

**THE EVALUATION OF LEGAL AND INSTITUTIONAL FRAMEWORK FOR
ADVOCATE DISCIPLINARY PROCESS IN KENYA UNDER THE NEW
CONSTITUTION 2010.**

By

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**A Thesis submitted in partial Fulfillment of the Requirements of the Award of the
Master of Laws (LL.M) Degree of School of Law, University of Nairobi, Kenya
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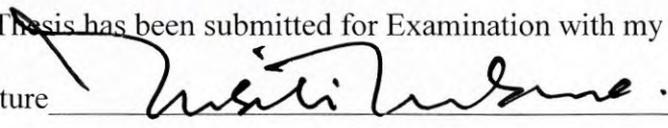
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DEDICATION

This work is dedicated to my beloved wife Marygorret, my two beautiful daughters Patricia & Natalia, and my handsome Son Gathirwa and all those who contributed to the success of this work.

ACKNOWLEDGEMENT

I am particularly indebted to Professor Paul Musili Wambua, PhD. whose dedicated and diligent supervision made this project to take an intelligent form.

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The writer however is responsible for any short-coming in the project.

ABSTRACT

The study aimed at investigating the constitutionality of the legal profession regulatory framework in Kenya. This was necessitated by the fact that the existing framework precedents the Kenyan Constitution 2010 while the same is based on Statutes which are subsidiary to the Constitution. The study therefore gives structural analysis of the Advocate Disciplinary processes rising deficiencies in the said system and showing how these deficiencies make the existing framework unconstitutional.

The research is based on the theory of Constitutional supremacy as defined by the Supreme Court of United State of America in the famous case of *Marbury v Madison* and the theory of public interest. The research is also guided by the concept of professional regulation. This concept is as old as the profession itself. Despite the concept being around for over a decade, Kenya does not seem to have gotten it right despite several amendments to the existing framework. The research demonstrate that it is not just not getting it right but the now with the new Constitution 2010 the existing framework risk being declared unconstitutional.

A descriptive research design was used, however the research heavily did the comparative analysis. In the analysis the research looked at other jurisdictions and how they have managed to deal with deficiencies highlighted in the current framework. From the analysis several recommendations were given if the current framework was to be rescued. The recommendations may look at a paradigm shift from the current regime but it is necessary if the profession was to be effectively regulated.

LIST OF THE ABBREVIATIONS/ACRONYMS

A.C.C Advocate Complaints' Commission

A.G Attorney General

CAP Chapter

DT Disciplinary Committee

G.O.K Government of Kenya

HE His Excellence

L.S.K Law Society of Kenya

S.G Solicitor General

S.L.O State Law Office

U.N United Nations

L.S.C Legal Services Commissioners

Contents

DECLARATION	Error! Bookmark not defined.
DEDICATION	i
ACKNOWLEDGEMENT	ii
ABSTRACT.....	iii
LIST OF THE ABBREVIATIONS/ACRONYMS	iv
CHAPTER ONE.....	1
1.0 INTRODUCTION	1
1.1 BACKGROUND TO THE PROBLEM	1
A) PRE-INDEPENDENCE PERIOD	1
B) POST-INDEPENDENT PERIOD	6
1.2 RESEARCH PROBLEM.....	9
1.3 RESEARCH OBJECTIVES.....	10
1.4 RESEARCH QUESTIONS.....	10
1.5 HYPOTHESIS.....	11
2.0 LITERATURE REVIEW.....	12
3.0 JUSTIFICATION OF THE STUDY.....	17
4.0 THEORITICAL FRAMEWORK.....	17
5.0 CONCEPTUAL FRAMEWORK.....	20
6.0 LIMITATIONS OF THE RESEARCH.....	22
7.0 METHODOLOGY.....	22
7.1 Analysis of written documents.....	23
7.2 Observation.....	23
7.3 Interviews.....	23
8.0 CHAPTER OUTLINE.....	24

CHAPTER TWO	25
2.0 LEGAL AND INSTITUTIONAL REGULATORY FRAMEWORK ESTABLISHED UNDER THE ADVOCATES ACT AND THE LAW SOCIETY OF KENYA ACT	25
2.1 INTRODUCTION	25
2.2 ADVOCATES COMPLAINTS’ COMMISSION	26
2.2.1 THE STRUCTURE OF THE ADVOCATES’ COMPLAINTS COMMISSION	26
2.2.2 POWERS AND FUNCTIONS OF THE COMMISSION	27
2.2.3 TYPES OF COMPLAINTS RECEIVED BY THE COMMISSION	28
2.2.4 REPORTING AND INVESTIGATION OF A COMPLAINT AT THE COMMISSION	32
2.3 THE DISCIPLINARY TRIBUNAL	33
2.4 THE LAW SOCIETY	36
2.5 CONCLUSION	37
3.0 CHAPTER THREE	38
3.1 THE CONSTITUTIONAL FRAMEWORK FOR ADVOCATES	38
DISCIPLINARY PROCEDURE	38
3.1.0 Introduction	38
3.2 The Constitutionality of the Advocates Act and the Law Society of Kenya Act	38
3.2 The Structural dilemma	39
3.2.1 The investigation, prosecution and adjudication processes	39
3.3.0 The technical dilemma	48
3.4 Conclusion	51
CHAPTER FOUR	54
4.0 BEST PRACTICES IN THE LEGAL AND INSTITUTIONAL FRAMEWORK IN THE LEGAL DISCIPLINARY PROCESS	54
4.1 THE CASE OF SOUTH AFRICA	54
4.1.1 Introduction	54

4.1.2	Historical Perspective of the Legal Profession in South Africa.....	55
4.1.3	The Legal Education in South Africa.....	56
4.1.4	Entry into the profession	56
4.1.5	Regulations of the Profession	57
4.1.6	Constitutional Principles	57
4.2	THE CASE OF AUSTRALIA	59
4.2.1	Entry Controls in the Legal Profession.	59
4.2.2	Complaints Grafted on to Disciplinary Controls	60
4.2.3	Disciplinary System of Advocates	61
4.3	A Brief History of Lawyer Discipline in Queensland.....	64
4.3.1	The Content and Implementation of the Legal Profession Act, 2004	66
4.3.2	Independence of the Legal Services Commissioner	72
4.3.3	Is the Legal Services Commission dealing adequately with consumer protection issues?	73
4.4	Conclusion	73
	CHAPTER FIVE	75
	5.0 SUMMARY OF THE MAJOR FINDINGS, CONCLUSION AND RECOMMENDATIONS	75
	5.1 Summary of the discussion.	75
	5.2 Major findings.....	76
	5.3 Conclusions.....	77
	5.4 RECOMMENDATIONS	79
	BIBLIOGRAPHY.....	85
	PRACTICE MANUALS	86
	ARTICLES AND PAPERS	87
	U.N PUBLICATION	88
	UNPUBLISHED WORKS	88
	REPORTS	88

LEGISLATION	88
FOREIGN LEGISLATION	89
INTERNET SOURCES	89
APPENDIX I	90
QUESTIONNAIRE	90

CHAPTER ONE

1.0 INTRODUCTION

Kronman (1998)¹ defines a profession as an activity to which it is attached possession of a special dignity that other non-professional jobs do not. The Black's Law Dictionary, eighth edition², defines a profession as: A vocation requiring advanced education and training; especially, one of the three traditional learned professions-law, medicine, and the ministry. Further, it continues to state:

“Learned professions are characterized by the need of unusual learning, the existence of confidential relations, the adherence to a standard of ethics higher than that of the market place, and in a profession like that of medicine by intimate and delicate personal ministrations. Traditionally, the learned professions were theology, law and medicine; but some other occupational have climbed, and still others may climb, to the professional plane.” while regulation is defined as; the act or process of controlling by rule or restriction and regime is defined as; A system of rules, regulations, or government.³

1.1 BACKGROUND TO THE PROBLEM

A) PRE-INDEPENDENCE PERIOD

“History is important because the law was one of the major tools used by the colonial power to establish its presence, and create the colonial society in which today's leaders of African states grew up, and to which they succeeded at independence. The law created an on-going system of government which was not likely to be, nor was it, in fact, overthrown at independence or thereafter; this is true for all Anglophone African states, with possible

¹ The Law as a profession _Essay presented in Chapman University of Law.

² Garner A.Bryan, et al, Black's Law Dictionary, eighth edition , West Publishing Co page 1246.

³ ibid

exception to Zanzibar. The law at independence therefore is the baseline from which all independent African states have started, and to ignore that baseline and its development is to tell than half the history.”⁴

In Kenya, as in all British dependencies, the legal profession at independence was divided into “Public” legal profession and “Private” legal profession. Public legal Profession comprised of members of Colonial Legal Service, and the Judiciary. These members had been trained and qualified at the Bar in England. They were employed by the Crown and they could be posted in any of the British Colony.⁵

On the other hand the Private legal Profession comprised of qualified Advocates practicing as individuals and was collectively referred to as the Bar. The division between the two groups of Lawyers despite undergoing the same training was so distinct and still is to date.⁶

At independence one of the distinct features which are different to the current situation was the occupants of the office. The Public Legal Profession comprised of mainly the British personnel while the Private Legal Profession comprised advocates of Asian origin.⁷

The history of the regulatory Legal regime in Kenya can be divided into two periods: Pre-1949 period and Post-1949 period.

One of the distinction of the two periods is the fact that before 1949 the profession was subject to public control through the Chief Justice while the post 1949 period witnessed the profession

⁴ Ghai & Mc Auslan, public law and political change in Kenya (an introduction to the Legal System in East Africa) W. Burnett page vi

⁵ Ghai & McAuslan, Public law and Political Change in Kenya (an introduction to the Legal System in East Africa) W. Burnett page 382

⁶ ibid

⁷ Ghai & McAuslan, Public law and Political Change in Kenya (an introduction to the Legal System in East Africa) W. Burnett page 383

become self-governing⁸. This period as we shall see later ushered in the co-regulatory regime which is in place today.

From 1901, the discipline of Barristers and Solicitors from England and pleaders from Indian High Courts was exercised by High Court. Appeals on disciplinary rulings were to the High Court at Zanzibar and appeal of last resort to the Foreign Secretary. Remuneration was regulated by way of agreements filed/registered in Court.⁹ 1906 Legal Practitioners Act was enacted barring pleaders not enrolled before the Indian High Court from practicing in the East Africa protectorate.¹⁰ In 1911 the rules of Court (Legal Practitioners) No 2 (1911), appendix 1, 4 E.A.L.R 3 were promulgated whose effects were to omit the Licensing of non-lawyers. In 1929 Penalties for wrongfully acting as an advocate were introduced giving the profession a total monopoly.¹¹

The 1911 disciplinary rules clarified empowering the Crown Advocate (later Attorney General) or other person aggrieved by acts of an advocate to apply to a judge in chambers for a rule directed to that practitioner to show cause why he should not be suspended. No law forbade undercutting and only maximum fees was regulated. Lawyers could make agreements with clients so long as the agreements never gave interest to the advocate or exempted them from liability. A taxing Master and the court could examine and vary any agreement.

Existence of The Law Society of Kenya was based in Nairobi and the Mombasa Law Society. Membership of both bodies was voluntary with Nairobi Law Society being exclusively European. The amalgamated body, Law Society of Kenya, came into being in the 1920s. By

⁸ibid

⁹ 1906 Legal Practitioners Act

¹⁰ ibid

¹¹ ibid

1935 the Law Society of Kenya was agitating for a solicitor's profession styled like the England Law Society which had a centralized statutory role. This pressure resulted in the Advocates, and Law Society of Kenya Acts of 1949.

The Law Society of Kenya Act established the Society as an incorporated body whose main objectives included “*maintenance and improvement of conduct of the legal profession in Kenya, representation and protection of, and assistance to members of the profession as regards their conditions of practice and otherwise, and the protection of and assistance to members of the public in all matters touching law*”¹²The Act Provided for governance of the Society through a Council elected during an Annual General Meeting at which meeting the President was to be elected and six other members. The six members were to elect the President. The Council would among other things expel a member from the Society though this did not stop one from practice, as membership at this time was still voluntary. On the other hand the Advocates Act ¹³introduced two bodies: *The Advocates Committee, and the Remuneration Committee*. The Advocates Committee comprised of: the Attorney General, the Solicitor General, and three Advocates from the society.

The mandate of the advocates Committee included hearing of a Complaint concerning conduct of an advocate and filtering the complaints filed before forwarding to the High Court. Where the Committee thought that there was a case to answer the same was forwarded to the high Court for determination. When the complaint was before the high Court, two Judges would hear both parties and in the event of a conviction an advocate would be admonished, suspended, or struck

¹²Law Society of Kenya Acts of 1949

¹³No 55 of 1949

off the Roll of advocates.¹⁴ It is important to note that efforts were made to make the professional body independent of government.

On the other hand the Remuneration Committee comprised of five advocates nominated by Law Society whose mandate was to enforce, or set aside, a remuneration agreement, recommend to the Chief Justice the rates of remuneration for both contentious and non-contentious business and set the minimum rates to be charged by advocates. The Committee later formulated policy guidelines on issues of conveyance by prohibiting non-lawyers from preparing documents on such transactions.¹⁵ The Law Society never relented with pressure towards self-regulation. This pressure to the administration resulted to 1952 amendments. These amendments brought the following changes:

The first amendment¹⁶ the Advocates Committee acquired disciplinary powers over clerks working as an employee at an advocate's firm. The Committee also acquired the power to determine a Compliant without necessary calling an advocate to answer for any complaint lodged against him.

The Second amendment¹⁷, Membership to the Society was now made Compulsory and members no longer entitled to resign. Payment of subscription fees was introduced for the annual practicing Certificate. An advocate struck off the roll ceased to be a member of the society. A suspended member was denied entitlement to rights and privileges of membership.

The 1961 Amendments brought the establishment of the Disciplinary committee in place of the Advocates Committee. The Composition of the Disciplinary Committee included: The Attorney

¹⁴ Advocates(Amendment)Act No 20 of 1952

¹⁵ *ibid*

¹⁶ Advocates (Amendment) Act No 20 of 1952.

¹⁷ Advocates (Amendment) Act no 55 of 1952;

General, the Solicitor General, and three Advocates of ten years standing and one of the three should be practicing out of Nairobi.

A board of inquiry was established to act as the investigating arm of the Disciplinary Committee. The board consisted of three advocates of not less than five years standing appointed by the Council of the Law Society. All complaints to the Disciplinary Committee were forwarded to the boards whose mandate was to inquire into the complaints with a view to either dismiss the complaint if the complaint in their view does not warrant forwarding to the Disciplinary Committee. The board can refer the complaints to the Disciplinary committee. The Disciplinary Committee would first look at the Complaint as forwarded to it and *suo moto* determine whether or not there is prima facie case established before it. It may therefore decide to dismiss the case or call the advocate complained against to answer to the complaint. After the hearing, the advocate maybe acquitted, admonished, fined, or suspended or order struck off the Roll. Appeal lay before a two Judge bench.¹⁸

“Though in some respects the two Acts (Advocates & Law Society) only placed a legal footing on what had been the practice for some time past, the total effect was to give a measure of self-government and power to the bar, greatly in advance of anything it had had before.”¹⁹

B) POST-INDEPENDENT PERIOD

In 1989 further amendments were made to the Advocates Act, Cap 16 Laws of Kenya wherein The Advocates Complaints Commission was established as a department of the State Law Office. The Commissions mandate includes, inquiring into complaints against any advocate, firm

¹⁸Ghai & McAuslan, Public Law and Political Change in Kenya (an introduction to Legal System in East Africa William Burnet page 90)

¹⁹ Ibid page 390

of advocates or any member or employee hereof²⁰ It can be argued that these amendments changed the disciplinary regulatory regime of the legal profession. The boards of inquiry were replaced by the Commission therefore bringing back the government at the centre of the disciplinary process of the advocates. Two theories have been advanced as to the reasons for the turn-around. In his book, *The Black Bar*,²¹ the author asserts that the reason for the government involvement in the legal disciplinary system was as a measure to control the LSK leadership which by then was very active in the clamor for multi-party . He further asserts that by creating the Commission the government felt that the Commission would be used to silence the dissenting voices from this end. On the other hand there is the school of thought that links the establishment of the Commission to failure of the boards of inquiry to effectively carry out its mandate. It is said by the proponent of this school of thought that uncertainty had increasingly risen over the ability of LSK to discipline its members. Whatever disciplinary machinery that existed for self-regulation of LSK members conduct, had largely broken down. It was feared that LSK could no longer effectively protect and assist the public in all matters touching, ancillary or incidental to the law. The boards of inquiries which had been established to deal with complaints against advocates could not cope with the said complaints.

The government which is Constitution-bound to protect citizenry had to do something to come to the aid of the public. This eventually necessitated the formation of the Advocates Complaints Commission its primary duties being ensuring that advocates conduct themselves properly and that standards of legal services rendered to the public are improved and maintained.¹⁸ Just like

²⁰ Advocates Act (1989) section 53.

²¹ Mwangi Paul, 2001, *The black Bar. Corruption and political intrigue within Kenya's legal fraternity*, Nairobi:Oakland Media Services Ltd.

the previous Boards of inquiry, the Commission role is akin to a sieve on matters presented before the Disciplinary Committee.

Similarly under the same Act²² the Disciplinary Committee is established. Its composition includes: The Attorney General, the Solicitor-General, and/or a person deputed by the Attorney General, by the amendments of 2002²³ six Advocates, and three other persons (not advocates) appointed by the Attorney General.

Election of LSK representatives to the Disciplinary Committee is conducted under rules made by the Council by dint of Section 27 (h) ¹⁹.

Part III of General Rules provides that: *“Election by way of ballot/notice by secretary to members, Notice 42 days before 31st Dec calling for nominees”* ²⁴

Through LSK chair or his vice, complementing the panel of the Disciplinary Committee.

Under section 4 of the LSK act the objectives of the LSK as far as disciplinary process is concern includes: to maintain and improve the standards of conduct and learning of the legal profession in Kenya, to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya, to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise, to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law and to do all such other things as are incidental or conducive to the attainment of all or any of the foregoing objects.

²²Advocates Act 1989, section 57(1).

²³Statute Law (misc Amendment) 2002.

²⁴ The Law Society of Kenya Act (cap 18) Laws of Kenya.

1.2 RESEARCH PROBLEM

The passing of the Constitution of Kenya of 2010 and its promulgation on August 27, 2010 brought with it a raft of changes. These changes are geared towards creating a society that respects liberties and livelihoods of its citizenry without discrimination. The Constitution introduces transitional justice that seeks to heal society, facilitates exit from authoritarianisms, and establish a just society based on the rule of law. The new Constitution seeks to facilitate government accountability, by seeking to circumscribe the exercise of power in the three branches of government in general, and in doing so it promises to prevent future violation of human rights and the commission of economic crimes²⁵. The existing legal and Institutional profession disciplinary framework in Kenya is established under Advocate's Act and the LSK Act, which legal framework establishes two institutions that is the Advocates Complaints Commission, and the L.S.K. With the promulgation of the new Constitution the existing legal and institutional framework does not meet the minimal Constitutional requirements. This makes the framework unconstitutional.

The proposed research seeks to examine areas of conflict between the existing legal and institutional Advocates disciplinary framework and make suggestions on the best way forward. The study will mainly analyze the Advocate's Act, LSK Act, and the provisions therein as far as the advocate's disciplinary regime is concerned and juxtapose these provisions with the 2010 Constitution in view of highlighting areas of possible conflicts.

²⁵ Akech Migai, October 2010 Institutional Reform in the New Constitution of Kenya (International Centre for Transitional Justice).

1.3 RESEARCH OBJECTIVES.

The research objective is to evaluate the existing advocate's disciplinary framework deficiencies, under the Advocate's Act Cap 16 and LSK Act Cap 18 in relation to the 2010 Constitution.

Specific objectives are:-

- a) to examine the effectiveness of existing legal and institutional framework for the Advocates disciplinary procedure as established under the Advocate's Act and the LSK Act.
- b) to establish how the new Constitution (2010) has affected the legal, structural and technical deficiencies in the Advocates Act and the L.S.K Act as far as Advocates' disciplinary process is concerned.
- c) establish changes, if any are, necessary to the existing legal and institutional framework to harmonize it with the 2010 Constitution.

1.4 RESEARCH QUESTIONS.

The research will seek to answer the following questions:

- a) What is the existing structural, legal and institutional Advocate's Disciplinary framework as established by the Advocate's Act and the LSK Act effective?
- b) How has the 2010 Constitution affected the existing structural, legal and institutional framework of the Advocate's Disciplinary system as established by the Advocate's Act and the LSK Act?
- c) What reforms if any, are necessary to the existing Advocates Disciplinary framework to harmonize it with the 2010 Constitution?

1.5 HYPOTHESIS.

The new Constitution is not only extensive in setting up guarantees of rights but also seeks to protect them from interference by both the State and non-state actors. There are many Articles that seem to work towards protecting the rights guaranteed therein. In the Preamble of the new Constitution, one clause spells out one's aspiration of Kenyans as follows: '...recognizing the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law...' It is this aspiration that the **Kenyan Bill of Rights** in the new Constitution seeks to fulfill and which to a great extent has not been seen before in Kenya's history. The Bill of Rights recognizes all the categories of rights i.e. civil, political, economic, social and cultural spheres. The new Constitution domesticates international and regional human rights law and instruments as well as the universal characteristics of human rights (**Article 2(5)**: The general rules of international law shall form part of the law of Kenya, **Article 2(6)**: Any treaty or convention ratified by Kenya shall form part of the law of Kenya) The above provisions among others broaden scope of Bill of Rights. This has far reaching effects to the existing legal, institutional and structural framework in the Advocates Disciplinary process.

This study is designed to assess the hypotheses that the coming to force of the Kenyan 2010 Constitution has brought far reaching effects to the operations of various statutes in force before its implementation. The two statutes (advocates Act Cap 16 and L.S.K Act Cap 18) involved in the advocates' disciplinary framework have not been spared either. With the Constitution being the Supreme Law, there is need to relook at the areas of possible conflict between the Constitution and the two Statutes with a view to recommend for amendments of the Statutes to harmonize them with the new Constitution.

2.0 LITERATURE REVIEW.

In Kenya the legal regulatory regime seem to have undergone metamorphosis cutting across the two types of regulations at a given historical epoch. The period running 1901-1949, the profession was under independent regime.²⁶ The regulations were placed under the Chief Justice as a measure of control by the public through this office. Complaints against advocates were referred to a High Court Judge.

This was done by way of an application by the aggrieved to the Judge for the advocate to show-cause why the advocate should not be suspended. During this period according to the Author²⁷ several amendments were done aimed at making the profession exclusive to trained advocates. These amendments included the 1906 Legal practitioners Act, which forbade pleaders who had not been enrolled before an Indian High Court, and notaries public, to practice in East Africa Protectorate .The 1911 rules omitted the licensing of non-lawyers from practicing, while in 1926 the requirements that one must have been a resident of Kenya for the last six months before one is allowed to practice was introduced. In 1929 penalties were introduced for wrongfully acting as an advocate²⁸.

The second regulatory regime run from the period 1945-1989.Towards the end of the first period, specifically around 1935 when both the Nairobi Law Society and Mombasa Law Society started agitating for a Society replica to that of England. The result of this agitation was the formation of the Advocates and Law Society of Kenya Act of 1949.These Acts now brought the regulation of the profession under self-regulations. The Law Society was tasked with the role of maintenance

²⁶ Ghai & McAuslan, Public Law and Political Change in Kenya (an introduction to Legal System in East Africa) page385.

²⁷ ibid

²⁸ ibid

and improvement of the standards of conduct of the legal profession, protection of their members and the members of the public as regards their condition of practice among other responsibilities.²⁹ However despite these provisions, amendments to the Advocates Act which introduced the Advocates' Committee and the Remuneration Committee seemed to introduce a limitation on the powers of the Society. In the Advocates' Committee the composition included the Attorney- General, the Solicitor General, and three Advocates from the Society. Similarly in the Composition of the Remuneration Committee five members of Law Society worked together with the Chief Justice. Though complaints lodged with the Advocates Committee would still be heard by a two bench Judge .Later following further agitations Disciplinary Committee was formed with full executive powers over the disciplinary process.³⁰ From 1989-todate the situation seems a little different as the Advocates' Complaints Commission is established as a department at the Attorney General's Office with the responsibility of investigating and prosecuting complaints before the disciplinary Tribunal.

From the above discussion, the writer clearly emphasizes the need for regulating the Legal Profession .This is motivated by several factors which include the protection of consumers on one hand and the protection of the monopoly of services and privileges enjoyed by members of a profession on the other hand³¹.However the writer discusses professional regulation before the coming to force of the new 2010 Kenyan Constitution. The researcher herein looks at the existing legal, structural and institutional framework and the difficulties the said framework finds itself in during the implementation of the new Constitution.

²⁹ *ibid*

³⁰ *ibid*

³¹ Stephen F.H and Love,J. H 'Regulation of Legal Profession'(1999) University of Strathclyde, Glasgow, United Kingdom, pg. 987-995

While **Kronman**³² argues that professional regulation is deemed necessary as it sets a profession apart from other trades. He states that the word profession suggests a certain stature and prestige and that a profession implies that the activity to which it is attached possesses a special dignity that other non-profession does not possess.³³ In his book the writer advance an argument that there is need to separate the definition of a Profession from that of other trades. After this distinction the writer support the idea of having regulatory regime in place to govern the operations of the profession. However the point of departure between the work of this writer (Kronman) and the current research is that as much as both work insist on the need of having a regulatory regime to govern the legal profession, the research seeks to identify areas where the existing legal regulatory regime in Kenya comes to conflict with the new Constitution.

In the discussion of the history of the Bar in Kenya **Ghai & McAuslan**³⁴ the writer states that the legal profession was subject to a measure of public or state control exercised primarily through the Chief Justice before 1949. After this period the profession was given self – governing powers in law and henceforth it progressed to incrementally acquire powers of self-government. The writer describe the legal profession in Kenya prior to independence which was wholly non – African as being aloof and remote from the African population and the legal problems affecting it. They argue that the profession concentrated on systematically increasing Law Society Act in 1949. Which Acts substantially shifted the power to control and regulate the profession from State to the Private Bar. However the position seems to slowly change going back to co-regulation .This turn of events can be traced back from the 1989 amendments to the advocates Act which took away the investigative and prosecutorial powers from LSK to the government

³² Kronman The Law as a profession _Essay presented in Chapman University of Law (1998).

³³ ibid

³⁴ Ghai & Mc Auslan, Public Law and Political Change in Kenya(an introduction to Legal System in East Africa)

through establishment the Advocates Complaints' Commission. The writer herein gives the historical development of the legal regulatory regime in Kenya from the colonial days to the period just before the coming to force of the new Constitution. This research however starts from the period the new Constitution came to force looking at the effects the new Constitution would have on the framework as described by the two authors in their book.

In examining the arguments for professional self-regulation **Dingwall and Fenn**³⁵ comment that self-regulation arises from the social institution of trust; a social contract between society and the profession which mitigates the moral hazard problem arising from the information asymmetry discussed above. They insist that safeguards must be built into a self-regulatory framework to ensure that the profession does not operate as cartel. These writers lay emphasis on the need for self-regulation of the legal profession by the lawyers themselves without allowing non-lawyers room to take any role in the regulatory process. The researcher on the other hand seeks to analyze the existing regulatory regime and how this regime becomes unsustainable with the coming to force of the new 2010 Constitution.

Kailash Rai in his book³⁶ puts a strong case of self-regulation by commending that the legal profession is one of the professions that exercise self -regulation in many jurisdictions. It has been underscored that the profession which considers itself noble and honorable has evolved rules of conduct and ethics which only its members can design and enforce. In the context of the legal practice, the fundamental aim of legal ethics is to maintain the honor and dignity of the profession. Professional legal ethics has been defined as a code of conduct written or unwritten

³⁵Dingwall and Fenn. *A Respectable Profession, Sociological and Economic Perspective on the Regulation of Professional Services*, Butterworths, (1987).

³⁶ Kailash Rai: *Legal Ethics, Accountancy for lawyers and Bench-Bar Relations*, 5th ed, Central Law Publisher, 2004.

for regulating the behavior of practicing lawyer towards himself, his client and adversary in law and towards the court.³⁷

The unique position occupied by lawyers in the administration of justice bestows on the profession dignity and honor as well as heavy responsibility to safeguard the public interest. Thus the norms which guide the profession and which have evolved through the centuries were given recognition by the United Nations in 1990 when the General assembly endorsed the UN basic principles on the role of lawyers. The principles which provide that a lawyer shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The principles also state that the executive body of such professional associations shall be elected by its members and shall exercise its functions without external interference. This writer has strong feelings for self-governance of the legal profession away from what he calls external interference. However this position looks very autopen with the coming to force of the new Constitution. This is because the new Constitution provides for more public participation, demands for better service delivery and calls for more scrutiny by the public on issues of access to justice by all. With these provisions the advocate cannot continue to enjoy the unfettered position he/she enjoyed before the coming to force of the new Constitution. This is what this research seeks to establish and therefore distinguishing itself from the works of the above writer.

Ojienda O.T³⁸ discusses the legal Profession in Kenya, its history and the current structure, the legal training in Kenya, the Institutions involved in the training of Lawyers in Kenya. The writer also looks at the institutions involved in streamlining the profession in Kenya such as the

³⁷ *ibid*

³⁸Ojienda.o.Tom, The Law Society of Kenya Journal: *The Legal Profession in 2015: Rethinking the Challenges, Opportunities &Threats*, Vol.1 2005 no 2 page 19-55.

Council for Legal Education, Advocates' Complaints' Commission, the Disciplinary Tribunal, the law society among others. The Author discusses the process of instituting a complaint, the procedure through which a compliant goes through, the expected outcome in the event of a successful prosecution. The writer further list challenges facing the Disciplinary process and gives recommendations. The discussion by this writer is almost similar to what that researcher is discussing in this research. However the difference is the fact that the above discussion does not look at the existing Advocate disciplinary process in respect to the new Constitution enacted in 2010.

3.0 JUSTIFICATION OF THE STUDY.

The findings of this research shall be very instrumental to the stakeholder involved in the advocate's disciplinary regime in Kenya today. The research could not have come at a better time than this as both the advocates Act Cap 16 and the Law Society of Kenya Act Cap 18 are going through review processes aimed at harmonizing these Act with the provisions of the new Constitution. This research will go a long way in informing the stakeholders the gray areas that need to be amended so as to make the two Acts be in harmony with the new Constitution.

4.0 THEORITICAL FRAMEWORK.

This research is premised two theories of Laws: Legal positivism theory of Law and Marxist-Lenist school of thought. The proponents of Legal positivism theory include John Austin and H. L. Hart³⁹. According to this school of thought, Law is a set of rules laid down for the guidance of intelligent being by an intelligent being having power over him, this they named Man –made-laws. The school of thought categorizes Man –made-laws into Laws made by those in political superior position hence sovereign Laws and Laws made by those not political superior hence not

³⁹Bix Brian Jurisprudence: Theory and Context, 4th ed. 2006, London Sweet & Maxwell, page 33-36

having duties to make Laws. Those Laws established by those enjoying sovereign power have been referred to as positive Laws while those made by those not enjoying sovereign power have been referred to as positive morality⁴⁰. This theory links comfortably the concept of Constitutional supremacy which is the area under study in this research work. Constitutional supremacy theory was defined by the Supreme Court of United State of America in the famous case of *Marbury v/s Madison*⁴¹. From this case it was represented that the Constitutional position is that courts are the unquestionable interpretive authority, and all statutes must comply with the terms of the Constitution.⁴² The supremacy of the 2010 Constitution is stated in Article 2 (1)-(6)

- (i) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
- (ii) No person may claim or exercise State authority except as authorized under this Constitution.
- (iii) The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.
- (iv) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
- (v) The general rules of international law shall form part of the law of Kenya.
- (vi) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.
- (i) Every person has an obligation to respect, uphold and defend this Constitution.

⁴⁰ *ibid*

⁴¹ *Marbury v/s Madison* 1 Cranch 137 (1803).

⁴² Ojwang j.b; Constitutional Development in Kenya: Institutional Adaption and Social Change, 1990(Acts Press, African Centre for Technology Studies), Nairobi, Kenya.

(ii) Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.

From these two Articles it is clear that any statute that is inconsistent with the new Constitution, the Constitution shall prevail and the statute shall be void to the extent of the inconsistency⁴³.

The Marxist-Leninist theory seeks to underscore the issues arising from limited resources and the need for Law to moderate struggle for survival due limited resources⁴⁴. This theory collaborates the public interest theory. This theory is the reason behind the enactment of the two statutes that is the advocates Act and the L.S.K Act. Public interest theory is an economic theory first developed by Arthur Cecil Pigou⁴⁵ that holds that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices. Regulation is assumed initially to benefit society as a whole rather than particular vested interest. The regulatory body is considered to represent the interest of the society in which it operates rather than the private interests of the regulation⁴⁶. This theory is the reason behind government involvement in the advocates disciplinary process. However the government in its attempt to protect public interest has entrenched itself in advocates disciplinary process by amending the Advocates Act by creating the Advocates Complaints Commission⁴⁷. This Commission has operated since its inception in 1989⁴⁸ but since the coming to force of the new Constitution 2010 serious issues have arisen and there is urgent need to relook at the existing legal framework. The study therefore seeks to highlight the possible areas of conflict and bearing in mind the theory of Constitutional supremacy, recommend amendment to the two Acts.

⁴³ Article 2(4)

⁴⁴ Bix Brian Jurisprudence: Theory and Context, 4th edition 2006, London Sweet & Maxwell, page 33-36

⁴⁵ Pigou, A.C. (1932) the Economics of Welfare. London: Macmillan and Co.

⁴⁶ Richard A. Posner, Theories of economic Regulation, The Bell Journal of Economics and Management Science, Vol.5, No.2 (Autum, 1974), pp.335-358.

⁴⁷ Section 53 of Cap 16 as per amendments of legal notice no 507 of 1989. Which established the Commission.

⁴⁸ Advocates Act Cap 16.

5.0 CONCEPTUAL FRAMEWORK.

The concept of professional regulation is as old as the profession itself. What has been changing with passage of time is the structure of the regulation. In the US for example the power to regulate the legal profession was shared between the central government and the states and was the most divisive issue at the Constitution Convention of 1787⁴⁹. Friedman⁵⁰ in his book states that the power of the State courts to regulate the practice of law is generally considered an inherited power of the judiciary. Invoking the doctrine of separation of powers, the state courts have vigorously resisted attempts by the legislative and executive branches to regulate the conduct of lawyers. Many more scholars have advocated for professional regulation, including Stephen F.H and Love⁵¹. These writers advocate for professional regulation because they feel it is necessary due to the information asymmetric between the professionals and their clients which is imbalance in favour of the professional.

The study analyses the disciplinary regulatory process of the legal profession in Kenya. In attempt to initially deal in this topic, the study looks at two critical institutions that are involved in the disciplinary process and which institutions are established by two different statutes. The study will therefore analyze the provisions of the Advocates Act and the Law Society of Kenya Act. These two Acts establishes Institutional regulatory framework in the Advocates disciplinary process. The Advocates Complaints Commission (herein after referred to as the Commission), the Disciplinary Tribunal (herein after referred to as the DT), are a creation of the Advocates Acts. The study will focus on how the provisions of these two Acts maybe affected by the 2010

⁴⁹ Daly. c. Mary, Regulation of the Legal Profession, Federalism, and the Supreme Court: Preserving the Independence of the Bar, paper presented at in IALS Conference, at St. John's University School of Law.

⁵⁰ Friedman m. Lawrence, History Of America Law, Simon & Schuster, Inc, New York,10020, (1985) pg 633-654

⁵¹ Stephen F.H and Love, J. H 'Regulation of Legal Profession'(1999) University of Strathclyde, Glasgow, United Kingdom, pg. 987-995

Kenyan Constitutions. Of great concern is the fact that the Advocates Act under section 53 establishes the Commission as a department of the State Law Office created in 1989, following an amendment of the Advocates Act, Cap 16 Laws Of Kenya 'for the purpose of inquiring into complaints against any advocate, firm of advocates or any member or employee hereof. The Commission also prosecutes matters before the DT. It can therefore be said that the Attorney General investigate and prosecute before the DT. The Advocates Act under Section 57 establishes The Disciplinary Tribunal [DT] which has the responsibility to resolve complaints of professional misconduct against advocates in a manner that maintains the public's trust and confidence in the legal system and the profession. Its membership includes:

The Attorney General, the Solicitor General, or a person deputed by the Attorney General, six advocates of at least 10 years standing, one of whom practices outside Nairobi, who are elected by Law Society of Kenya [LSK] members for staggered 3-year term. Member/s of the Council of the LSK may also sit if a Tribunal member is unavailable. During the sitting, the Secretary of the LSK is the Secretary of the DT.

The Attorney General chairs all DT meetings at which he is present. In his absence, the Solicitor General presides. In their absence, the person deputed by the Attorney General chairs the meeting. If none of the three is present, the tribunal appoints a Chairman from one of its member.

An advocate against whom a complaint is referred to the DT will be given an opportunity to defend himself.

The DT may, at any stage of the proceedings, dismiss a complaint on the basis that it does not disclose a *prima facie* case. Hearings are held in public and after hearing the complaint; the DT may dismiss the complaint or find that professional misconduct has been established. A guilty

party may be; Admonished, suspended for up to 5years, struck off the roll of Advocate or ordered to pay fine not exceeding 1 million. The Tribunal may order one or a combination of the above sanctions. Additionally, the DT may order that the advocate pay an aggrieved person compensation or reimbursement not exceeding 5 million shillings. From the above discussion it is clear that the concept of Legal professional regulation is as old as the profession itself. However with the coming to force of the new Constitution the existing Advocate Disciplinary framework in Kenya seems to be in conflict with the new Constitution. This research will therefore endeavor to discuss the concept of professional regulation as practiced in Kenya and how the existing regulatory framework maybe affected by the new Constitution.

6.0 LIMITATIONS OF THE RESEARCH.

It is expected that the researcher may not benefit from a wide variety of published works as the issues arising from the legal disciplinary process after the promulgation of Kenyan Constitution 2010 is very limited.

The institutions involved in the legal disciplinary process have not had any published publication so far, hence what will be relied on basically will be papers presented on seminars whose authenticity may not be guarantee. Time constraint is another limitation as this research is undertaken within limited time.

7.0 METHODOLOGY.

The study heavily used qualitative data. The reason for using this research method is because the study sought to explain further areas of conflicts between the new Constitution and the existing framework.

The following data collection methods were used.

7.1 Analysis of written documents.

A review and analysis of published texts was undertaken. This information was found in libraries and internet. Both Primary data and Secondary data were used in the research. Primary data was collected by use of documentary analysis. Secondary data was also used in the research. Secondary data was collected from literal works mostly books, journals, working documents as used by various Institutions, a lot of reference was be made to both the old (1963) and the new (2010) Constitutions and from internet.

Materials obtained from authentic research institutions like School of Law ,Kenya Law reform, Law Society of Kenya, Kenya Human Rights Commission, Advocates Complaints Commission, The Lawyer Magazine, Published Reports and journals, Kenyan independent Constitution(1963) and the 2010 Constitution, as well as research thesis and projects carried out by other researchers was used as a source of secondary data.

Case studies were used to map and analyze the various processes under discussion. In appropriate cases and where feasible, on-going cases as well as concluded cases were used. Cases herein shall referred to court cases as well as complaints filed and processed through the DT.

1.1.1 7.2 Observation

The researcher also used observation as a method of data collection by attending the proceedings of DT.

7.3 Interviews

Interviews were conducted through administering questionnaires. Due to limitation of time questionnaires as a tool of data collection which were administered by the researcher, were only given to the existing members of the DT.

8.0 CHAPTER OUTLINE.

Chapter one contains the introduction, history of regulation of the legal profession, research problem, research questions, hypothesis, literature review, justification of the study, theoretical framework conceptual framework, scope and limitation of the research and research methodology.

Chapter two looks at the institution legal framework established under the Advocates Act and the Law Society Act in so far as Advocates disciplinary process is concerned.

Chapter three looks at the provisions in the Kenyan Constitution 2010 and the provisions of both the Advocates Act and the L.S.K Act and the possible area of conflicts.

Chapter four looks at what other jurisdictions have in place to avoid the above conflicts.

Chapter five gives conclusion and recommendations. These recommendations may be very useful in the amendment of the relevant Acts.

CHAPTER TWO

2.0 LEGAL AND INSTITUTIONAL REGULATORY FRAMEWORK ESTABLISHED UNDER THE ADVOCATES ACT AND THE LAW SOCIETY OF KENYA ACT.

2.1 INTRODUCTION

The advocates Act⁵² and the Law Society (of Kenya) Act ⁵³regulate the legal profession in Kenya. Regulation encompasses qualifications for a citizen or foreigner to practice as an advocate,(membership) admission as an advocate, prescriptions, issuance of Practicing Certificate, how advocates are remunerated and Disciplinary process. The disciplinary framework in the Advocates Act is found in part x and part xi. The disciplinary process for advocates is a subject surrounded by controversy and many writers have described it using different terms. For example, Ray Simon/Murray Schwartz⁵⁴ warned law students that they are about to enter a profession which is under constant attack. They said, *“lawyers are not popular, they are not trusted; lawyers are not respected. You are embarking on a career that will lead you to ridicule, criticism and suspicion, your work will seldom be understood or appreciated by your friends, by the public or even by your own clients.”*

Against this background, it is necessary to have a body or a mechanism to regulate the conduct of advocates and to instill the much needed discipline in the legal profession. Under the advocates Act, two bodies are established, for enforcing discipline within the legal profession. These are the Advocates Complaints Commission and the Disciplinary Tribunal.

⁵² Advocates Act Cap 16, Laws of Kenya.

⁵³ Laws Society Act Cap 18, Laws of Kenya.

⁵⁴ Ray Simon/Murray Schwartz, Lawyers and the Legal Profession

The Advocates Complaints Commission (herein referred to as the Commission) was established in 1989 and prior to that the Disciplinary Tribunal was the only body entrusted with disciplinary process. The Disciplinary Tribunal which had been in existence since 1949 when the Act⁵⁵ came into force. Following the creation of the two bodies, the Advocates disciplinary process has been undertaken by the two bodies which have worked together as far as advocates Disciplinary process is concerned. The following discussion looks at each institution in detail and shows how they inter-link. From the description of the two bodies we start asking whether the two bodies complement each other or they compete against each other. We shall also be asking whether there is need to continue have the two bodies without being accused of duplication of duties. The institutional legal framework on advocates Disciplinary process discussed herein clearly paints a picture of a system that makes one office, the investigator, the prosecutor and the Judge in the same case. This scenario contradicts the Constitutional principle of ensuring that “Every person is equal before the law and has the right to equal protection and equal benefit of the law.”⁵⁶

2.2 ADVOCATES COMPLAINTS’ COMMISSION

2.2.1 THE STRUCTURE OF THE ADVOCATES’ COMPLAINTS COMMISSION

Section 53(1) of the Advocates Act establishes the Advocates Complaints’ Commission as a department in the Attorney General’s office. Commissioners in the Commission are appointed by the President and their remuneration by way of Salary, allowance, pension or gratuity is determined by the President and paid out of moneys provided by Parliament.

At the moment, the Commission has two Commissioners and one of them is the chairman. Both Commissioners are advocates of the High Court of Kenya.

⁵⁵ 1949 Advocates Act

⁵⁶ See Article 27(1) of the Constitution which provides that, “Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

The Act⁵⁷ establishes the secretariat with the Chief Executive as the Secretary who is appointed by the Attorney-General. The Attorney-General further provides such public officers as are necessary for the proper and efficient exercise of the duties and functions of the Commission. The Secretary is the administrative officer. He is involved in the day to day running of the Commission. The Commission Secretary shall be an advocate of the High Court of Kenya. The rest of the members of staff are officers of the State Law Office deployed in the Commission. This is a serious structural deficiency on the Advocate disciplinary processes. In Chapter four the writer will compare this structure and other structures in other jurisdictions that seem to function well in developed democracies. The discussion below looks at the powers and functions of the Commission.

2.2.2 POWERS AND FUNCTIONS OF THE COMMISSION.

The Commission has powers to, receive and consider complaints against advocates, institute investigations, and examine witnesses on oath. While conducting investigations on an allegation, the Commission may require any person to assist it in carrying out its duties, summon witnesses in the process of investigations or order an advocate to produce all relevant books and documents relating to a matter being investigated. The Commission may engage the services of an accountant to assist in the investigations of an advocate's accounts make such order or award as it shall consider just and proper within its mandate. The Commission is also encouraged to endeavor to promote reconciliation and facilitate amicable settlement between advocates and their clients. The Commission has powers to award the complainant compensation or reimbursement of expenses not exceeding Kshs.100, 000/-, order the surrender to the client of all funds or property which the advocate does not dispute, issue a warrant for the levy by distress or

⁵⁷ Advocates Act Cap 16 Section 54

sale of the amount of any sum ordered to be paid by it on the immovable property of the person or firm so ordered to pay the compensation. The Commission is mandated to refer complaints to the Disciplinary Tribunal if the issue under investigation may not be compensated by the above enumerated remedies and generally, the Commission to take all such steps as it may consider proper and necessary for the purpose of its enquiry.

An Order made by the Commission shall be enforceable in the same manner as an order of the Court once it is registered with the Court.

2.2.3 TYPES OF COMPLAINTS RECEIVED BY THE COMMISSION

(a) The Commission is concerned with the following categories of complaints:

(i) Failure to account for/withholding funds

Failure to account to a client any monies received by the advocate on behalf of the client is gross misconduct of the most serious character as the advocate has committed a breach of trust in handling of the client's money. His conviction implies a defect of character which unfits the advocate for his profession.

(ii) Failure to keep clients informed;

Advocates should keep clients informed of the progress of matters that they are handling on their behalf.

They should deal promptly with communications relating to such matters and give clients reasons for any serious delay. Request for information should be answered promptly. All this will reduce the risk of misunderstanding by clients.

(iii) Issuing cheques which are subsequently dishonored;

This is a disciplinary offence despite being a criminal offence punishable under the penal code. Advocate should not issue a cheque to the client when they know that the account may not be having funds.

(iv) Failure to honor professional undertaking;

An advocate must honour his/her word. Fraudulent or deceitful conduct by one advocate towards another will render the offending advocate liable to disciplinary action.

(v) Delay (no active steps taken by advocate to prosecute or finalize client's matter);

Delay caused by advocate in dealing with a matter amounts to professional misconduct and is punishable as such. During investigation the Commission should establish the cause of the delay and all factors be considered.

(vi) Failure to reply to correspondence or other communications from professional colleagues and the Commission.

An advocate should deal promptly with communication from professional colleagues and the Commission. The Commission has powers to compel advocates to answer allegations made against them by clients. An advocate who fails to answer and deal with issues raised in the communication from the Commission will be subjected to disciplinary action.

Should an advocate receive a letter he or she does not like, as a matter of courtesy, he or she should all the same acknowledge it.

(vii) Failure to comply with instructions from clients/acting contrary to instructions.

An advocate must carry out client's instructions diligently and promptly. He has to act within client's expressed and implied authority. However, an advocate must not allow his or her client to override the advocate's professional judgment for example by insisting on the advocate acting in a way which is contrary to law or professional conduct.

(viii) Failure to release file/document(s) especially where instructions have been withdrawn from the advocate.

An advocate should release files or documents belonging to his/her client provided he or she has been paid his or her fees. It is not unprofessional for an advocate to retain Client's papers, documents and property pending payment of professional fees and costs. The right of lien will be challengeable unless the advocate either delivers a bill of costs or gives the client sufficient particulars to enable the client calculate the amount owing. An advocate should not make it difficult for a client to terminate his/her services when there is a serious breakdown in confidence between them.

(ix) Overcharging or failure to advise client on costs.

On taking instructions the advocate should give clients best information possible on the likely costs of matter. If no fee has been agreed or estimate given, advocate should tell the clients how the fees will be calculated either to scale, hourly, or based on percentage of the value of transaction among other rates as provided for by the Law.

An advocate should discuss with the client how legal charges and disbursements are to be met. It is an implied term in that advocates will be paid reasonable remuneration for their services.

Advocate should keep the client informed about costs as the matter proceeds. He should not give an unrealistically low level of fees solely to attract work and subsequently charge a high fee. This is improper because it misleads the client as to the true or likely cost. Failure to keep the client informed regarding the costs incurred could prejudice an advocate's ability to recover a fair and reasonable fee for the work done.

(x) Failure to attend court;

It is not proper for an advocate to fail to attend court after accepting a brief. If the client is unable to pay, the advocate must attend court and withdraw from acting. An advocate must not blackmail a client to pay before attending court.

(xi) Conflict of interest (where advocates acts for two or more clients in the same matter without their permission);

This is unethical especially where the clients' interests are conflicting.

(xii) Demanding legal fees from a person who is not a client.

Fees are only recoverable from the instructing client as the relationship between the advocate and his client is a contractual one.

(xiii) Any other behavior which may amount to "professional misconduct" (an expression which includes any disgraceful or dishonorable misconduct incompatible with the status of an advocate)

An advocate must maintain his/her personal integrity and observe the requirements of good manners towards other members of the profession no matter the difference between them.

An advocate must not engage in conduct which is dishonest or otherwise discreditable to him as an advocate or prejudicial to the administration of justice or likely to diminish public confidence in the legal profession into disrepute.

2.2.4 REPORTING AND INVESTIGATION OF A COMPLAINT AT THE COMMISSION.

Complaints lodged with the Commission must be reported in writing. To avoid the Commission being bombarded with unnecessary information, the Commission has designed a “help form” for this purpose. This form reduces area of conflict to cover the above discussed types of complaints. The form should be fully completed, duly signed and accompanied by a photocopy of the complainant’s identification, for instance the Identity Card, Passport or Driving License.

Where applicable, copies should be enclosed of all relevant correspondence as far as possible including copies of letters, receipts, particulars of the parties involved for example insurance claims and policy numbers, motor vehicle registration numbers and where the matter was filed in court, the case number and the parties involved.

Upon receipt of this compliant, the Commission evaluate the nature of the compliant, classify the complaint and thereafter make a decision, either to reject a complaint forthwith if the nature of the complaint is outside its mandate, or the compliant is of no substance⁵⁸ and or advice the complainant to file their complaint with the relevant body. Where the nature of the complaint is that which is within the mandate of the Commission, two options are available to the Commission.

⁵⁸ Advocate Act CAP 16 Section 53 (4)(a)

The first one is, if it appears to the Commission that there is substance in the complaint but that it does not constitute a disciplinary offence, then it shall notify the firm or person complained against and embarks on the investigation process. It will then deal with the matter and make such orders or awards as it may consider just and proper as per the provisions of sections 53(4) (b)-(e)⁵⁹.

Forwarding a complaint before the disciplinary Tribunal is done by way of drawing a charge in a format provided for by the advocates Act form2 which is an affidavit in form. (See appendix 3).

Looking at the above discussion it is clear that the Commission has so much bestowed on it.

However all the above investigation responsibilities are performed by State Counsel who are not necessarily trained in investigation.

2.3 THE DISCIPLINARY TRIBUNAL

The Tribunal is established under Section 57 of the Advocates Act⁶⁰ and it is vested with the power to discipline any person who is entitled to act as an Advocate. Its membership comprises of the following persons.

- a) Attorney General;
- b) Solicitor General or a person deputed by the Attorney General, that is, someone from the Attorney General's office;
- c) Six Advocates other than the Chairman, Vice-Chairman and Secretary of the Law Society and they should be of not less than ten years standing. One of whom shall be an advocate who does not ordinarily practice in Nairobi, all of whom shall be elected and shall hold office for three years and be eligible for re-election;

⁵⁹ Advocates Act, Cap 16 sections 53(4) (b)-(e)

⁶⁰ Advocates Act, Cap 16 sections 57

Members of the Council of the LSK may also sit if a Tribunal member is unavailable and there is issue of quorum. The Secretary of the LSK is the Secretary of the Disciplinary Tribunal.

The Act⁶¹ sets out the procedure for dealing with complaints against advocates. Under this provision, a complaint may be made by any person. This implies that the complaint may not necessarily be by the client but by any person who has notice of some misconduct on the side of an advocate. A complaint may be directed to the Disciplinary Tribunal by an aggrieved person as a private prosecutor. Due to secretarial position the same has to go through the Law Society of Kenya to find its way to the Disciplinary Tribunal.

Upon receipt of the complaints, the Disciplinary Tribunal gives the advocate against whom the complaint is made notice of the filing of the complaint and gives him an opportunity to appear before the Tribunal and to inspect any relevant documents which the complainant is relying on.⁶²

Where in the opinion of the Tribunal the complaint does not disclose any *prima facie* case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint.⁶³ Where in the opinion of the Tribunal the complaint appears to have merit, it shall allow the same to proceed for full hearing. Hearing is by affidavit evidence, where the complainant is supposed to prosecute his own case by giving testimony and he/she may be cross-examined by the advocate complained against or the advocate representing him. There is a right to legal representation. The Advocate to whom the complaint relates may also present his own evidence.

⁶¹Advocates Act, Cap 16 sections 60 .

⁶²Advocates Act, Cap 16 sections 60 (3)

⁶³ *ibid.*

After the hearing, the Tribunal may dismiss the complaint after considering the evidence or if in the opinion of the Tribunal the complaint makes out a case of professional misconduct the Tribunal upon convicting the advocate may order the following:⁶⁴

- (a) that such advocate be admonished; or
- (b) that such advocate be suspended from practice for a specified period not exceeding five years; or
- (c) that the name of such advocate be struck off the Roll; or
- (d) that such an advocate do pay a fine not exceeding one million shillings, or such combination of the above orders as the Tribunal thinks fit.
- (e) that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings.

The Disciplinary Tribunal may make orders regarding the settlement of costs and witness expenses, if the complainant had witnesses and brought them from far away, the Disciplinary Tribunal can order that the complainant be compensated. On order on costs may be registered in the courts and be enforceable in the same manner as an order of the Court of the same effect, one can attach for the costs.

Any Advocate aggrieved by the order of the Tribunal can appeal against it⁶⁵ at the High Court. There is also right of further Appeal to the Court of Appeal. It is interesting to note that this provision is silent as to whether an aggrieved complainant can appeal against the order of the Tribunal. It is fair to conclude that the complainant may not get justice through exercising the right of appeal in the event he is dissatisfied with the decision of the Tribunal.

⁶⁴ Advocates Act section 60 (4)

⁶⁵ Advocates Act section 62

Sections 72 to 74 of the Advocates Act provide that disciplinary action against clerks to advocates who are guilty of professional misconduct are also liable to disciplinary action through the Disciplinary Tribunal.

The Disciplinary Tribunal sits in Nairobi and that is a short coming of the whole disciplinary procedure as it inconveniences clients who reside outside Nairobi. This means that some people with genuine claims may be barred from filing complaints because they would have to travel all the way to Nairobi to bring complaints against their lawyers. The complaint is prosecuted by the Commission on behalf of the complainant. This incidentally makes the bases of our discussion in the next Chapter when we look at the principals of natural justice as captured in our 2010 Constitution *visa vi* the role of the Commission as the investigator, prosecutor and a judge in the same matter.

2.4 THE LAW SOCIETY

At the LSK the Ethics and Compliance section receives the affidavit of complaint for Advocates Complaints' Commission and opens a file with new reference number .This number becomes the cause number. The LSK guided by its diary fixes the date for plea taking. This date is communicated to all parties vide a hearing notice which is send by registered mail and is in a format provided for under form 4 of the LSK Act(see appendix 4). The notice to the accused advocate clearly indicates that his/her personal appearance is mandatory and that the advocate has a right of representation. All the proceedings files and records are kept by the LSK. LSK also performs all the secretariat function including leading parties on dock, swearing them where proceedings are by *viva voce*, and execution of all orders emanating from the Disciplinary Tribunal. Any other documents to be filed by either party to the proceedings are filed with the LSK.

2.5 CONCLUSION.

The above discussion analyses the existing legal disciplinary process and shows the statutes which govern the same. These provisions may have existed during the old Constitution (1963-2009) with no much conflict, if any. The above structural analysis of the Advocate Disciplinary processes raises several issues that this research to find conclusive answers. Some of these questions include the following:-

- why would the Attorney General investigate a matter, then prosecute the same matter before a Tribunal where he is the Chair?.
- similarly, why should we have three bodies, that is, the Advocates Complaints' Commission, the Law Society of Kenya and the Disciplinary Tribunal doing the same activity without necessarily adding value to the process?.
- why should the same parties from three bodies perform the same activities? does this add any value to the process nor does it ensure any checks and balance to the process?
- if the intention of having the Attorney General at the Centre of this process was to ensure public interest is protected does the existing structure ensure that this is achieved?

In seeking to answer these questions the research clearly demonstrates that the current structure is not only inadequate but also unconstitutional. The above discussion gives the background of the Advocates Disciplinary process in Kenya. This discussion becomes the beginning of the rest of the discussions in the subsequent Chapter of the research. In the next chapter the researcher looks at provisions in the Constitution and in the existing statutes which have some disharmony.

3.0 CHAPTER THREE

3.1 THE CONSTITUTIONAL FRAMEWORK FOR ADVOCATES DISCIPLINARY PROCEDURE

3.1.0 Introduction.

Arising from the discussion of the previous Chapter, which dealt on the legal framework for Advocates disciplinary process, it is prudent at this point to appreciate the Constitutionality of the legal framework. This Chapter interrogates the provisions of the Constitution of Kenya, 2010 and its impact on the practice of law in Kenya. In this Chapter the researcher starts by defining the Constitution, establishing the Constitutional supremacy, and thereafter point out areas of conflict between the Constitution and the existing Advocate disciplinary Legal framework. An effort will be made to demonstrate how the current Constitution departs in a very great extent from the repealed Constitution hence rendering the exciting Advocates Disciplinary Legal framework Unconstitutional. After pointing out areas of conflict, the research then make recommendations which if implemented will resolve the constitutionality issues raised herein.

3.2 The Constitutionality of the Advocates Act and the Law Society of Kenya Act.

The practice of law is based on public confidence and trust. To maintain this legal environment, there must be discipline within the legal profession. In addition, there should be a regulatory framework to control the process. These processes or activities within the regulatory regime require appropriate laws and suitable institutions in place. The goals for the disciplinary systems are to protect the legal professionals, protect the public, and promote the interest of

administration of justice while punishing errant lawyers. The Advocates Act⁶⁶ and the Law Society of Kenya Act⁶⁷ are the principal acts which regulate the practice of law in Kenya. It is important to interrogate these pieces of legislation against the supreme law of the land, the Constitution of Kenya, 2010.

3.2The Structural dilemma

3.2.1 The investigation, prosecution and adjudication processes

The investigative powers have been vested with the Advocates Complaints Commission. The function of the Commission is to enquire into complaints against advocates, firms of advocates or employees of advocates.⁶⁸ It does not hear cases but where the Commission after investigation feels that a case of professional misconduct is sustainable the Commission prefers charges against the advocate. During the hearing before the Disciplinary Tribunal the Commission prosecutes.⁶⁹

The Commission is composed of Commissioner(s) appointed by the President.⁷⁰ The Commission is a department at the Attorney General's Office .This makes the office of the Attorney General have a big role to play in the staffing and the running of the Commission.⁷¹

⁶⁶Advocates Act Cap 16, Laws of Kenya, the preamble states that it is an Act of Parliament to amend and consolidate the law relating to advocates.

⁶⁷ Law Society of Kenya Act Cap 18, Laws of Kenya, the preamble states that it is an Act of Parliament to consolidate the law relating to the Law Society of Kenya.

⁶⁸ Advocates Act Cap 16 Section 53 (1) .

⁶⁹ Advocates Act Cap 16 Section 54 (4) (b) provides that if it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it. Part XI of the Advocates Act will apply.

⁷⁰ *Ibid*

⁷¹ For instance, the Attorney General under Section 54(1) of the Advocates Act is given the mandate to appoint the Secretary to the Commission. Under Section 54(2), the Attorney-General is given powers to provide to the Commission public officers as are necessary for the proper and efficient exercise of the duties and functions of the Commission. In addition, under Section 54 (3) of the Advocates Act, the Attorney-General has the power to make rules regulating the structure and operation of the Commission and for the carrying into effect its functions.

This is a clear manifestation that the Attorney General wields far reaching powers and control over the Commission.

The Disciplinary Tribunal is established under Section 57 (1) of the Advocates Act. It has the responsibility of resolving complaints of professional misconduct against advocates in a manner that maintains the public's trust and confidence in the legal system and the profession. Its membership includes:

- a) The Attorney General;
- b) The Solicitor General, or a person deputed by the Attorney General;
- c) Six advocates of at least 10 years standing, one of whom practices outside Nairobi, who are elected by Law Society of Kenya members for staggered 3-year term. Members of the Council of the Law Society of Kenya may also sit if a Tribunal member is unavailable.
- d) During the sitting, the Secretary of the Law Society of Kenya is the Secretary of the Disciplinary Tribunal.

The Attorney General chairs all the Disciplinary Tribunal meetings at which he is present. In his absence, the Solicitor General presides. In their absence, the person deputed by the Attorney General chairs the meeting. If none of the three is present, the tribunal members present appoints a Chairman from one of its member.⁷²From these provisions it is clear that the Attorney General investigate complaints against advocates at the Commission, then when he forwards the same

⁷² Advocates Act Cap 16 Section 58 (2).

before the Disciplinary Tribunal, he prosecute while at the same time he is the chair of the Disciplinary Tribunal, meaning that he is the Judge in his own case.

As already pointed out, the meetings of the Disciplinary Tribunal are chaired by the Attorney General or the Solicitor General in the absence of the Attorney General or a person deputing the Attorney General in the absence of Attorney General and the Solicitor General.⁷³ In the absence of all the three members, the tribunal may appoint its own Chairman. This structural framework is definitely unconstitutional in the following ways:

The Constitution of Kenya, 2010, upholds certain values and principles. It recognizes the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.⁷⁴ In addition, the national values and principles of governance bind all State organs, State officers and all persons.⁷⁵

The provisions of the Law Society of Kenya and the Advocates Act seem to be against these provisions of Constitution. The Attorney General is a State Officer, therefore is bound by the Constitution. However, by conducting a multiplicity of roles in the disciplinary process of advocates, this defeats the purpose and spirit of democracy, equality and the rule of law upheld in the Constitution. In such a scenario where the Attorney General investigates, prosecutes and adjudicates over complaints against Advocates, it can be argued that he cannot accord the advocates equal protection in law.⁷⁶ Women and men have the right to equal treatment,

⁷³ Supra note

⁷⁴ Constitution of Kenya, 2010 the Preamble thereto .

⁷⁵ Constitution of Kenya, 2010 Article 10(1) .

⁷⁶ Constitution of Kenya, 2010 Article 27(1) provides that, "Every person is equal before the law and has the right to equal protection and equal benefit of the law."

including the right to equal opportunities in political, economic, cultural and social spheres.⁷⁷
This is derogation from the fundamental rights accorded to all the citizenry of Kenya.⁷⁸

The Constitution of Kenya 2010 also provides a clear distinction of separation of powers. It appears in the Constitution that each body has been seized with its own responsibilities and functions while maintaining a healthy system of checks and balances. For instance, the three arms of government have their independence strengthened by express provisions of the Constitution. Separation of powers promotes justice and fairness in solving disputes. The Constitution provides that every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.⁷⁹ Can impartiality and independence be realized when one person in this case the Attorney General is the investigator, the prosecutor and the judge in the same judicial process? In such an arrangement, since we have one person carrying out a multiplicity of functions, fairness and best practices in the practice of law will be compromised. The Attorney General in structure of the two Acts becomes the judge in his own cause.

The doctrine of separation of powers was expounded by Montesquieu in his book, *The Spirit of the Law*:

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. Again, there is no liberty if the judiciary power were not separated from the legislative and the executive. Were it joined with the

⁷⁷ Constitution of Kenya, 2010 Article 27(3) .

⁷⁸ Constitution of Kenya, 2010 Article 27(2) provides that: “Equality includes the full and equal enjoyment of all rights and fundamental freedoms.” Advocates are no exception, they are protected under this provision in the Constitution.

⁷⁹ Constitution of Kenya, 2010 Article 50(1).

legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive however, the judge might behave with violence and oppression. There would be an end to everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.”⁸⁰

John Locke also explained:

“It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage”⁸¹

In addition, Henderson noted that:

“The threefold division of labour, between a legislator, an administrative official and an independent judge, is a necessary condition for the rule of law in modern society for democratic government itself.”⁸²

In the context of the foregoing discussion, public power should be purely separated and/or divided. Some of the reasons advanced to support this argument include, *inter alia*:

⁸⁰ Montesquieu, *Del'Esprit des Lois* (1748) livre XI Chapter VI, 3-6

⁸¹ John Locke, *Second Treatise of Civil Government*, New York: New American Library, (1952), Chapter XII, para. 143.

⁸² Henderson E.G., *Foundation of English Administrative Law*, as quoted in E.C.S Wade and Godfrey Philip, *Constitutional and Administrative Law*, New York: Longman, (1977), 45.

Where powers are fused or concentrated, there is a tendency to abuse those powers. On this point, Montesquieu further argues thus: “Constant experience shows us that every man vested with power is liable to abuse it and to carry his authority as far as it will go...to prevent this abuse, it is necessary from the very nature of things that one power should be a check on another⁸³

Division of powers facilitates and helps secure checks and balances in governance. It would ensure that the High Court checks the executive and parliament through constitutional adjudication and judicial review.⁸⁴

It facilitates specialization of functions. This would enhance competence and knowledge regarding a specific matter.⁸⁵

Division of power helps secure space for individual liberties. As Montesquieu argued, fusion of powers limits liberty, and when all powers are placed in one hand, there will be an end to everything.⁸⁶

In a limited form, the concept of separation of powers may mean at least three different things:

That the same persons should not form part of more than one of the three arms of government. In this context, the Attorney General should not be the investigator, prosecutor and the adjudicator of complaints against Advocates. He should have one clear role in order to dispense justice; the existing structural deficiency makes him a player in three different fields hence placing him in a compromising position.

⁸³ *Supra* note 11 at 3-6.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

That one organ of government should not control or interfere with the work of another, for example that the judiciary should be independent of the executive or that minister should not be responsible to parliament. In the same vein the Attorney General's work should not interfere with other officials in the discharge of their duties and their mandate.

That one organ of government should not exercise the functions of another, for example that ministers should not have legislative powers.⁸⁷ The Attorney General should not be an investigator, prosecutor and judge at the same time. These structural deficiencies have led to miscarriage of justice in the following ways:

(a) Access to justice

The Kenyan Constitution⁸⁸ provides for access to justice by all persons and the state must ensure that nothing impedes access to justice. Looking at the current legal disciplinary framework, it is clear that the above Constitutional provisions have been violated. The discussion below explains these assertions.

i) Delayed Justice

The trial will take an unnecessary long time since the complaint has to be investigated by the Commission and prosecuted before the Tribunal.⁸⁹ In general complaints take between three and five years at the Commissions offices under investigation. There after the matter takes another two to four years before the Disciplinary Tribunal. Once judgment is delivered enforcement/execution is undertaken by the Law Society and the Attorney General and the

⁸⁷ *Ibid.*

⁸⁸ Constitution of Kenya, 2010 Article 48 titled Access to justice stipulates The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

⁸⁹ This is against the provisions of Constitution of Kenya, 2010 Article 50 (2) (e) which stipulates that: "Every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay."

Disciplinary Tribunal have no control. This explains the fact that there are matters being mentioned before the Disciplinary Tribunal which matters have been pending execution for over five years. This means that the complainant is forced to wait longer to enjoy the fruits of the judgment of the Disciplinary Tribunal if at all. This is against the established principle of law that justice delayed is justice denied. In addition, the Constitution provides that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution.⁹⁰

The issues of delay was well established in the research conducted by a Masters student while looking at Professional self-regulation and challenges in enforcing professional Discipline⁹¹

ii) Complainant denied right of Appeal and Judicial Review

The above structural deficiencies become a hindrance to access to justice by the complainant whose right the Attorney General purported to champion during investigation, prosecution and adjudication.

The provisions of the Advocate's Act give the accused Advocate a right to appeal against the order(s) of the Tribunal⁹² or may seek for judicial review in the High Court or further, the accused Advocate may apply for review of the orders of the tribunal in the same tribunal.⁹³

What happens to the aggrieved complainant? That is, if the complainant is aggrieved by the decision(s) and/or order(s) passed by the Tribunal? do they have a right to appeal in the High Court or apply for judicial review in the High Court?. The Advocates Act and the Law Society of

⁹⁰ Constitution of Kenya, 2010 Article 159 (1) .

⁹¹ Langat-Korir Roselyne in a Project paper in partial fulfillment of the Degree in Masters of Law (LL M) titled *Professional Self-regulatory and Challenges in enforcing Professional Discipline*.

⁹² Advocates Act Section 60. This right of appeal lies before the High Court of Kenya.

⁹³ Advocates Act Section 53 (6C) provides that an Advocate against whom an order is made under this section who has not appealed against such order under Section 62 may apply to the Disciplinary Committee for a review of the Order.

Kenya Act are silent on this eventuality. It can safely be concluded that the fate of the complainant lies with the Tribunal. If the complainant is dissatisfied with the decision of the Tribunal then they have to live with it. The position is arrived at due to structural flaw on the disciplinary structure. It is a precarious position since the Attorney General prosecutes on behalf of the complainant. The Attorney General prosecutes the complaint before himself since he is the Chair of the Tribunal. Therefore if the complainant is not satisfied with the decision of the Tribunal which decision is by the Attorney General then the natural question, is can the Attorney General appeal or apply for judicial review against his own decision? This is a hurdle to access to justice and against the tenets of fair trial being visited upon the complainant. The Constitution of Kenya entitles every person a fair administrative action.⁹⁴ Parliament has been given the mandate to enact a legislation that will provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal and promote efficient administration.⁹⁵ In addition, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.⁹⁶ The million dollar question that begs an answer is whether the composition and the process of the Tribunal are constitutional given the above structural deficiencies?

iii) Accessibility of the Tribunal

The Tribunal is based in Nairobi only. However, it is ideally established to serve the whole country. The right of establishment of advocates is felt everywhere in Kenya. Therefore, it is expected that the complaints against the advocates are everywhere where the advocates provide

⁹⁴ Constitution of Kenya, 2010 Article 47(1) of the provides that: "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

⁹⁵ Constitution of Kenya, 2010 Article 47 (3) (a) and (b)

⁹⁶ Constitution of Kenya, 2010 Article 50(1) .

the legal services.⁹⁷ This is an upfront to access to justice which is one of the principles in which the Constitution of Kenya, 2010, has been premised.⁹⁸ The structure of the advocate disciplinary framework must consider putting in place mechanism that would enhance access to justice by the complainant at the same time without compromising the justice.

(b) Provision of goods and services to the public and access to information

The Constitution protects the citizens in the provision of goods and services offered by public entities or private persons.⁹⁹ There are no formulated codes of conduct as well as a service charter so that members of the public may know what to expect from their legal service providers and how to seek redress in the event of a complaint.

The Constitution thus provides for consumer protection, competent services and proper communication to the client. Without clear codes of conduct which clearly stipulates the expectations of the client, whole process becomes suspect and unconstitutional

3.3.0 The technical dilemma

3.3.1 Advocates social and economic rights

On the other hand, the Constitution grants social and economic rights, including the right to social security.¹⁰⁰ These rights apply to every person including Advocates. Suspending or striking out a lawyer may have implications on the welfare of his family which have to be taken into account. The disciplinary process has to keep a balance between protecting the public and punishing and rehabilitating advocates. Look at the right to practice a profession as more appropriate)

⁹⁷ Constitution of Kenya, 2010 Chapter Eleven discusses the objects and principles of devolved government. The objects of devolution as outlined under Article 174 of the Constitution is inter alia to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya and to facilitate the decentralization of State organs, their functions and services, from the capital of Kenya.

⁹⁸ *Supra* note

⁹⁹ Constitution of Kenya, 2010 Article 46(2) .

¹⁰⁰ Constitution of Kenya, 2010 Article 45.

3.3.2 Election of the members of the Disciplinary Tribunal

The Tribunal consists of six advocates of not less than ten years standing, one of whom shall be an advocate who does not ordinarily practice in Nairobi, all of whom shall be **elected** (*emphasis mine*) and shall hold office for three years and be eligible for re-election.¹⁰¹ These members are elected by advocates during the Law Society of Kenya elections. This makes the elected members-“Judge” to have an electorates or constituents. Same advocates (constituents) will have complaints brought against them before the Tribunal presided over by the same Tribunal members whom they elected and who after three years will be seeking re-election by the same advocates. Will the advocates sitting in the Tribunal rule against their electorates? It is noted that the advocates sitting in the Tribunal are eligible for re-election. Will they be bold enough to lose votes by ruling against their electorates, the advocates having complaints being prosecuted against them before the Tribunal? This creates a perceived “allegiance” by the Tribunal members to the advocate appearing before them. This makes the whole proceedings before the Tribunal suspect and unfair and fall short of attaining fair trial. It is important to note here that the complainants have little faith in the tribunal because they believe that the Advocates protect their own. This perception has very serious damage to the image of the whole Advocates disciplinary process, this is contrary to the express provisions of the Constitution.¹⁰²

3.3.3 Severally struck-off advocates

It is on record that the Tribunal has struck off advocates severally from the roll of advocates. That is one Advocate struck off several times.¹⁰³ Severally struck off advocates may be subjected to unfair trial. If the same advocate is charged with a capital offence, for example,

¹⁰¹ Advocates Act Cap 16 Section 57 (1) (c).

¹⁰² Constitution of Kenya, 2010 Article 50(1) .

¹⁰³ For instance In the Matter of Afwokah John Makokha Saisi (Advocate), the Petitioner while making a Petition to be restored to the Roll of Advocates, it was held that he had been struck off the roll thirteen times.

murder, how many times can they be charged? This accords the charged advocates inhumane and an unfair treatment and is expressly against the provisions of the Constitution.¹⁰⁴

3.3.4 Execution of the orders issued by the Tribunal

Once the Tribunal issues orders, execution ensues. The Law Society of Kenya as the secretariat of the Disciplinary Tribunal is mandated to execute the orders of the Tribunal. Execution is done against the advocates who were unsuccessful in defending themselves at the Tribunal and having exhausted their right of appeal or judicial review. One way of carrying out the execution is through attaching and selling the movable property of the errant advocate where money is involved and the order seeks restitution. A successful complainant seeks through the Law Society the services of an auctioneer to carry out the execution process through attaching and selling the movable property of the charged advocate. These instructions are issued by the Law Society of Kenya through their advocate and then passed to auctioneers from the area the errant advocate is practicing. It can be noted that these auctioneers work with the advocates; they are clients to the advocates on a daily basis. They are clients to the advocates and they are now being instructed by the complainant to attach the advocates movable property. This raises serious conflict of interest. Will the auctioneers serve the interests of the complainant or will they jealously seek to protect their long business relationships between themselves and the errant advocate? It is arguable that the auctioneers may develop cold feet in seeking to execute against their former or current bosses. The upshot of this is that the auctioneers will be very reluctant to pursue their clients for a disciplinary cause. The complainant will end up not enjoying the fruits of their judgment; since there is no one willing to carry out the execution process

¹⁰⁴ *Supra*

3.3.5 The Budget of the Disciplinary Tribunal

The members of the Tribunal shall be paid such remuneration, fees or allowances for expenses as the Attorney General in consultation with the Treasury, may authorize out of monies provided by Parliament for that purpose.¹⁰⁵ This implies that the Attorney General, Commissioners, Disciplinary Tribunal members and the State Counsel who investigate and prosecute the complaints against the advocates are all paid by the Attorney General. This money is contributed by the tax payers. This raises a legal and ethical question of why should tax payers money be spent to promote only one profession in the expense of all other professions?

3.3.6 Pending cases before the ordinary courts

Fairness in the trial of advocates is also compromised by the fact that Tribunal proceeds to hear cases against advocates when such cases are pending before the ordinary courts; brought either under civil or criminal law.¹⁰⁶ In some cases where an Advocate has been acquitted by court the tribunal has held that such decision does not bind them. This is despite the Advocate pleading that pursuing the matter before the tribunal after courts have deliberated on the same is subjecting him/her to double jeopardy. Under Articles 50(1)& 50(2)(o) of the Constitution, it is clear that Courts and a tribunal has been given similar jurisdiction and decision arrived by either should suffice. It is Unconstitutional to therefore subject the Advocate to trial before the Tribunal on a matter that has already been determined by Court.

3.4 Conclusion.

From the above discussion it is evident that there are serious flaws in the existing advocate's disciplinary process. The current system seems to over-concentrate on co-regulation of legal

¹⁰⁵ Advocates Act Cap 16 Section 57 (1A).

¹⁰⁶Constitution of Kenya, 2010 Article 50(2)(o) provides that: "Every accused person has the right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."

profession. However this does not seem to achieve its intended goal, by putting more power to the office of the Attorney General does not make the regulatory system effective. It is time that the legal profession is left to regulate itself by putting in effective structures. It is ironical for one to imagine that when an advocate is appointed by the Attorney General he/she protects the interest of the public more than when they are in private practice. The coming to force of the new Constitution has further complicated the situation as the existing framework is in conflict with the new Constitution. There is dire need to relook at the framework a fresh with a view to recommending for amendments to the existing legal framework.

The traditional model for regulation of the legal profession was self-regulation.¹⁰⁷ Within the self-regulation model, formal regulatory power over the profession was conferred by the Government on the professional associations. Regulatory powers exercised by the professional associations included the determination of entry standards¹⁰⁸ and regulation of lawyers' professional conduct.¹⁰⁹ The self-regulation of the legal profession was traditionally regarded as integral to professional practice because it ensured the independence of the profession from Government intervention in its affairs and ensured that members of the profession were judged by their peers.

The model which has been adopted in the Advocates Act is that of co-regulation. The role of the Law Society of Kenya and the State Law Office as the regulators of the profession has been

¹⁰⁷ Julia Black in her field defining essay, "Critical Reflections on Regulation" (2002) 27 Australian Journal of Legal Philosophy 1 at 25, defines regulation as "the intentional activity of attempting to control, order or influence the behavior of others." Parker et al. build on this definition by arguing that "it incorporates three basic requirements for a regulatory regime: the setting of standards; processes for monitoring compliance with the standards; and mechanisms for enforcing the standards."

¹⁰⁸ This is provided under the Council of Legal Education Act, Cap 16A of the Laws of Kenya. The Preamble to this Act provides that it is an Act of Parliament to provide for the establishment and incorporation of the Council of Legal Education and for connected purposes.

¹⁰⁹ The professional lawyers' conduct is regulated by the Advocates Act, Cap 16, Laws of Kenya, the Law Society of Kenya Act, Cap 18, Laws of Kenya and several legal digests on legal profession.

largely preserved. The Act provides a legislative mandate to the role of the professional bodies in matters such as rule making and the administration of the disciplinary system on one hand and scrutiny of the exercise of their powers on the other. The professional bodies have both representative and regulatory roles. However, the Acts set standards to be applied by the professional bodies and provide for external scrutiny of their actions. This co-regulation now seems obsolete by coming to force of the new Constitution. To cure this, the next chapter looks at other jurisdiction that may have found themselves in the same dilemma and how the situation was salvaged. This is achieved by allowing the profession to regulate itself. The government can facilitate by funding and ensuring that systems are put in place. This solution is what the researcher discusses in the next chapter as best practices.

CHAPTER FOUR

4.0 BEST PRACTICES IN THE LEGAL AND INSTITUTIONAL FRAMEWORK IN THE LEGAL DISCIPLINARY PROCESS.

Having looked at the Constitutional framework for Advocates' disciplinary procedure in the previous Chapter and having identified the structural and the technical dilemma from the above discussion it is evident that there are serious flaws in the existing advocate's disciplinary process in Kenya. These flaws makes the existing procedure (Advocates' disciplinary procedure) Unconstitutional as the same fall short of the Constitutional threshold. This dilemma is caused by the framers of the Advocates Act and the Law Society Act, who sought to establish a Co-regulatory Advocates Disciplinary process. The following discussion looks at how other jurisdictions have established a strong Advocates' Disciplinary process while ensuring Constitutionality of the procedure. In this Chapter therefore the researcher does a comparative analysis of South Africa, Australia and Queensland.

4.1 THE CASE OF SOUTH AFRICA

4.1.1 Introduction

The apartheid government made substantial but racially selective investments in education which gave rise to a class of highly qualified but largely white professionals. In the post-1994 era, this has created both opportunities and challenges. On the one hand, the country is blessed with a

strong base of engineers, accountants and lawyers. On the other hand, all the three professions are under immense pressure to transform¹¹⁰

South Africa's new Constitutional dispensation has generated new concepts and terminologies which are not only unique but have also provoked much heated debate. They include words like: transformation, configuration, reconstruction, reparation and phrases like: African renaissance, affirmative action and black empowerment. What makes these concepts and terminologies so significant and controversial is the peculiar South African context in which they have evolved and are currently understood and applied. Various forums have frequently debated the multi-faceted issues of reconstructing the legal system and legal profession in South Africa.¹¹¹

4.1.2 Historical Perspective of the Legal Profession in South Africa

The context within which the prevailing socio-legal values in South Africa today need to be recognized has been defined by a variety of historical factors, notably colonialism, imperialism and the subsequent system of apartheid characterized by conservatism, white domination, division and repression of the majority black population.¹¹² State policy for centuries sought to deny the same citizens by means of a battery of racially based legislation. This was complemented by a host of socio-political, economic and cultural deprivation by the use of oppressive and segregationist policies, laws and practices. The impact of this system on the legal profession has been documented; the legacies of which linger on the present day.¹¹³

¹¹⁰ By 2009 the percentage of black professionals in the accounting, engineering and legal professions remain very low, at 12%, 24% and 21% respectively.

¹¹¹ Iya, Philip F. (2003) "From Lecture Room to Practice: Addressing the Challenges of Reconstructing and Regulating Legal Education and Legal World Legal Studies: Vol. 16, Article 7. Available at: <http://scholar.valpo.edu/twls/vol16/iss1/7> (Last accessed on 19th March, 2012).

¹¹² P.F. Iya, Reform of Legal Education in South Africa: Analysis of the New Challenge of Change, 31 LAW TEACHER 310, 311-312 (1997). "Blacks" for this purpose includes Indians, coloureds and black South Africans.

¹¹³ Iya, supra note 2, at 312. In 1997 the figures expressed in percentages are: of the total number of lawyers in the country, 85% were white, 10% black and 15% others, including foreigners.

4.1.3 The Legal Education in South Africa

Until recently, apartheid ideology provided the framework of education generally and legal education in particular. In 1953, for example, the Bantu Education Act ensured that all education in South Africa was officially divided along racial lines to reinforce the dominance of white rule, by excluding blacks from quality education and technical training. The Extension of University Education Act of 1959, which established racially based universities, applied these ideologies to higher education. The result was that entry to the universities was formally restricted on the basis of race. For black people to be admitted to white universities, they had to get special ministerial permits certifying that no equivalent programmes were offered at black universities. The logical extension of this type of segregation culminated in the establishment in the early 1980s of several universities in the independent “homelands,” to service the needs of separate development.¹¹⁴

The discriminatory system of education was reflected in the legal education. This featured in three different areas:

4.1.4 Entry into the profession

The extent of discrimination in legal education extended to entry into the profession in two important spheres. In the first place, disadvantaged law graduates, originating mostly from historically black universities, experienced severe difficulties in entering the profession and establishing themselves as successful legal practitioners. This was so because of the process (the “ladder system”) of education, and the quality of their education which was characterized by lack of resources and facilities.¹¹⁵ Second, the lack of equality within which the profession was exacerbated by the qualification requirements for admission to legal practice. For example,

¹¹⁴ Ibid.

¹¹⁵ Ibid.

admission to the attorneys' and advocates' profession was different. Attorneys could be admitted with an undergraduate bachelor's degree, while advocates required an LL.B postgraduate degree. Attorneys are also required by statute to undergo a two-year (eighteen months if they attend the Practical Training School) period of vocational training, whereas there is no such statutory vocational-training for advocates. The only vocational training for advocates who wish to become members of the practicing Bar is six months or less.¹¹⁶

4.1.5 Regulations of the Profession

There are remarkable differences in the manner the various branches of the profession are regulated. For example, attorneys are obliged by statute to be members of a law society which exercises professional control over them,¹¹⁷ whereas membership of the Societies of Advocates is voluntary, and many advocates practice without being subject to the control of any regulatory authority other than the High Courts. Besides, advocates may not accept instructions from a member of the public without instructions (briefs) from attorneys, irrespective of whether the advocate is a member of one of the Constituent Bars of the General Council of the Bar.¹¹⁸

4.1.6 Constitutional Principles

The broad values¹¹⁹ in South Africa shaped the process of democratization both before and during the struggle that led to the enactment of the 1993 Constitution,¹²⁰ which ushered in a new order based on the supremacy of the Constitution. This resulted in the embodiment of several treasured principles in the current Constitution of South Africa which include inter alia: healing

¹¹⁶ Ibid.

¹¹⁷ The Attorneys Act No. 53 of 1979.

¹¹⁸ For courts decision on these issues see *Society of Advocates of Natal V De Freitas and Another* 1997 (4) SA 1134 (N). See also *General Council of the Bar of South Africa V van der Spuy*_1999 (1) SA 577 (T).

¹¹⁹ These include inter alia general socio-economic values including historical factors like colonialism, apartheid and resulting racism.

¹²⁰ Act No. 200 of 1993.

the division of the past and establishing a society based on democratic values, social justice and fundamental human rights;

Laying the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improving the quality of life of all citizens and freeing the potential of each person; and building a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.¹²¹

The focal point of the Constitution is the Bill of Rights, the cornerstone of democracy in South Africa. The rights provided for include guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law;¹²² that “everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum,”¹²³ and that “every accused person has the right to a fair trial, which includes the right... to have a legal practitioner assigned to (him or her) by the State and at State expense if substantial injustice would otherwise result.”¹²⁴

The Constitution also provides that the State “must respect, protect, promote and fulfill” these rights.¹²⁵ A closer look of these provisions proves that the Constitution of Kenya, 2010, borrowed heavily from the Constitution of the Republic of South Africa.¹²⁶ Despite this

¹²¹ Preamble to the final Constitution, Act No. 108 of 1996.

¹²² Constitution of South Africa Section 9(1) .

¹²³ Constitution of South Africa Section 34 .

¹²⁴ Constitution of South Africa Section 35(3) (g) .

¹²⁵ Constitution of South Africa Section 7(2).

¹²⁶ The Preamble to the Constitution of Kenya, 2010 recognises the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. In particular Constitution of Kenya, 2010 Article 21(1) provides that it is a fundamental duty of the State and every State organ to observe, respect, protect and fulfill the rights and fundamental freedoms in the Bill of Rights. Constitution of Kenya, 2010 Article 47(1) on fair trial expressly provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Constitution of Kenya, 2010 Article 50(1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

borrowing in the New Constitution, the Kenyan Advocates Disciplinary process has lagged behind in harmonizing the existing framework with the new supreme Law.

4.2 THE CASE OF AUSTRALIA

4.2.1 Entry Controls in the Legal Profession.

Traditional regulatory controls focus on entry requirements in the attempt to ensure that only well qualified people of ‘good character’ enter the profession, that is, people whom clients can trust. Lawyers are admitted into practice on the basis of academic legal qualifications, practical training and ‘good fame and character’¹²⁷ The character requirement disqualifies from legal practice those who have a record of dishonesty, serious criminal misconduct or continued disregard for law and legal institutions.¹²⁸ Consistent with a concern with ‘character’, candidates for admission are expected to disclose everything that might possibly cloud their character including minor convictions or charges of which they have been acquitted. A candidate who shows candour in disclosing potential issues, remorse for past wrongdoing and a change of conduct is more likely to be successful than a candidate who seeks to hide ‘information which may raise eyebrows’.¹²⁹

Efforts to implement significant structural changes in lawyer discipline were accelerated during the late 1990’s due to the scandals involving lawyers or inadequate lawyer discipline.¹³⁰

The requirement that prospective lawyers show reverence for the law and legal institutions may discourage involvement in broader social causes outside the legal system.¹³¹ For example, in the

Constitution of Kenya, 2010 Article 50 (2) (h) provides that every person has the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

¹²⁷ Gino Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand* (1996) 30.

¹²⁸ *Re Davis* (1947) 75 CLR 409 and *Ex parte Lenehan* (1948) 77 CLR 403 on dishonesty and criminal misconduct, *Re B* [1981] 2 NSWLR 372 on disregard of the law and legal institutions.

¹²⁹ *Re Del Castillo* (1998) 136 ACTR, 1, 7.

¹³⁰ R. Bond, “ASIC Must Get Tough on Managers” *The Australian* (Sydney), January 6, 1999, 26.

controversial case of *Re B*, a prominent journalist and political activist was refused admission to the bar. It was held that she was not fit to serve the law because it was ‘demonstrated that in the zealous pursuit of political goals she will break the law if she regards it as impeding the success of her cause’.¹³² The breaches of the law include numerous arrests in relation to political activism and protests, and the candidate’s dishonesty about the source of bail funds that she provided for an accused in a case with political overtones.

It is clearly evident that the standards of admission to the Bar in Australia are higher than in Kenya. While the entry requirements in Kenya are more inclined towards academic requirements, the system in Australia is holistic; it transcends to issues of integrity, morality and generally a person of good character in the society. This is a welcome move and practice since it is assumed if someone is of good moral standing he will definitely practice such in the legal profession.

4.2.2 Complaints Grafted on to Disciplinary Controls

In the 1980s and 1990s the disciplinary process for lawyers in most Australian jurisdictions was reformed in an attempt to improve its accountability and transparency to the public as well as to improve consumer redress. At first, lay representatives and lay observers were included on investigatory and disciplinary bodies. Now, consumer complaints handling functions and independent ombudsmen have been patched onto traditional self-regulatory disciplinary processes of all jurisdictions.

¹³¹ It has even been suggested that this may be a particular disincentive to indigenous law graduates seeking admission to the profession: Kevin Dolman, “Indigenous Lawyers: Success or Sacrifice?” (1997) 4(4) Indigenous Law Bulletin 4.

¹³² *Re B* [1981] 2 NSWLR 372, 402 (Helsham CJ in Eq).

The most far-reaching reforms¹³³ increase the consumer remedies available to clients and blur the distinctions between discipline and consumer complaints handling. The Office of the Legal Services Commissioner receives all complaints in the first instance and resolves many consumer-type complaints informally by giving complainants advice over the phone or by a simple phone call to the lawyer involved.¹³⁴ However, many of those complaints that are not easily resolved are still referred to the (self-regulation) Law Society and Bar Association Councils for investigation.

4.2.3 Disciplinary System of Advocates

Once entry to the profession has been attained, under the traditional model, lawyers are assumed to be competent and capable of serving clients well. Ongoing regulation of lawyers' practice focuses mainly on maintaining standards of character, not competence.¹³⁵ Sanctions are mostly imposed for dishonesty (particularly knowingly or deliberately misleading a court or tribunal, or falsifying a document), breach of trust account rules (including misappropriation of funds) and other fiduciary duties. Thus traditional self-regulation is disciplinary and usually has no role to play in resolving disputes with clients about competence or standards of service. This is despite the fact that the vast majority of complaints clients make about lawyers concern poor service—delay, incompetence, over-charging and discourtesy or failure to communicate.¹³⁶ It is assumed that the practices of the profession as a whole are ethical and that it is appropriate to sacrifice one

¹³³ These reforms are under the Legal Profession Act, 1987 .in New South Wales

¹³⁴ In the 2000-1 reporting year, the number of written complaints was 28.9 per cent of the total of 9110 calls to the inquiry line. This means that up to 71.1 per cent of complaints or inquiries were resolved by informal advice over the phone, educational material sent out to inquirers or simple action such as a phone call to the lawyer involved: Office of the Legal Services Commissioner, Annual Report 2000-2001 (2001) 5, http://www.lawlink.nsw.gov.au/olscl.nsf/pages/ar2000_2001_mission (Last accessed on 24th March, 2012).

¹³⁵ The only ongoing regulation of lawyers' competence is a requirement to attend a certain number of hours of continuing legal education requirement in most States.

¹³⁶ Supra note

or two members when there is a public scandal rather than to change the whole culture and structure of legal practice among all members.¹³⁷

Disciplinary offences are generally investigated and prosecuted by self-regulatory legal professional associations (or in some cases by an independent ombudsman) and enforced in specialist tribunals dominated by practicing lawyers. Courts of superior jurisdiction in Australia also retain an inherent jurisdiction to discipline lawyers.¹³⁸ The court can therefore enforce appropriate standards of conduct particularly in relation to the duty to the administration of justice and to resolve costs disputes.¹³⁹

The way in which the ethics of legal practice is regulated in Australia perpetuates a mismatch between the ethics that the public expects of lawyers (an ethic of responsiveness) and the ethics that the legal profession has traditionally adopted for itself (an ethic of autonomy).¹⁴⁰ Despite important reforms, the most significant regulatory controls on lawyers' ethics continue to be the traditional requirements of admission, discipline and liability for breach of fiduciary duties.¹⁴¹ The traditional controls are not responsive to public concerns about justice and customer service. Rather, the profession and its regulation were intentionally built on a foundation of ethical autonomy.¹⁴² The profession decided for itself what was in the best interests of clients, the public and the administration of justice. Other perspectives were disregarded because non-lawyers were thought to lack the expertise (and frequently the inclination) to comment

¹³⁷ Ibid.

¹³⁸ Mostly the inherent jurisdiction has been exercised reactively where another party (usually a Bar Association) has made an application to discipline a lawyer on more traditional grounds of professional misconduct such as dishonesty.

¹³⁹ Ibid. Other courts also have these powers by virtue of their legislation and court rules.

¹⁴⁰ Christine Parker, Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness, UNSW Law Journal, Volume 25(3) at 676.

¹⁴¹ These controls are often referred to collectively as the rules of 'professional conduct' or the 'law of lawyering'. They have their origins in the 19th century, and earlier.

¹⁴² *supra* note 18

intelligently on the ethics of legal practice.¹⁴³ This paper focuses majorly on the practice adopted in Queensland.

The magnitude of the reforms is well illustrated in Queensland, where the Legal Profession Act¹⁴⁴, 2004 substantially altered the structure and focus of lawyer discipline in Queensland. Prior to 2004, the Queensland Law Society and the Bar Association handled most discipline complaints against solicitors and barristers. Their efforts focused primarily on serious misconduct and rarely addressed the more common client complaints like failure to communicate or neglect of client matters.¹⁴⁵ In 2004, the Act shifted the responsibility for lawyer discipline to an independent Legal Services Commissioner¹⁴⁶ who was effectively directed by the legislation to take a much more consumer oriented approach to lawyer discipline. This is in stark contrast with the Kenyan system where the two institutions responsible for Advocates disciplinary process; the Advocates Complaints Commission and the Disciplinary Tribunal lack independence.¹⁴⁷

On the whole, the new regulatory system in Queensland appears well-conceived and is superior to the previous mechanisms for handling complaints against barristers and solicitors. There is much that other jurisdictions, generally, and Kenya in particular, can learn from the Queensland's reforms.

¹⁴³ David Wilkins, "Who Should Regulate Lawyers?" (1992) 105 *Harvard Law Review* 799.

¹⁴⁴ Legal Profession Act No. 112 of 2004, assented to 21st December, 2004 and repealed the Legal Profession Act, 1987. It is an Act to provide for the regulation of legal practice in New South Wales and to facilitate the regulation of legal practice on a national basis and for other purposes.

¹⁴⁵ Leslie C. Levin, Building a Better Lawyer Discipline System: The Queensland Experience at 1

¹⁴⁶ This Office is established under section 686 of the Legal Profession Act, 2004.

¹⁴⁷ *Supra* note for instance the Advocates Complaints Commission is a Department under the Office of the Attorney General. The purpose of the Advocates Complaints Commission is to investigate complaints and prosecute them before the Disciplinary Committee. The Attorney General performs two roles; investigating and prosecuting. In addition, the Attorney General chairs all the meetings of the Disciplinary Committee. It is therefore arguable that this system lacks independence and impartiality since the Attorney General plays three duties at the same time; investigating, prosecuting and judging.

4.3 A Brief History of Lawyer Discipline in Queensland

The Australian Courts have consistently maintained their inherent authority to impose discipline on lawyers.¹⁴⁸ Nevertheless, professional associations of solicitors and barristers historically were given or assumed most of the responsibility for disciplining Australian lawyers until the end of the twentieth century.¹⁴⁹

In Queensland the Law Society Act, 1927, established the Queensland Law Society as an incorporated body, created a tribunal of the Law Society (“the Statutory Tribunal”) to hear complaints against solicitors and gave it the power to strike them off the roll.¹⁵⁰ The court retained ultimate jurisdiction over solicitor discipline, however, and the Statutory Tribunal’s decisions could be appealed to the courts. During the 1920’s the Law Society was also given the authority to monitor solicitors’ trust accounts and in 1930 it received the power to decline to issue solicitor’s certificates.¹⁵¹

In contrast, the Queensland Bar Association, which was formed in 1903, was a voluntary association of barristers and it had no statutory authority to impose discipline. It was, in essence, a ‘toothless tiger’.¹⁵² When it received what appeared to be a possibly meritorious complaint about a member, the Bar Tribunal (the Association Board of Directors) would refer the matter to an ad hoc Tribunal that would investigate and make a recommendation. Other than encouraging barristers to voluntarily undertake to make certain changes or removing a barrister from membership in the Bar Association, it had no direct power over its members. In very rare cases

¹⁴⁸ Dal Pont G.E., *Lawyers’ Professional Responsibility* (Melbourne, Thomson, 3rd ed, 2006), 512.

¹⁴⁹ See D. Weisbot, *Australian Lawyers* (Melbourne, Lonman Cheshire, 1990), 193, 199-201.

¹⁵⁰ *Law Society Act, 1927* ss 3,5.

¹⁵¹ *Trust Accounts Act 1923*; L Haller, “Waiting in the Wings’: *The Suspension of Queensland Lawyers*” (2003) 3 Queensland University of Technology Law and Justice Journal 397, 416-17.

¹⁵² *Supra* note

it would go to court and ask that the court uses its inherent power to strike a barrister off the rolls.¹⁵³

Starting in the 1970's, serious questions began to be raised about the effectiveness of lawyer self-regulation throughout Australia. In New South Wales, where the most rigorous and extensive study of lawyer discipline was conducted, the Law Reform Commission concluded "that a significant number of complaints against lawyers are not dealt with fairly and effectively."¹⁵⁴

The Commission also noted that problems arising out of matters that concerned the ordinary consumer, including overbilling, neglect of client matters and lack of competence, were not being handled as disciplinary matters.¹⁵⁵

In 1985, Queensland's Parliament enacted a legislation establishing a Lay Observer and creating the Solicitors Disciplinary Tribunal.¹⁵⁶ The Solicitors Disciplinary Tribunal was a lower level tribunal which would hear matters in panels of two solicitors and one lay person. Unlike the Statutory Tribunal, which was composed exclusively of solicitors, the Solicitors Disciplinary Tribunal could not strike off or suspend a solicitor.¹⁵⁷

In 1997, the Statutory Tribunal and the Solicitors Disciplinary Tribunal were replaced by the single Solicitors Complaint Tribunal which heard discipline matters in panels composed of two

¹⁵³ Haller, *Discipline of the Queensland Legal Profession*, supra note 124-26.

¹⁵⁴ New South Wales Reform Commission, *The Legal Profession Discussion Paper No. 2, Complaints, Discipline and Professional Standard*, Part I (1979), 7.

¹⁵⁵ *Ibid.*

¹⁵⁶ Queensland Law Society Act Amendment Act 1985.

¹⁵⁷ Haller .L., "Solicitors' Disciplinary Hearings in Queensland 1930-2000: A Statistical Analysis" (2001) 13 *Bond Law Review* 1, 4.

solicitors and one lay person. A Legal Ombudsman was also appointed, with power to bring charges against solicitors and to appeal against decisions of the Solicitors Complaint Tribunal.¹⁵⁸

By this time, the Australian state Attorneys-General recognized the need for more serious structural changes in lawyer regulation and some jurisdictions began to move lawyer discipline out of control of the professional associations.¹⁵⁹ Due to these scandals, the Ombudsman recommended that an independent body should handle complaints because of the Law Society's "conflict of interest in maintaining a regulatory role as well as maintaining their (*sic*) role as a Society to benefit the profession."¹⁶⁰ This leads to the enactment of the Legal Professional Act, 2004.

4.3.1 The Content and Implementation of the Legal Profession Act, 2004

This legislation significantly altered the structure of lawyer discipline in Queensland and broadened its focus. The Act provides for the appointment by the Attorney General of a Legal Services Commissioner (LSC), who may be a lay person or a lawyer.¹⁶¹ The Act gives the LSC the exclusive power to receive complaints and where appropriate, to dismiss them without investigation.¹⁶² If the LSC decides to proceed with a matter, he has the exclusive authority to prosecute the case.¹⁶³

¹⁵⁸ Queensland Law Society Amendment Act 1997: Queensland Law Society Act, 1952 section 6 AI(1) inserted by Queensland Law Society Legislation Amendment Act 1997 section 9

¹⁵⁹ By the late 1990's, Western Australia and New South Wales had already implemented some changes although the professional associations continued to conduct investigations of complaints against lawyers. By 1996, Victoria permitted persons to make complaints to the Legal Ombudsman or the professional associations and the Ombudsman could conduct an investigation, Legal Professional Act 1996 (Vic) ss 138, 143.

¹⁶⁰ Legal Ombudsman, The Queensland Law Society and Baker Johnson Lawyers (2003), at 2,5,7-8.

¹⁶¹ Legal Professional Act, section 414.

¹⁶² Legal Professional Act, section 259.

¹⁶³ Legal Professional Act, section 276. This is in stark contrast with the practice in Kenya where this power has been vested with the Advocates Complaints Commission, a Department under the Attorney General Chambers. The Attorney General wields a lot of influence over the Commission. The Commission investigates and prosecutes complaints before the Disciplinary Committee where again the Attorney General chairs all the meetings of the

Under the Act, complaints that are not immediately dismissed are divided into three categories. Complaints of “professional misconduct” allege conduct that would “justify a finding that the practitioner is not a fit and proper person to engage in legal practice” and includes “a substantial or consistent failure to reach or maintain a reasonable standard of competence or diligence.”¹⁶⁴ Complaints of “unsatisfactory professional conduct” allege conduct “that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian practitioner”.¹⁶⁵ Complaints involving “consumer disputes” are disputes between a person and a legal practitioner that do “not involve an issue of unsatisfactory professional conduct or professional misconduct.”¹⁶⁶ The LSC may suggest to the parties that they enter into mediation but mediation is voluntary and consumer disputes will not result in a hearing.¹⁶⁷

The Act represents a significant departure from the prior systems, not only because it establishes an independent agency to handle complaints about lawyers, but because of its decidedly consumer-oriented-tilt.¹⁶⁸ Problems with lawyer competence and diligence-which had previously been largely, ignored by those in charge of lawyer discipline-are now expressly a basis for discipline. The standard applied in determining unsatisfactory professional misconduct is no longer what the community of lawyers thinks about the conduct but rather what a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.¹⁶⁹ The

Committee. In this scenario, independence is compromised as opposed to the practice in Queensland where the Legal Services Commissioner is an independent institution.

¹⁶⁴ Legal Profession Act 2004, section 245(1).

¹⁶⁵ Legal Profession Act 2004, section 244.

¹⁶⁶ Legal Profession Act 2004, section 263(2).

¹⁶⁷ Legal Profession Act 2004, section 263(2). Solving of complaints through Alternative Dispute Resolution mechanisms has been anchored in the law. This provision is not available in the relevant Kenyan pieces of legislation despite being a constitutional requirement; Article 159(2) (c) of the Constitution of Kenya, 2010.

¹⁶⁸ Supra note

¹⁶⁹ *Legal Profession Act 2004* (Qld) s 244. In contrast, the prior common law definition looked to the standard of professional conduct “observed or approved of by members of the profession of good repute and competency. L.

Act also provides for a mechanism to mediate minor consumer disputes so that clients can obtain some relief. The Act also provides that all disciplinary action taken against an Australian legal practitioner must be maintained by the LSC on a discipline register which must be available on the LSC's internet website.¹⁷⁰

The Act has a provision for two separate tribunals to hear discipline matters. Professional misconduct complaints are heard by the Legal Practice Tribunal, which is composed of members of the Queensland Supreme Court and is constituted by any one of its members.¹⁷¹ The single justice, who alone constitutes the Legal Practice Tribunal sits with one member of a lay panel and one member of a practitioner panel who are to 'help' him in hearing and deciding a discipline application.¹⁷² The Legal Practice Tribunal's decisions may be appealed to the Queensland Court of Appeal.¹⁷³ Unsatisfactory professional misconduct complaints are heard by the Legal Practice Tribunal, which is composed of two lawyers and a lay person.¹⁷⁴ Decisions by the Legal Practice Tribunal may be appealed to the Legal Practice Tribunal, and with leave, to the Court of Appeal.¹⁷⁵

At present, initial calls about a lawyer are received at the Legal Services Commission or at the Queensland Law Society.¹⁷⁶ All inquiries are logged into a computerized case management system that was adapted from the one already being used by the Law Society¹⁷⁷ and both the

Haller, "Imperfect Practice Under the *Legal Profession Act 2004* (Qld)" (2004) 23 *University of Queensland Law Journal* 411, 417-18, quoting *Re R, a practitioner of the Supreme Court* [1927] SASR 58, 61.

¹⁷⁰ Legal Profession Act 2004, section 296 (1), (4).

¹⁷¹ Legal Profession Act 2004, section 429.

¹⁷² Legal Profession Act 2004, section 280(1), 437 (3).

¹⁷³ Legal Profession Act 2004, section 292(1).

¹⁷⁴ Legal Profession Act 2004, sections 282(1) and 469(2).

¹⁷⁵ Legal Profession Act 2004, sections 293(1), 294(2).

¹⁷⁶ Queensland Bar Association, *How to Make a Complaint*, <http://www.qldbar.asn.au/2199.html> (last accessed on 30th March, 2012).

¹⁷⁷ John Briton, *The Legal Services Commission-One Year On*, 26th October, 2005 at 18.

Law Society and the Commission can access the inquiry concerning any lawyer.¹⁷⁸ Cases where it appears that the problem is simply one of poor communication or a minor understanding, the Commission's Complaint Officers or the Law Society's Complaint's Client Relations Centre may attempt to informally resolve the problem by placing a call to the lawyer.¹⁷⁹ New South Wales is the most progressive jurisdiction in relation to consumer dispute resolution because the Office of the Legal Services Commissioner receives all complaints about lawyers in the first instance. It therefore has a chance to informally resolve many consumer-type complaints. The provision of a single gateway for complaints about lawyers that is independent of self-regulatory professional bodies has been resisted in other States. If it appears that the matter cannot be resolved, or if the allegations are of such a serious nature, that they may constitute a conduct matter, the caller is advised to file a complaint with the LSC.¹⁸⁰

At its inception in July 2004, the Legal Services Commission inherited 938 complaints. Two years later, it reportedly has eliminated most of the complaint backlog, reducing the pending number of pre-Act complaints to 29.¹⁸¹ After initially relying heavily on the investigative resources of the Law Society and the Bar Association, which handled most of the investigations in the Legal Services Commission's first year of operation, by mid-2006 only about half of the investigations were being referred to the Law Society or the Bar Association for investigation, while the remainder were handled by the Legal Services Commission.¹⁸²

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ Legal Services Commission, *Annual Report*, supra note . This is a clear demonstration of fair trial where justice is delivered within a fairly short period of time as opposed to the Kenyan practice where the complaints can drag for several years, thereby denying the parties justice. This goes against the constitutional principles of fair trial, Constitution of Kenya, 2010 Article 159 (2) (b),.

¹⁸² *Ibid* 16.

Although the Legal Profession Act 2004 does not expressly provide for private discipline, some complaints are resolved privately. Complaints that allege unsatisfactory professional conduct may be resolved informally with the Legal Services Commission if the lawyer will take restorative steps such as apology to the complainant, waiving some or all of a fee, or implementing better office systems. In such cases, the Commission “will use the leverage the Act gives [it] to seek to persuade [lawyers] to do whatever they reasonably can to put things right and to prevent similar mistakes in the future.”¹⁸³ If the Legal Services Commission is satisfied with the steps taken by the lawyer, the complaints are dismissed in the “public interest” on the theory that there is no public interest in prosecuting them. At present, almost 15% of all conduct matters are dismissed on public interest grounds.¹⁸⁴

Less than three years after the passage of the Legal Profession Act 2004 the transition has been made to an independent lawyer discipline agency with a consumer-oriented focus. Problems with neglect of client matters and failure to communicate are receiving attention, and in many cases are being rapidly resolved. The Legal Services Commission, the Queensland Law Society and the Queensland Bar Association are working together to investigate complaints and have effectively eliminated the complaint backlog. It is clear that the lawyer discipline system is more efficient and more responsive than it was before the passage of the Act. Thus the Act has seemingly accomplished many of its intended goals.¹⁸⁵

There is an advantage to having a non-lawyer serve as the Legal Services Commissioner. Lawyers are acculturated to the norms of the legal profession which are sometimes at odds with ordinary norms of morality and the interests of the public. It is important in a lawyer discipline

¹⁸³ *Ibid* 10,18.

¹⁸⁴ *Ibid* 18.

¹⁸⁵ *Supra* note

agency designed to protect the public that there be someone in authority with a non-lawyer's perspective.¹⁸⁶ That perspective helps ensure that complaints about certain lawyer misconduct will not be “overlooked” or dismissed especially where the conduct conforms with professional norms but violates ordinary notions of morality.¹⁸⁷

An example of the advantages to having a non-lawyer Legal Services Commissioner was recently illustrated in *Legal Services Commissioner v. Mullins*.¹⁸⁸ In that case, a discipline complaint was filed against a Queensland barrister who did not reveal when settling a personal injury automobile accident case that he had recently learned that his client was seriously ill with cancer. The barrister continued to rely in mediation on the claim that his client had a 27 year life expectancy when he knew that this life expectancy was very unlikely due to the client's illness. While many lawyers might take the conventional advocate's view that the barrister was simply preserving privileged information and being a zealous advocate for his client,¹⁸⁹ a non-lawyer would readily see that by allowing the insurance company to settle the case believing that his client had a 27 year life expectancy, the barrister was committing fraud. This was, in fact, the view taken by the lay Legal Services Commissioner, who pursued the complaint and obtained a reprimand and a \$ 20,000 fine against a highly-regarded member of the Bar.¹⁹⁰ It is less likely that a legally-qualified commissioner—or at least one who had previously practised in Queensland—would have had the courage to prosecute the complaint.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Legal Services Commissioner versus Mullins* [2006] LPT 012.

¹⁸⁹ Indeed, in the Mullins case, the barrister sought the advice of senior counsel, who advised him that he was not required to reveal the information during the mediation.

¹⁹⁰ *Ibid.*

4.3.2 Independence of the Legal Services Commissioner

It is important to consider whether Queensland's Legal Services Commissioner is afforded sufficient independence, regardless of whether the LSC is a layperson or a lawyer. The Legal Services Commissioner is appointed by the Attorney-General, but may not serve for more than 10 years.¹⁹¹ There is no requirement that the Attorney-General consult with any constituency about the appointment. The LSC reports annually to the Attorney-General, who tables the report with Parliament.¹⁹² The annual report is available to the public. The Legal Services Commission is funded by payments from the Legal Profession Interest on Trust Accounts Fund, and those payments are approved by the Attorney-General.¹⁹³ The LSC can seek budget enhancements as required at any time and has done so successfully. Thus, the LSC is independent from those whom he investigates and prosecutes, *i.e.*, the solicitors and barristers, and from their professional organizations.¹⁹⁴ The LSC is also largely independent from the judiciary, which has an institutional interest in the perception that lawyers are behaving ethically, but may also retain ties with the bar.¹⁹⁵ Although the LSC is directly accountable to the Government, some level of accountability to the public is desirable, and it is far preferable that the oversight reside in those who are not being regulated by the LSC.

¹⁹¹ Legal Profession Act 2004, section 415.

¹⁹² Legal Profession Act 2004, section 311.

¹⁹³ Legal Profession Act 2004, section 208-11.

¹⁹⁴ This is a great lesson Kenya should emulate. The legal disciplinary process in Kenya is arguably not independent. The Attorney General investigates and prosecutes at the same time. The Disciplinary Committee is composed to a large extent of Advocates who are expected to be above board in adjudicating complaints brought against their fellow members of the Bar. This raises a 'red flag' since the Advocates, sitting in the Committee, may pass rulings lenient, or to a large extent favorable to their fellow estranged learned colleagues facing the disciplinary action before them.

¹⁹⁵ Of course, the LSC, like all litigants cannot be completely unconcerned with the views of the judiciary since the LSC is dependent on the Legal Practice Tribunal for favorable rulings.

4.3.3 Is the Legal Services Commission dealing adequately with consumer protection issues?

It seems clear that the Queensland Legal Services Commission is committed to a model of individual consumer protection, and does not view that function as subsidiary to the discipline function. Significant resources are devoted to informally resolving consumer concerns of existing clients. In some cases, these efforts may include obtaining agreements from lawyers to pay clients money in order to resolve consumer dissatisfaction. Thus, while the LSC has no power to make compensation orders, the Commission and the Law Society will sometimes informally arrange for compensation in appropriate cases. Likewise, the Legal Services Commission is now treating fewer complaints as “consumer disputes,” and more complaints as “unsatisfactory professional conduct,” which gives it more leverage to work out dispositions that are likely to satisfy individual consumers.¹⁹⁶ In other words, the Legal Services Commission is working within the Act—and at times, finding creative ways to do so—to satisfy many consumer concerns.

4.4 Conclusion

There is much to be admired by the world generally, and Kenya, particularly, in both jurisdiction. In the case of South Africa, we can learn how young and growing democracies have developed Advocates Disciplinary process in-line with the Constitutional provisions of the land. As quoted earlier Kenyan Constitution 2010 heavily borrows from the South African. Kenya should therefore take the next step of learning how Legal profession has been managed without being in conflict with the Constitution. On the other hand the Queensland disciplinary process could be a solution to the Kenyas problem as far as Advocates Disciplinary process is concerned. For the first time, barristers are subject to a disciplinary process that can result in an array of

¹⁹⁶ Legal Services Commission, *Annual Report*, supra note

sanctions. Complaints against practitioners are being investigated much more quickly and prosecution decisions are being made by an independent agency headed by a Lawyer like in Kenya or non-lawyer but independence is guaranteed. The public is able to learn about the discipline imposed on lawyers, which allows individuals to better protect themselves when they choose to retain counsel. The legal disciplinary system is much more transparency and credibility than the Kenyan system. It is among the most consumer-oriented discipline systems in the world. From the Queensland example the profession self-regulate though the Attorney-General is involved and independence is assured. No one becomes the investigator, the prosecutor and the jury is the same cause as is the case in the current Advocates' Disciplinary process in Kenya.

CHAPTER FIVE

5.0 SUMMARY OF THE MAJOR FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Summary of the discussion.

Chapter One outlined the objectives and the importance of this research paper. It laid out the scope of the paper and the idea was to shed light on to the study, its significance and what it aimed to achieve.

Chapter two was a conceptual chapter whose purpose was to look at the institutional and legal framework established under the Advocates Act and the Law Society Act in so far as Advocates disciplinary process in Kenya is concerned

The relevant provisions which discuss the disciplinary process of advocates were interrogated at length. It was indeed pointed out that these twin acts have inherent weaknesses that make the advocates disciplinary process weak, susceptible to abuse and unconstitutional.

Chapter three discussed the provisions of the Kenyan Constitution 2010 and the provisions of both the Advocates Act and the L.S.K Act and the possible area of conflicts. The main aim of this chapter was to show that these provisions of these pieces of legislation need to undergo various amendments to put them in line with Constitution of Kenya, 2010.

Chapter four discussed the advocates disciplinary processes practiced in other jurisdictions. This chapter discussed the advocates' disciplinary process in South Africa and Australia. These jurisdictions have adopted a self- regulation system for disciplining advocates. It is demonstrated that the self-regulation model in these two jurisdictions work harmoniously with their respective constitutions. The chapter brings out a comparative discussion and demonstrates

that the Kenya's approach is susceptible to abuse by the Attorney General and is again unconstitutional because the legal provisions are manifestly conflicting with the Constitution of Kenya, 2010.

5.2 Major findings

The role of an Independent legal profession in protection of human rights and fundamental freedoms to all persons, improvement of access to justice, fair treatment, restitution, compensation and assistance for victims of crime, safe guarding and guaranteeing protection of rights of suspects or those charged with a crime whether capital or otherwise cannot be explained better than as captured in the "basic principles on the role of lawyers"¹⁹⁷

In the same UN congress, the professional associations of lawyers, was guaranteed in all governments, specifically resolution 24 which states "*lawyers shall be entitled to form and join self-governing professional association to represent their interests, promote their continuing education and training, and perfecting their professional integrity*". The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

On the relationship between the government and the legal profession, article 25 states "*professional associations of lawyers shall cooperate with Government to ensure that everyone has effective and actual access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics*".

¹⁹⁷ adapted by the Eighth United Nations Congress on the prevention of Crime and the treatment of offenders, Havana, Cuba, 27th August to 7th September 1990

The disciplinary process of the legal profession was discussed in the congress. The resolution arrived at are captured in article 26-29 as follows;

“26 Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law, customs and recognized international standards and norms”.

“27 Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and favorably under appropriate procedure. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

“28 Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority or before a court, and shall be subject to an independent judicial review”

“29 All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of the principles”

5.3 Conclusions

Kenya by the dint of Article 3 of the Constitution has ratified these provisions hence making them Constitutional provisions which must be adhered to. The discussion in earlier chapters clearly looked at the three main regulatory approaches in the regulation of the legal profession. These approaches are self-regulatory, external regulatory and co-regulatory. In chapter three we discussed the co-regulatory which Kenya has adopted while in chapter four, the researcher analyzed how other jurisdictions have managed to maintain a self-regulatory approach of the

legal profession. As discussed earlier, the Kenyan co-regulatory has not only failed to meet its obligation, but it is largely unconstitutional thanks to the Kenyan Constitution 2010.

The Attorney General investigates, prosecutes and adjudicates complains against Advocates. The Attorney General becomes the judge in his own case. This causes a structural dilemma to Advocates disciplinary legal framework, in the process making the whole process conflict with preamble of the Constitution, Article 10 (1), 27 (1), (2), (3) of 2010 Constitution. This shows a structural deficiency in the current advocate disciplinary process.

Because of the structural flaws, there is delayed justice, making it fly against the provision of the Constitution that provides that administrative process should be expedited¹⁹⁸ further, the complainant's right for judicial review is limited because such review would be tantamount to Attorney General seeking review in his own decision or even seeking appeal in his own judgment. This is in contravention of the Constitution¹⁹⁹.

By having both the Advocates Complaints Commission and the Disciplinary Tribunal in Nairobi is upfront to access to justice which is against the Constitution²⁰⁰

The Advocates Disciplinary Tribunal consists of other six members other than the Attorney General and the Solicitor General who are elected by advocates who may appear before them during their tenure. The members of the public have perception that they are the strangers in the proceedings as the accused advocate is the electorate of the "judge".

Another finding was that even where there is conviction the process is lengthy and cumbersome. This is mainly because execution is bestowed on auctioneers who may not be willing to

¹⁹⁸ Constitution of Kenya, 2010 Article 50 (2) (e).

¹⁹⁹ Constitution of Kenya, 2010 Articles 159 (10), 47(1), 47(2), 47(3)(a) &(b), 50(1).0

²⁰⁰ Constitution of Kenya, 2010 Article 174

embarrass their “boss” in the name of accused Advocate who may have been giving the auctioneer work. Some accused advocates escape jurisdiction to defeat the course of justice.

5.4 RECOMMENDATIONS

The researcher recommends the following:

a) Migrate from Co-regulation to Self-regulation

This recommendation seeks to cure the Constitutional issues arising from the current co-regulatory advocates’ Disciplinary process and to effectively ensure independence of the process. Kenya should migrate from Co-regulation to self-regulatory. The current advocates’ disciplinary framework is far from being institutionally independent either real or perceived. This is because of unclear defined role of the Executive through the office of the Attorney General in regulating the legal profession. The Attorney General is the chair of the Disciplinary Tribunal, deputized by the Solicitor General or his appointee. Here is therefore expected as the chair of the Disciplinary Tribunal, to lead in making all the decisions of the Disciplinary Tribunal because he is the head judge of the Tribunal. On the other hand, he initiates all investigations on complaints lodged at the Advocates Complaints Commission by the members of the public as the Advocates Complaints Commission is a department in his office. In addition, he prosecutes the matters before the Disciplinary Tribunal where he is the chief judge. This makes him a judge in his own cause.

To cure this fundamental irregularity on separation of power, it is imperative that we relook at the Kenya’s advocates’ disciplinary framework. The Australia and Queensland, have adopted a system where the disciplinary offences are generally investigated and prosecuted by self-regulated legal professional association (or in some cases by an independent ombudsman), and

enforced in specialist tribunals dominated by practicing lawyers. The Australian model, especially the Queensland State model, which is a self-regulation model of disciplinary process of Advocates, provides an excellent practice which Kenya can emulate. In Queensland, the Attorney General appoints an independent body (the Legal Services Commissioner) whose role is to carry out the disciplinary process of advocates. The Attorney General's limited role is to appoint the chair of that body. In this arrangement, the Attorney General fulfills his role as a defender of the interests of the public and does not interfere with the running of the body.

This arrangement also ensures financial independence. The current position in Kenya is that the Attorney General controls the funds to run the operations of both the Disciplinary Tribunal and the Advocates Complainants' Commission. This is perceived to compromise the decisions to be passed by these two Committees. This arrangement makes the members of both the Disciplinary Tribunal and the Advocates Complainants' Commission employees of the Attorney General. Consequently, because they have to protect their personal interests, they should work under the whims of the Attorney General and this creates a room for manipulation.

The Queensland' approach is very different. The Legal Services Commissioner receives its funding from the Exchequer but files its returns to Parliament to establish a system of checks and balances. Parliament, being the representative of the people, and in particular, the tax payers, checks on the expenditure incurred by the Legal Services Commissioner.

This recommendation also seeks to cure the issue of membership of the Disciplinary Tribunal. Currently Six members of the Disciplinary Tribunal are elected by Advocates from the Law Society of Kenya to serve for 3 years. These members are practicing advocates. These Advocates sit as judges in the Disciplinary Tribunal. The same advocates who elected them

appear before them if they are accused of professional misconduct. As a result, the elected Disciplinary Tribunal members assume an electorate in the form of Advocates (accused of professional misconduct). As elected members they should pay allegiance to the advocates who are accused before them. Consequently, there is a likelihood of their decisions being influenced in order to protect the interests of their electorates. On the other hand members of the Disciplinary Tribunal sit for only three years with a possibility of re-election for a further and final second term of three years. This re-election is not guaranteed because it depends on the wishes of the electorate. The abrupt change of the members of the Disciplinary Tribunal disturbs the process of precedent-setting almost impossible. In addition, this change makes the existing jurisprudence on advocate's disciplinary process in Kenya inconsistent and scanty and this erodes the confidence in the Disciplinary Tribunal and the members of the public. The current execution process of the decisions of the Disciplinary Tribunal is weak and almost impossible to be realized. The Disciplinary Tribunal issues instructions to an advocate who is in private practice to carry out the execution process. This advocate is supposed to carry out this execution against a colleague in the bar. There is a perceived challenge to implement this process. In addition, the advocate is required to instruct an auctioneer to help in the execution process. There is a likelihood that this auctioneer once worked for the advocate who is now guilty of the professional misconduct. It is unlikely that this auctioneer will proceed to execute against his former 'employer'. It is therefore evident that the execution process is challenging. It is therefore imperative devise a workable mechanism of carrying out the execution process. An independent body to carry out the execution process would salvage this current challenging position.

While the right of appeal and/or judicial review is inherent in the law and cannot be taken away without contributing to injustice, it has been abused by advocates who have been found guilty of professional misconduct. The current advocates disciplinary legal framework has loopholes which have been utilized to delay and ultimately to defeat the execution proceedings. Advocates guilty of professional misconduct first apply for judicial review of the decisions passed by the Disciplinary Tribunal. If they are unsuccessful, they go ahead and lodge an appeal at the High Court. There is no time frame for this process. It is evident that the main aim of this process by the advocates has been to delay the process to the detriment of the victims.

The Disciplinary Tribunal and the Advocates' Complainants' Commission sit in Nairobi only, the capital city of Kenya. All complaints must be lodged in Nairobi. This does not necessarily mean that advocates who are likely to be involved in professional misconduct practice in Nairobi. Complaints come from all parts of the country. This makes the process of seeking justice by the victims very expensive in terms of the time spent and finances utilized in travelling to Nairobi.

The Constitution of Kenya, 2010, was discussed and passed on the strong basis of devolution of power and services to the people. In this regard, therefore, it is unconstitutional for the advocate's disciplinary process to be accessed only in Nairobi. This goes against the basic tenets in which the Constitution of Kenya, 2010, was founded. In addition, looking at the arrangement in Australia and South Africa, the advocates' disciplinary process is devolved in States and Provinces respectively.

This makes accessing this service very easy and harmoniously works with their respective constitutions which are pro-devolution of power. The current arrangement of the advocates'

disciplinary process of advocates in Kenya is run by several bodies without clear cut duties and roles hence Multiplicity of roles.

There is the Advocates Complainants' Commission, Disciplinary Tribunal and the Ethics Committee of the Law Society of Kenya. Since their roles duplicate each other, this creates multiplicity of roles. In order to harmonize this process, there is a need to merge these bodies to form an independent body which would receive its own budget from the Exchequer but its expenditure subject to checks and balances from Parliament.

To cure this, there is a need to establish an independent body as is the practice in Queensland, Australia and South Africa. In Queensland, the Legal Services Commissioner is an independent and impartial body serving the interests of both the legal profession and the consumers of these services.

In this system, courts of law should also have inherent jurisdiction to discipline lawyers. Both the accused lawyer and the complainant should have a right for judicial review or appeal in courts. This system has not only worked in the jurisdictions discussed herein but also in others like England and Wales where the office for the Supervisor of Solicitors is a department of the Law Society of England and Wales and deals with solicitors and has no functional connection at all with the state.

Canada's system of lawyer regulation is modeled in a self-regulated system based on the principle that an independent self-regulated legal profession is fundamental to the maintenance of Rule of Law²⁰¹.

²⁰¹ Michael W. Milani Q.C August 8, 2007 "Why look to the UK? Canada's System of lawyer regulation works well."

(a) Migrate from Co-regulation to External-regulation

External regulation loosely means having third party look into disciplinary affairs of the profession. The best example of this kind of regime is what the Queenlands has adopted, where the Attorney General appoints a legal services Commissioner who need not necessarily be a lawyer and who is independent. This creates an independent agency which is customer focused. This system will not only be concerned with what the community of lawyers think about their conduct but rather what a member of the public (wanjiku) is entitled to expect of a reasonably competent Kenyan Legal practitioner.

This system categorizes the complaint into issues that may be mediated as minor consumer disputes and the serious disciplinary action. The law society should establish Complaint's Client Relation Centre where minor issues can be sorted out through use of telephone which may resolve many consumer- type complaints.

Such structure will lay the foundation for a democratic and open society where government is based on the people and where citizens are equally protected by law.

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APPENDIX I

QUESTIONNAIRE

(Please tick or fill in the blanks where necessary)

(A) THE ADVOCATES ACT AND IT'S EFFECTS ON ADVOCATES DISCIPLINARY PROCESS.

1).Advocates Complaints' Commission.

(i) In your opinion is the establishment of the Advocates Complaints Commission in the Advocates Act as far as Advocates disciplinary process is concerned effective?

YES

NO

If your answer above is NO give the specific areas/sections you think the Act need to be amended to make it more effective.

.....
.....
.....
.....
.....

(ii) The new Constitution

The new Constitution was promulgated in August 2010, which brought about strict and wide provisions on administrative processes. On the other hand the Advocates Complaints Commission was established by the Advocates Act in 1989. Definitely the coming to force of the new Constitution may have effects on the provisions of the Advocates Act and the administrative bodies established therein.

From your end does the new Constitution affect the Commissions operations as established under the Advocates Act?

YES

NO

If your answer above is YES give the specific areas/sections you think the Act is in Conflict with the new Constitution and make proposal for amendments.....

.....
.....

2).Disciplinary Tribunal.

(i) In your opinion is the establishment of the Disciplinary Tribunal in the Advocates Act as far as Advocates disciplinary process is concerned effective?

.....
.....
.....
.....

(ii) Does the new Constitution affect the establishment and the operations of the Disciplinary Tribunal as established under the Advocates Act?

YES

NO

If your answer above is YES give the specific areas/sections you think the Act is in Conflict with the new Constitution and suggest amendments.....

.....
.....
.....

3) The Advocates Disciplinary Procedure under the Advocates Act.

(i) Are you familiar with the Advocate Disciplinary Procedure as established under the Advocates Act?

YES

NO

(ii) If YES how Constitutional or otherwise is the current Advocates Disciplinary Procedure since the coming to force of the new Constitution?.....

.....
.....
.....

(B) THE LAW SOCIETY ACT AND ITS EFFECT ON THE ADVOCATES
DISCIPLINARY PROCESS.

(i) Do you know the role played by the Law Society of Kenya in the Advocates
Disciplinary Process?

YES

NO

(ii) If the above is YES how effective is the Law Society in carrying out its role in the
Disciplinary process?

Extremely effective

Somewhat effective

Effective

Less effective

Very ineffective

(iii) With the coming to force of the new Constitution, how Constitutional or otherwise is
the role of Law Society as far as Advocate Disciplinary process is
concerned?.....

.....

(v) Which provisions of the Law Society Act as far as Advocate Disciplinary process is
concerned that need amendments if
any?.....

.....