did not involve enormous costs. Even then, indications were that the Government would take the recommendations seriously (PPS 2006).

Finally, as was the case for the findings, political support for the recommendations wavered from time to time. Central to the trend were recommendations such as further investigations into the role played by other prime suspects including retired President Moi. Nonetheless, Government support has been steadfast on proposals with piecemeal incremental changes.

In summary, on the Inquiry's performance on the *quality of recommendations* the results are mixed. On one hand, most recommendations were relevant, clear, incremental in nature, and feasible. On the other hand, the Commission avoided some politically sensitive recommendations. Also, the political support for recommendations has not been consistent.

4.2.6 Implementation Criterion

Here, the extent of recommendations implemented and their nature are considered. Immediately after the Report was delivered to the President, the Attorney General commenced prosecutions based on the evidence by the Commission. A Special Anti-Corruption Prosecution Section in the Attorney General's Office was also established to boost the prosecutions (GoK 2006). At least 10 suspects had been charged in court, including Prof. Saitoti who resigned following the implication (Cawthorne 2006). But Saitoti was later reinstated to Government after the Court exonerated him (Ochieng 2006). So far, none of those facing prosecution have been convicted. Furthermore, at least twenty suspects were asked to surrender their passports, lest they escape from the country (Cawthorne 2006).

Legislative reforms that followed the submission of the Report include the enactment of the Witness Protection Act (2007) and the re-publication of the Proceeds of Crimes and Anti-money Laundering Bill (2007). Additionally, through the Statute Miscellaneous (Amendment) Act (2007), the Anti-Corruption and Economic Crimes Act (2003) was amended in order to provide for amnesty to persons guilty of corruption or economic crimes upon confessing and making restitution.²¹ Using the provision, in 2008 Kamlesh Pattni handed over the prestigious Grand Regency Hotel.²² Note, however, that the idea of amnesty, which has drawn criticisms, was not part of the Inquiry's recommendations. In fact, the Inquiry never recommended specific modalities of recovering the Goldenberg-related assets other than the passing of the proceeds of crime law.

Interestingly, a quick audit of the recommendations also shows that even before the Report was completed, a number of legislative reforms were taking place. Some of the parallel initiatives would address the issues identified by the Inquiry in both *form* and *substance*.

²¹ The provision remains controversial between those who call for justice and those for amnesty (*e.g.* Mati 2007).

²² The Hotel has become a subject of another commission of inquiry following its suspicious disposal to the Libyan Government was suspect.

Examples include: the enactment of the Government Financial Management Act (2004), later proposed by the Inquiry; the Anti-Corruption and Economic Crimes Act (2003) which established the Kenya Anti-Corruption Commission; the Public Officer Ethics Act (2003) to provide for the Code of Conduct for government officials; and, the Public Audit Office Act (2004) to establish the Kenya Audit Office (GoK 2006). Further, in 2005 the CBK updated its Prudential Regulations to include anti-money laundering provisions requiring “banks to identify and report suspicious money transactions to authorities for further investigation” (Warutere 2006). As early as 2004, the Proceeds of Crimes and Anti-money Laundering Bill had been drafted following recommendations of a taskforce formed in 2003 (Ibid).

These were major legislative initiatives in as far as the anti-corruption reform agenda was concerned. However, none of them resulted directly from the ultimate recommendations of the Bosire Inquiry. This raises questions as to whether Government was using the Inquiry legitimise its pre-determined policies or it was mere coincidence. Nevertheless, there was an attempt by Government to implement the recommendations.

The question to be answered now is whether the implementation was merely in *form* or *substance*; and whether they were the most salient or not. First, the enactment of the Witness Protection Act; re-publication of the Proceeds of Crimes and Anti-money Laundering Bill (2007); initiating prosecutions and establishing a special unit for that purpose; and, relieving suspected Ministers of their duties (Cawthorne 2006), shows Government’s *intention* for *substantive* changes.²³ If the enlisted parallel legislative reforms are included, then Government fares very well on implementation.

But the good intentions did not, however, translate into *convincing* results as far as public perception was concerned. **Table 2** shows an overwhelming 67.8% of Kenyans who were

²³ But what is also evident is that other factors such as consistent pressure from civil society organisations, watchful eyes by donors, and the search for political legitimisation at the helm of crisis such as the Anglo Leasing scandal, were instrumental in keeping the issues on the political agenda

doubtful of Government's resolute to address the Goldenberg cases. The same polls showed a 51.5% of people who thought that the Government was not committed to fighting corruption (International Republican Institute [IRI] 2006). Compared to surveys conducted three years before, this was a drastic drop in approval ratings (*see* Wolf *et.al.* 2004).

Table 2: Government's Likelihood to Deal Conclusively with High Level Corruption Cases

Case	Likely	Unlikely	Don't Know	No Response
Goldenberg Cases	23.3	67.8	8.1	0.8
Anglo Leasing Case	19.8	70.9	8.3	0.9
Ndung'u Report on Land Use	18.9	64.7	14.8	1.6
The Armenian (Artur) Brothers Issue	15.6	69.7	13.0	1.7

Source: IRI/Strategic Public Relations and Research June 2006 Survey.

Public expectations were that the Government would commence further investigations into the role played by prime suspects such as Moi and his allies; secure convictions from the prosecutions; and recover stolen funds stashed in foreign banks. These were the most salient and substantive steps that the public wanted to see. Instead, a political alliance between KANU (Moi) and President Kibaki's Party of National Unity (PNU); the exoneration and later reinstatement of Saitoti to the cabinet; and no recovery of assets, sent wrongs signals against the Government.

The conclusion here is that the Government attempted to implement the proposals even beyond what the Inquiry suggested. But it needed to show more substantive action to restore public confidence in its efforts. Also, notable is the fact that major legislative reforms and proposals had preceded the Report, hence casting doubt on the rationale of the Inquiry.

4.2.7 Value-Addition Impact Criterion

This criterion has four dimensions: change of behaviour and attitude towards corruption; new knowledge and advocacy coalitions; engendered social values; and recurrence in the public

debate. The close interrelationship among these dimensions does not warrant discussing them independently.

To begin with, the Inquiry was an awareness creation forum. This should lead to behaviour and attitude changes among the public and Government officials. The following observation has been made:

“While the guilty have so far escaped incarceration, the fact these cases have been so widely reported and debated, that investigations continue, and that a number of individuals resigned under public pressure, is a remarkable shift away from practices of the past” (Cooke 2007, online).

Cooke (2007) alludes to the transformation of the Kenyan society into a culture of zero-tolerance to corruption and impunity. Further, the Inquiry was a sign of democratic accountability where irresponsible leadership is brought to justice. While this trend was on the public side, the emergence of the Anglo-Leasing Scandals during NARC’s mid-term, is an indicator of failure of the Government side to transform. However, due to public pressure the implicated ministers were forced to resign (Cawthorne 2006). Although these gains remain minimal in terms of actual impact in the long-term, they underscore the potential impact in attitudinal changes and accountability in society (*see* Cooke 2007).

In addition, the Inquiry proceedings and the Report, as sources of new information, have been the basis for new advocacy coalitions. Recent examples include calls for the enactment of laws on freedom of information, witness protection, anti-money laundering, regulation of party and campaign financing, public procurement, among others, can be traced to new information and ideas following the Inquiry.²⁴ This development has been reinforced by the

²⁴ Examples include: Name and Shame Coalition against Corruption Network; Coalition for Political Party Financing; Movement for Political Accountability; Anti-Money Laundering Campaign, and the Governance Justice Law and Order Programme, among others. *See* Tepper (2004) on bandwagon effect of commissions’ reports.

recurring debate on corruption in both political rhetoric and media analysis.²⁵ The trend is likely to continue with potential impact on the governance sector.

In conclusion, some positive things can be said about the value-addition impact of the Inquiry. On recurrent public debate and advocacy coalitions, both potential and actual impact can be observed. On attitude and behaviour and engendered values, the results favour potential impact as opposed to significant actual impact. It should be recalled, however, that these are more of indirect consequences as opposed to direct consequences of the Inquiry.

4.3 A Synthesis of the Findings

Using an integrated framework, the Bosire Inquiry was evaluated against seven criteria; namely, rationale, purpose, process, quality of the findings and recommendations, implementation and value-addition impact criteria. The evaluation demonstrated that the Inquiry performs better against some criteria and not so well against others. But generally, the findings are positive.

Against the *rationale criterion*, it was established that the Inquiry was the appropriate mechanism for the reform-driven Government to break into a system that had been unresponsive to corruption. Subsequently, the *purpose* was in harmony with that rationale. In essence, the Inquiry was mandated to establish facts on past policy failures in relation to the Goldenberg affair, allocate responsibility, and make policy recommendations that would close the case. The establishment of the Inquiry boosted public confidence in the institutions of governance and Government's anti-corruption agenda. By implication, the Government's legitimacy to pursue anti-corruption reforms would in the end depend on how that purpose was going to be achieved. There was political backlash – loss of legitimacy – when Government appeared to go slow on its commitment

²⁵ In 2007 general elections, the Bosire Report was highly profiled and now the new Coalition Government is on the spot on whether it will implement the remaining part of report.

With the *process criterion*, the results were mixed. The Inquiry performed very well on participation and accessibility to its proceedings. Thus, it was an awareness creation forum for citizens to learn about the ills of corruption. On the quality of the testimony received, it was noted that despite the controversy over witnesses, in the end the evidence received was adequate to somewhat fulfil the mandate of the Inquiry. However, the Inquiry did not fare as well on the atmosphere it operated in. Litigation, tension among members of the Inquiry, reputational attacks, and delays in submission of the Report affected its credibility.

Considering the *quality of the findings*, it was shown that most of the recommendations were relevant to the TORs. While the findings continue to receive wavering political support, it is civil society activism that has sustained that support. It remains debatable whether the decision by the Court to expunge some of the most important findings in the Report renders it completely irrelevant. The submission here is that while the decision may have been a drawback, it does not render the Report completely irrelevant. In the end, the Report has a wealth of information for future policy action.

Regarding the *quality of recommendations criterion*, the results were also mixed. The Commission made recommendations that were relevant, clear, incremental in nature, and feasible for implementation. However, it did not adequately address some of the important aspects of the findings, such as campaign financing and allocating ‘moral’ responsibility on certain government officials despite their legal innocence. Furthermore, it was observed that political support for politically sensitive recommendations by both Government and Opposition has not been consistent because of underlying political interests. In the end, the Inquiry underutilised its TORs and showed some inability in formulating recommendations.

The results on the *implementation criterion* showed success in implementation from the Government’s perspective but not the public. The Government had passed a number of legislation, proposed some, and initiated prosecutions. But the public was not satisfied with

prosecutions without convictions; and, investigations without any money recovered. This shows that while the Government did well much in terms of *form*, it had not convincingly attended to what the public considered *substantive* implementation. Apparently, political will was at the core of the results. Moreover, some recommendations were either expressed or implied in the reforms implemented in parallel with the Inquiry. The unanswered question is whether the Government used the Inquiry to legitimise its pre-determined policies or it was a mere coincidence.

Finally, on the *value-addition impact criterion*, the Inquiry was generally rated positive, especial on potential impact. Specifically, the Inquiry was found to be a catalyst for recurrent public debate and stronger advocacy coalitions in the governance sector both in potential and actual terms. However, on attitude/behaviour change and democratic accountability, the results favour potential impact as opposed to significant actual impact

4.4 Conclusion

This chapter evaluated the efficacy of the Bosire Inquiry on anti-corruption reform in Kenya using an integrated framework of evaluation. Generally, the results were positive with a few areas that may require attention. The final chapter will make general conclusions and policy implications emerging from this study.

Chapter 5. General Conclusions

The aim of this study was to evaluate how and what contribution commissions of inquiry on corruption have had on the anti-corruption reform process in Kenya since 2002. Countering assertions had dominated the political space on the efficacy of these inquiries. However, no objective evaluation had been conducted. This study used the Bosire Inquiry as a case study to explore those assertions, fill in the gaps and highlight policy implications

It was contended that while commissions of inquiry can be tools for policy change, they can also be captive of political interests. Moreover, the lack of some universal criteria for evaluating commissions could obscure their relevance in policy-making. This study took the first step to develop an integrated framework of evaluation, which was later used for the case study.

According to the evaluation, the Bosire Inquiry cannot be dismissed just yet. Positive contributions of the Inquiry include: jumpstarting policy action on systemic corruption where there was governance failure; restoring public confidence in institutions of governance; rendering political legitimacy to Government's anti-corruption reform; creating public awareness on corruption with potential to transform behaviour/attitude on corruption; advancing public debate on corruption in Kenya; generating salient information for shaping present and future policy alternatives on corruption; influencing legislative and administrative reforms on corruption; creating opportunities for stronger advocacy coalitions in the governance sector; exposing the 'truth' on the architecture of grand corruption; allocating responsibility, hence facilitating the course of 'justice'; reducing public anxiety; shaking the culture of impunity; and, symbolizing political accountability. This is an impressive list of achievements by the Inquiry.

However, some shortcomings of the Inquiry were also observed. They include: unjustified attacks of personal and professional reputation of individuals; uncertainty as to whether the ‘*whole truth*’ or ‘*only partial truth*’ came to light due to controversy over witnesses; impediments arising from litigations; underutilisation of the terms of reference; lack of consistent political support for the Report; partial discrediting of the Commission’s work; avoiding major recommendations even when it were feasible to do so; and, the apparent legitimisation of Government’s pre-determined reform policies. Nonetheless, these shortcomings are not so fundamental that the positive contributions of the Inquiry to the reform agenda can be buried under.

5.1 Implications

This study has succeeded in two things: (1) developing a comprehensive evaluation framework for commissions; and (2), evaluating the extent to which the commissions have contributed to the anti-corruption reform agenda in Kenya since 2002. The results of the evaluation are surprisingly in favour of the Bosire Inquiry. This is contrary to most media reports. Gosnell (1934) was right when he warned against using the media to evaluate commissions.

As demonstrated by the case study, inquiries can be used “to push and shake” the dynamics of government failure in a systemically corrupt environment, and to create entry points and momentum for structural reforms (Kpundeh 2004, p.263). However, the success of such an intervention is dependent on a number of factors that decision-makers need to aware of.

First, there must be consistent political will from the time of appointment of a commission to implementation of its recommendations. Since politicians are election maximisers, applying political pressure for more accountability may lead to increased pay offs for politicians interested in implementing the recommendations (*also* Law Commission 2007).

Second, timing is an important factor in using inquiries (Cooper and English 2005). It was observed that the political transition coupled on new elections provided a window of opportunity for the Inquiry. In the first instance, inquiries must be used sparingly, and only when there is governance failure. Otherwise, there will be reversals on the significance of inquiries if appointed at the wrong time. In the second instance, those windows of opportunity that give rise to an inquiry begin to close as soon as the new government establishes itself in office or as political leaders shift their preferences. Commissioners must be conscious of this fact. It is advisable that they endeavour to complete their investigations and submit their findings soonest possible. Alternatively, in designing its procedures, a commission should be able to make interim findings and recommendations that would tap into the political opportunity to influence policy.

Thirdly, it was evident that an inquiry on corruption must be cushioned against manipulation by suspects under investigations. Suspects of grand corruption are rich enough to buy justice. Therefore, it is suggested that clear procedures, administered by competent persons of impeccable character, should be designed. This is to guarantee maximum non-interference of the proceedings by ‘primes suspects’ and their lawyers.

Fourth, delays in releasing the findings by an inquiry create unnecessary suspense. This leaves room for the media to indoctrinate the public with its own version of ‘truth.’ In order to boost the credibility of the findings, it may be appropriate to set a time limit within which a commission must submit its findings upon completion of the hearings.

Fifth, litigation through judicial review procedure can be an impediment to the inquiry “in terms of cost, risk and controversy” (Law Commission 2007, p. 20). The challenge for policy-makers is to explore the possibilities of limiting such impediments. This is important for corruption control because of the tension that exists between the ‘legality’ and ‘morality’ of corruption. Further, due to suspects using court procedure to thwart the efforts of an inquiry.

Lastly, implementation of recommendations may take a little longer, especially on a very complex issue such as corruption. Therefore, anticipation of major impact of inquiries in the short-term may not be realistic. Hence, it may be relevant in incremental policy-making (*see* Sulzner 1971).

5.2 Future Challenges

With the integrated framework of evaluation, this is the beginning of putting the debate on the efficacy of commissions in perspective. It is conceded here that the conceptualisation of the seven criteria may not be perfect; hence, there is room for improvement by infusing other criteria used in policy analysis.

Further, it will be interesting to evaluate the Bosire Inquiry in the future after a significant period of time would have elapsed. This may establish its actual long-term impact. Likewise, evidence from at least two or more case studies should be combined to come up with a more representative perspective on the efficacy of the inquiries. Meanwhile, the challenge is on the Kenyan Government to convince the public that it has so far done something positive in response to the Bosire Inquiry.

-----12,650 words with footnotes BUT without preliminaries and bibliography-----

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