

TOWARDS A FAIR LAWYERS' DISCIPLINARY SYSTEM IN  
KENYA.

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## DECLARATION

I, **OURE DANIEL ONDERI** do declare that this thesis is my original work and has not been submitted for a degree in any other university.

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## DEDICATION

I dedicate this research paper to my loving wife Mrs. Oure Emilly Bwile, my loving Children Oure Cynthia Nyaboke, Oure Brian Onderi, Oure Janet Asigo, Oure John Kivandah and Oure Michelle Siakilo.

## ACRONYMS AND ABBREVIATIONS

LSK : Law Society of Kenya

ACC : Advocates Complaints Commission

ABA : American Bar Association

DT : Disciplinary Tribunal

OAG : Office of Attorney General

ICPAK: Institute of Certified Public Accountants

MPDB : Medical Practitioners and Dentists Board

EBC : Engineers Board of Kenya

## LISTS OF STATUTES

### KENYA

The Kenya Constitution, 2010

The Advocates' Act

The Law Society of Kenya Act.

Accountants Act No. 15 of 2008

Medical Practitioners and Dentists Act

Engineers Act, 2012

### SOUTH AFRICA

The Legal Profession Act, 2007

The Attorneys' Act, 1979

The Bantu Education Act, Act No. 47 of 1953

The Extension of University Education Act, Act No. 45 of 1959

The Admission of Advocates Act

### AUSTRALIA

The Legal Profession Act, 2004

The Law Society Act, 1927

The Legal profession Act, 1996

### PENNSYLVANIA

The Constitution of Pennsylvania.

## LIST OF CASE LAWS

Andrew John Bolton verses The Law Society, (1994) 1 WLR 512 (1993) EWCA Civ 32.

Jasat verses Natal Law Society, 2000(2) ALL SA 310 (SCA), case number 78 of 1998.

Sweney verses Texas Department of Highway 483, US. 468(1987).

## ABSTRACT

The motivation for doing this research paper stems from my long interaction with the lawyers disciplinary Tribunal in Kenya as one of the prosecutors from the office of Attorney General, department of Advocates' Complainants Commission. The main aim of study is to analyze the structural legal framework defects of the existing lawyers' disciplinary Tribunal in Kenya. The question investigated in this paper is whether the legal and institutional framework does mitigate the unethical practices in the legal profession in Kenya. The existing institutional legal structure has failed to regulate the legal profession.

To accomplish this goal, the researcher used the existing literatures, Statutes, Journals both National and international relating to Lawyers Disciplinary process, case laws and questionnaires as means of collecting the required data. Questionnaires were dispatched to the Tribunal members, ACC staff, complainants and members of the public.

The findings of this research paper indicated that there exist gaps in the existing laws that establish the Lawyers Disciplinary Tribunal. The Advocates Act and the Law Society of Kenya Act have inherent weaknesses that have made the Lawyers Disciplinary Tribunal lack independence in its operations. The Tribunal is not allocated funds nor does it have offices of its own where it can independently operate from. The research paper suggests that there is a need to embrace institutional reforms in order to change the existing structural legal framework which can make the Lawyers' Disciplinary Tribunal be a fair and independent institution free from any interference.



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## CHAPTER ONE

### INTRODUCTION AND HISTORICAL PERSPECTIVE OF THE REGULATION OF LEGAL PROFESSION IN KENYA (1901-2014)

#### 1.1 INTRODUCTION

In the world, Lawyers play a vital role in protecting and advancing the individual rights and liberties in any democratic society. Fulfillment of this role requires an understanding and appreciation of lawyers to the society and the legal system. For any profession to maintain its integrity norms and procedures should be in place and the criteria for what good and bad professional practice is and/or should be. Members of the said profession must adhere to such norms established for the practice of the profession as the profession's valuable asset is its collective reputation and confidence which that inspires.<sup>1</sup>

The purpose of Lawyers' Disciplinary process is to maintain the reputation of the legal profession. The principle of justice places the legal profession practices under the criteria of social ethics from which the various needs and interests involved are coordinated with the available resources and possible course of action. Law must clarify expectations and standards of behavior that should be applied to lawyers' codes of conduct. Lawyers are expected to establish and maintain a reputation for integrity, which is the most important attribute of a member of the legal profession.<sup>2</sup>

Lawyers should observe the highest standards of conduct on both personal and at profession level in order to retain the trust, respect and confidence of colleagues and the members of the public.<sup>3</sup> Unless therefore proper system is in place to regulate the profession, the members of the public would lose confidence with lawyers.

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<sup>1</sup> (1994) 2 All ER 486, (1994) COD 295, (1994) 1 WLR 512, (1993) EWCA Civ 32.

<sup>2</sup> Hortal Alonso, Augusto "Seven theses on professional Ethics" Ethical Perspectives 3,4 (1996)200-2006.

<sup>3</sup> American Bar Associations Act 1878.

In order to maintain professionalism in legal profession, the practice of law should be overseen by an independent regulatory institution. The Tribunal as an institution administering justice should be structured towards promoting national values and principles enshrined in the Constitution of Kenya.<sup>4</sup>

This research paper seeks to address the discontent with legal practice driven by legal framework and structural factors. What is frustrating in the lawyers' disciplinary system in Kenya is the current plight in the gap between the bar and the public's perception of the existing weak tribunal as an institution administering justice and failure of both groups to confront its underlying causes and the need for structural changes.

The public perceive lawyers to be no longer seekers of justice but inappropriately manipulate the legal system through establishment of weak disciplinary lawyers' tribunal. The public would prefer a substantially different structure in which tribunal would be an independent institution where members who serve it have been vetted and found fit to serve. There seems to be irresponsible disciplinary structure and an overly broad protection of the professional monopoly, public does not appear ambivalent and its concerns do not seem unwanted.<sup>5</sup>

The research paper's objective would be to examine the existing legal and institutional framework deficiencies for the lawyers' disciplinary system in Kenya under the advocates' Act and the Law Society of Kenya Act. In order to achieve research objective, the paper would address as to whether the existing structural and legal framework of the lawyers' tribunal as established by the Advocates' Act and Law Society of Kenya Act is effective. The research of this paper would be limited only to the lawyers' disciplinary system in Kenya from the year 1990 to 2014.

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<sup>4</sup> Article 10 of the Constitution of Kenya, 2010.

<sup>5</sup> Rhode, Deborah L. "Ethical perspectives on Legal practice" *Stanford Law Review* (1985) 589-652.

The researcher would use mainly use the questionnaires, the existing relevant literatures, Articles and internet sources as a mean of collecting information. The research paper would be based on three theories namely public theory, private theory and institutional theory. Public theory stipulates that regulation is supplied in relation to demand of the public for correction of inefficient market practices.<sup>6</sup> Regulation must benefit the society as a whole and not particular group.<sup>7</sup> Institution theory stipulates that institutions should be well structured with proper guidelines for social behaviors.<sup>8</sup> Private theory requires individuals to form groups in order to pursue self interests.

The research paper would cite the existing gaps in the structural and institutional flaws in the existing lawyers' disciplinary tribunal established by the Advocates Act and Law Society of Kenya Act. Such gaps would include lack of sentencing policy, separation of powers, lack of fair hearing, tribunal lacking independence among others. To accomplish this goal, the researcher divided the research work into five chapters.

In chapter one, the research paper discusses the introduction, the history of the regulation of legal profession in Kenya, research problem, theoretical framework, conceptual framework, literature review research justification, research objectives, hypothesis, research questions and methodology. The institution should be well structured in order to shape the practices that it was established to regulate. There is need for the institution to undergo reforms that can enhance public confidence in it.<sup>9</sup>

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<sup>6</sup> Richard A. Posner, Theories of economic Regulation, *The Bell Journal OF Economics and Management Science*, Vol.5, No. 2 (Autum, 1974), page 335-358.

<sup>7</sup> Dacin, M. Tina, Jerry Goodstein, and W. Richard Scott, "Institutional Theory and Institutional Change: Introduction to special research forum" *Academy of Management Journal* 45 (2002): 45-56

<sup>8</sup> Scott W. Richard, 2004 "Institutional Theory" Pp 408-14 in *Encyclopedia of Social Theory*, George Putzer ed. thousand Oaks CA Sage.

<sup>9</sup> Richard P. Jones, Panel urges Reforms in lawyers Discipline, *MILWAUKEE J. SENTINEC*, Sept. 13, 1999 at 2.



Chapter two discusses the structural and institutional legal framework of the Lawyers' disciplinary tribunal in Kenya as established by the Advocates Act and the Law Society of Kenya Act. The Chapter as well narrates some challenges facing the lawyers disciplinary Tribunal in Kenya.

Chapter three examines the comparative practices of lawyers' disciplinary system with other jurisdictions. The chapter would focus on the lawyers' disciplinary system in Australia, South Africa and Pennsylvania. The chapter will demonstrate how these jurisdictions have established independent systems as far as lawyers' disciplinary system is concerned.

Chapter four focuses on the legal reforms required to remedy the existing gaps as a way towards a fair and an impartial lawyers' disciplinary tribunal in Kenya. The tribunal should model itself towards protecting consumers of legal services and ensuring that complainants are compensated rather than passing severe penalty against an advocate. There is need for the tribunal to be independent in order to avoid the existing influences from the law society of Kenya and from the Office of Attorney General.

The research concludes in chapter five by examining various recommendations which can be implemented in order to make lawyers' disciplinary system an effective institution. Such recommendations among others include independence of the tribunal, vetting of the tribunal members, amendments to the Advocates' Act and Law Society of Kenya Act in order to change composition of the tribunal members, members of the tribunal to leave practice when serving the tribunal and need for budgetary allocations to the tribunal to enable it to effectively manage its own operations.

## **1.2 HISTORY OF REGULATION OF THE LEGAL PROFESSION IN KENYA (1901-2014)**

The Legal profession in Kenya during the Colonial period was divided into two; the "public" legal profession and the "private" legal profession. Among those who comprised the public legal profession were Judiciary and members of the colonial legal service. In most cases, these

were only those who had their legal training in England and were employed by the Crown.<sup>10</sup> Those who mainly occupied the public legal profession offices were the British citizens while the occupants of private legal profession were mainly the advocates of Asian origin.<sup>11</sup> The private legal profession comprised of qualified Advocates in private practice who together formed the Bar.

In Kenya, regulation of legal profession from 1901 to date can be divided into three periods, first, the period from 1901 to 1949, secondly, the period from 1949 to 1989 and third, the period from 1990 to date.

During the first period 1901 to 1949, the legal profession was subject to public control through the Judiciary under the Chief Justice. During that time, discipline against Solicitors, Barristers and Indian Advocates was made to the High Court Judge for determination.<sup>12</sup> Any appeal at that time on disciplinary ruling was made to the High Court at Zanzibar.

The Law Society of Kenya during that time was in Nairobi and Mombasa. Memberships of the Law Society were exclusively European. In the year 1935, The Law society of Kenya started plans to have the legal profession in Kenya modeled like the England Law Society. The agitation later resulted to the establishment of the Law Society of Kenya Act, 1949.<sup>13</sup>

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<sup>10</sup> Ghai & McAuslan, Public Law and Political Change in Kenya (An Introduction to Legal System in East Africa) W. Burnett p 382.

<sup>11</sup> Ibid at page 383.

<sup>12</sup> Ibid at page 383.

<sup>13</sup> Ibid at page 385.

The second period ran from 1949 to 1989 ushered the legal profession into self governing.<sup>14</sup> The Law Society of Kenya Act established the Society as an incorporated body whose main objectives were;

*“Maintenance and improvement of the conduct of the legal profession in Kenya, representation and protection of, and assistance of members of the profession as regards their conditions and practice and otherwise, and the protection of and assistance to the members of the public in all matters touching law”.*<sup>15</sup>

The Act introduced two bodies namely the Advocates Committee and the Remuneration Committee.<sup>16</sup> The Advocate Committee presided by the Attorney General, Solicitor General and three advocates from the society had mandate to hear complaint concerning conduct of any advocate and were to screen complaints filed before forwarding them to the High Court should there be a case to answer. Two Judges would hear both parties. The advocate was to be admonished, suspended and/or struck off the roll of advocates should a prima facie case be established.<sup>17</sup>

The Remuneration Committee on the other hand was presided over by five advocates who were nominated by the Law Society and had powers to enforce, set aside, a remuneration agreement, recommend to the Chief Justice the appropriate rates of remuneration to be charged by advocates.

In an effort to bring the legal profession into self governing, the law society brought in the 1952 amendments. In the amendment,<sup>18</sup> the Advocates Committee had disciplinary power over clerks working as an employee to the advocate’s firm. The Committee further had power to determine a complaint in the absence of advocate.

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<sup>14</sup> Ibid at page 385.

<sup>15</sup> Act No. 10 of 1949.

<sup>16</sup> Act No. 55 of 1949.

<sup>17</sup> Advocates (Amendment) Act No. 20 of 1952.

<sup>18</sup> Ibid.

Membership of the Society was made compulsory and payment of the subscription fees introduced annual practicing certificate. Any advocate by then who was struck off the roll of advocates under the amendment could not be a member of the Law society.<sup>19</sup>

Further, the 1961 Amendments ushered in the establishment of the Disciplinary Committee which had replaced the Advocates Committee. The members of this Committee were the Attorney General, Solicitor General, and three advocates of ten years standing. There was a board of inquiry with the power to investigate, dismiss a complaint if it had no substance, and/or refer to the disciplinary Committee complaints with prima facie case for determination. The Committee had power during the hearing to admonish, fine, suspend and/or struck off the roll of Advocates should a prima facie case be established. Appeal against the orders of the disciplinary tribunal was to be lodged to the two judge bench.<sup>20</sup> The Law Society had set up structures for its self regulatory system, however in 1970s to the mid of 1980s, doubts and uncertainty had increasingly risen over the ability of the LSK to discipline its errant lawyers.

The third period in the regulation of the legal profession in Kenya was through the 1989 Advocates Act Amendments. The 1989 Amendments ushered in the establishment of the Advocates' Complaints Commission (ACC), an arm of the government and a department at the Office of the Attorney General Office. The ACC was given the mandate to receive, investigate and prosecute advocates, firm of advocates and/or any member or employee thereof before the Disciplinary Tribunal.<sup>21</sup> The 1989 Amendments changed the regulatory disciplinary system of lawyers' in Kenya from self regulatory to Co-regulatory system. The major reason for the 1989 amendments which brought the government in the legal disciplinary system was seen as a measure to control LSK who were seen as supporting the multi party system in Kenya.<sup>22</sup>

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<sup>19</sup> Advocates (Amendment) Act No. 55 of 1952.

<sup>20</sup> Ghai & McAuslan, Public Law and Political Change in Kenya (An Introduction to Legal System in East Africa) William Burnett at page 90.

<sup>21</sup> Section 53, Advocates Act (1989).

<sup>22</sup> Mwangi Paul, 2001, The Black Bar, Corruption and political intrigue within Kenya's legal fraternity, Nairobi: Oakland Media Services Ltd.

The Lawyers' Disciplinary system should protect the public by focusing on clients and sanctions that serve clients interest, screen lawyers in order to determine lawyers' qualification to continue practicing, focus on the profession as a whole in order to decide which sanctions would best encourage competence and ethical behavior throughout the Bar and focus on disciplinary process as an effort to shore up the impact of professional standards in guiding lawyers behavior.<sup>23</sup> However, the disciplinary tribunal would only act in accordance to the prevailing Laws that exist and institutions that are set to discipline lawyers for any professional misconduct committed.

A strong credible and respected legal profession is a must in any civilized democracy and a matter of public interest that the legal profession's strength, credibility and integrity are sustained through credible and independent legal institutions.<sup>24</sup>

Legal profession ought to be dedicated to effectively serving the public who are the ultimate consumer of its services. While standards for the imposition of sanctions are necessary to consistent applications of ethical rules, lawyers' regulation system ought to be structured to combat inherent bias. Regulation wherein State Bar Associations are involved in the formal disciplinary process creates conflicts of interest and impropriety.<sup>25</sup>

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<sup>23</sup> Fred C. Zacharias, (2003), The Purpose of Lawyers Discipline 45 WM and Mary L. Rev. 675, <http://scholarship.law.wm.edu/wmlr/vol45/iss2/6>.

<sup>24</sup> Chambers of the Advocates, the Law Court of Valleta Malta, Regulating the Legal Profession in the 20thC.

<sup>25</sup> Mackay Report on Evaluation of Disciplinary Enforcement, 1989-1992, New York.

### 1.3 TYPES OF REGULATIONS

The kinds of regulatory system vary considerably from country to country. The aim of regulations is to set market conditions such as price controls, market entry conditions, contract terms and social obligations.<sup>26</sup> Well regulated industry with performance based induces innovations that benefit consumers and the entire society, increase competitiveness improving the quality of products and services in the market.<sup>27</sup> Any kind of regulatory process that may be in place generally consists of the three stages, namely creating regulations, monitoring for compliance, and enforcing regulations.

There exist three major types of regulations namely self regulations, hybrid (co-regulation) and state regulations. Self regulation is a kind of regulatory process where an industry sets and enforces rules and standards relating to the conduct of the firms in the industry.<sup>28</sup> According to Ogus, self regulation is preferred as it is based on expertise and efficiency.<sup>29</sup> Most practitioners have more expertise and technical knowledge than public officials and are more able to faster conducts within the industry and keep knowledge up to date.<sup>30</sup>

Self regulation benefit government and taxpayers as resources for the same is provided by the same professional body. The system conserves limited government resources and it's more prompt and flexible than state regulation.<sup>31</sup> Self regulation involves same form of independent audit, verifications, assessment of compliance and applications of sanctions by professional associations

<sup>26</sup> Luke A. Steward, "the Impact of Regulation on Innovation in the United States, A cross-Industry Literature Review," Institute of medicine.

<sup>27</sup> Michael E. Porter and Claas Van der Linde,"Towards a new conception of the Environment," Journal of Economic Perspectives (A case study of the US. Auto Industry "Economic Development Quarterly Vol.1 No. 4(1987):358-373.

<sup>28</sup> Anil K. Gupta and Lawrence J. Lad. "Industry self Regulation: An Economic Organizational and Political Analysis," The Academy of Management Review 8,No. 3 (1983): 417.

<sup>29</sup> Ogus A. (1994), Regulation, Legal Reform and Economic Theory, Oxford, Clarendon Press.

<sup>30</sup> Baldwin R. and Cave M. (1999) Understanding Regulation, Theory, Strategy and Practice, Oxford, oxford University Press.

<sup>31</sup> Federal Trade Commission, Self Regulation in the Alcohol Industry, June 2008, <http://www.ftc.gov/os/2008/06.08062alcoholreport.pdf>.

Self regulation however is connected with weaknesses which lead to collusion and anti-competitive behavior. The system as well leads the possibility of regulatory capture which involves the control of regulation by parties not pursuing public interest hence no accountability through a democratic political process.<sup>32</sup> The system is perceived of being soft and likely not to achieve the intended objectives.

Co-regulation (hybrid) occurs when the industry and the government jointly administers the regulatory process. The regulations are specified, administered and enforced by a combination of State and regulated organizations. The purpose of such regulation is to ensure that the public is adequately served at reasonable rates and without unjust discriminations. The system as well ensures that the rules in place are not favoring those in professional bodies.

Co-regulation however attracts conflict of interest where both the members of the professional body and the government may want to take control. This weakens the system and the public end up not served well by this kind of regulation.

State Regulation involves government entities regulating the actions of the professional body in the private sector. In this system the government does the Legislations, monitors and enforces compliance. The regulations are specified, administered and enforced by the state. According to professor Salkin, the notion that Lawyers can regulate the ethical behavior of the legal functionaries is misplaced. Professor Salkin reiterates that Lawyers will always protect their own interest rather than the public interest.<sup>33</sup> The profession itself is thereby encouraged to believe that has no interest in regulating itself and not to use power to get what they want.<sup>34</sup> According to professor Pearce, he gives an example of Judiciary which is made up of Lawyers and is a branch of government independent of the Bar and Executive.<sup>35</sup>

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<sup>32</sup> OECD (2002a), United Kingdom, Challenges at the Cutting Edge, Paris, OECD.

<sup>33</sup> Patricia E. Salkin, Judging Ethics for Administrative Law Judges, Adoption of Uniform code of Judicial Conduct for Administrative Judiciary, 11 WIDENER J. PUB. L.7 (2002).

<sup>34</sup> William T. Braithwaite, Hearts and Minds: Can professionalism Be Taught? 1990 A.B.A. J. 70, 71.

<sup>35</sup> Russell G. Pearce, The Professionalism Paradigm shift. Why discarding Professionalism Ideology will improve the conduct and Reputation of the Bar, 70, N.Y.U.L. REV. 1229, 1275(1995)

The researcher reiterates from the above analysis the need to establish an independent Lawyers Disciplinary Tribunal in Kenya free from the Government and Law Society of Kenya influences. For such to be achieved, the researcher recommends for the amendment of the Advocates Act and the Law Society of Kenya Act so that an independent institution is established.

The three types of regulation analyzed above, each has merits and demerits. In Australia, after the public cry of self regulation which had failed, it was recommended that there be established an independent body to handle and regulate the Legal profession to avoid conflict of interest.<sup>36</sup> This in Australia had led to the enactment of the Legal profession Act, 2004 which had created an independent ombudsman to regulate the legal profession.

The researcher is of the opinion and in support of the state regulation in Kenya. There is need for the creation of such an independent body to handle disciplinary matters of advocates. This, according to the researcher would create confidence to the consumers of legal services and avoid conflict of interests.

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<sup>36</sup> The Legal Ombudsman, The Queensland Law Society and Baker Johnson Lawyers (2003) at page 2, 5.



### 1.3.1 REGULATION OF OTHER PROFESSIONS IN KENYA

The Institute of Certified Public Accountants (ICPAK) legal framework is governed by a council which is supported by secretariat headed by the Chief Executive officer.<sup>37</sup> The Institute shall be governed by the Council known as the Council of the Institute.<sup>38</sup> The Council is mandated to set standards which shall form the basis of accountancy practice for members of the Institute.<sup>39</sup> ICPAK has registration and quality assurance Committee who among other functions monitors compliance with professionals, quality assurance and other standards published by the Council for observance by the members of the institute<sup>40</sup>. ICPAK has a Disciplinary Committee who hears and determines professional misconduct of its members on any complaint referred to them by the Council.<sup>41</sup> Any aggrieved Party has a right to appeal to the Council<sup>42</sup> and to the High Court.<sup>43</sup>

The Medical Practitioners and Dentists Board (MPDB) is established and mandated to receive complaints from patients and any other member of the public who may not be satisfied with the health services rendered to him/her. The Disciplinary Powers are conferred to the Board to hear and determine any professional misconduct referred to it.<sup>44</sup> Any party aggrieved by the decision of the Board has a right to appeal to the High Court.<sup>45</sup> The Disciplinary proceedings take place in three stages. First, the preliminary Inquiry Committee receives and review complaints against Medical Practitioners in order to determine whether there is a *prima facie case*.<sup>46</sup>

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<sup>37</sup> Section 12 of the Accountants Act NO. 15 OF 2008.

<sup>38</sup> Ibid at Section 9(1).

<sup>39</sup> Ibid at Section 9 (2).

<sup>40</sup> Ibid at Section 13(2).

<sup>41</sup> Ibid at Section 32.

<sup>42</sup> Ibid at Section 33(3).

<sup>43</sup> Ibid at Section 33( 4)

<sup>44</sup> Section 20 of The Medical Practitioners and Dentists Board Act.

<sup>45</sup> Ibid at Section 20(6).

<sup>46</sup> Ibid at Section 20.

Secondly, there is Professional conduct Committee who consist of professionals and have power to conduct further inquiries into the complaint submitted to them by the preliminary Inquiry Committee. The Committee thereafter submits the complaint with recommendations to the Disciplinary Tribunal for determinations. Third, the full Board (Tribunal) hears and determines the complaint<sup>47</sup>.

The Engineers Board of Kenya (EBK) is established to register engineers and firms, regulating engineering professional services, setting standards, development and general practice of engineering.<sup>48</sup> Any person dissatisfied with any professional Engineering services may complaint to the Board.<sup>49</sup> The Board after hearing removes/cancels the name of the person if the decision is supported by two-thirds majority.<sup>50</sup> Any aggrieved party has a right to Appeal against the decisions of the Board to the High Court.<sup>51</sup>

The objective of regulation is to retain and enhance public trust and confidence in the profession. The same can be achieved through proper legal framework which can bring to account those who fail to maintain high professional standards. For purposes of proper comparative analysis, the researcher will not compare his research topic to other professions aforementioned. Instead, the researcher will do his comparative analysis with Lawyers Disciplinary Tribunal of Australia, South Africa and Pennsylvania which according to the researcher will demonstrate the existing gaps in the Lawyers Disciplinary process in Kenya.

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<sup>47</sup> Section 20 of The Medical Practitioners and Dentists Board Act.

<sup>48</sup> Section 3(1) of The Engineers Registration Act.

<sup>49</sup> *ibid* at Section 53(1).

<sup>50</sup> *Ibid* at Section 53(11).

<sup>51</sup> *Ibid* at section 54.

## **1.4 STATEMENT OF THE PROBLEM**

The legal profession disciplinary framework in Kenya is discharged by the ACC, an arm of the government, the LSK which is a professional body and the Disciplinary Tribunal. Despite the many amendments to the Advocates Act and the Law Society of Kenya Act, regulating the legal profession in Kenya has a problem in terms of the public perception of lawyers' honesty and the profession's ability and willingness in disciplining its errant members. The current institutional legal framework where an arm of the government (ACC) and LSK which is a professional body together have been mandated to regulate the legal profession in Kenya has made the public to lose trust in the entire lawyers' disciplinary system in Kenya.

The Advocates Act section 53 establishes the ACC with the mandate to receive, investigate and prosecute professional misconduct against advocates before the Disciplinary Tribunal. The same Act under section 57 establishes the Disciplinary Tribunal with a mandate to hear and determine professional misconduct against advocates. The DT is composed of AG, SG and six Advocates appointed by the LSK. This kind of hybrid structural legal framework where the members of the legal profession and the government both jointly engage in the Lawyers Disciplinary process has flaws that have made Lawyers Disciplinary in Kenya weak and not trusted by consumers of legal services. The two Acts does not provide on how such hybrid system would independently operate without either the influence from the Law Society of Kenya or the Government. The legal structural framework as well denies the complainant an opportunity to appeal against the orders of the Tribunal.

The proposed research therefore seeks to examine the failure of the existing structural and legal framework where ACC, LSK and DT are mandated in regulating the legal profession in Kenya. The research paper will demonstrate how the existing structural and legal framework in place has failed in regulating the legal profession in Kenya. The research would propose the suggestions and/or recommendations that should be in place in solving the vice.

## **1. 5 THEORETICAL FRAMEWORK**

The research paper will be based on the following theories;

### 1.5.1 Public Interest Theory

Public interest theory is an economic theory which was developed by Arthur Cecil Pigou.<sup>52</sup> The theory states that regulation is supplied in relation to demand of the public for the correction of inefficient market practices. Regulation must benefit society as a whole but not a certain group of people. Any regulatory body ought to represent societal interest in its operation but not private interest of the regulation.<sup>53</sup>

### 1.5.2 Institutional theory

According to this theory, institutions should be well structured and established as authoritative guidelines for social behavior. Well established institutions with much social order would be a product of social norms and rules that would constitute particular types of actors to effectively enforce them.<sup>54</sup>

Well established institutions consist of formal rules and the enforcement characteristics. The degree to which there is an entity between the objectives of the institutional constraints and the choices individual make in that institutional setting depends on the effectiveness of enforcement.<sup>55</sup> The Constraints imposed by any institutional framework define the kind of organization in existence. Stakeholders would evaluate if the institution in place is valuable and discharges the mandate bestowed in it impartially.

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<sup>52</sup> Pigou, A.C. (1932) *The Economics of Welfare*. London: Macmillan and company.

<sup>53</sup> Richard A. Posner, *Theories of economic Regulation*, *The Bell Journal OF Economics and Management Science*, Vol.5, No. 2 (Autum, 1974), page 335-358.

<sup>54</sup> Dacin, M. Tina, Jerry Goodstein, and W. Richard Scott, "Institutional Theory and Institutional Change: Introduction to special research forum" *Academy of Management Journal* 45 (2002): 45-56

<sup>55</sup> W. R/ Meyer, J. W. (eds) *Institutional Environments and Organizations* (1977): *Structural Complexity and individualism*. Thousand Oaks. Sage.

Institutions can be constraining, superimposing conditions of possibility for mobilization, access and influence. Such institutions limits some form of actions and on one hand facilitate others.<sup>56</sup> The rules governing the existing institution should be that which should fairly serve both actors interest well.

### 1.5.3 Private Interest Theory

Private interest theory acknowledges that individuals form into group to pursue self interests. The theory states that private interest dominates the regulatory process.<sup>57</sup> The theory assumes that groups are formed to protect group interests. The theory postulates that groups are viewed to be in conflict with each other and will lobby to put in place legislations that economically benefit them.<sup>58</sup>

The public theory is associated with the government amending the Advocates' Act in 1989 and being part of the Advocates Disciplinary process in Kenya through establishing the Advocates Complaints Commission.<sup>59</sup> This was with the hope that after public cry of self regulation, the Co-regulation where the arm of government (ACC) was part of disciplinary process was to benefit the society as a whole. Private interest theory is associated with members of the legal profession forming its own group to regulate its members without government involvement.

The Institutional theory was the reason why there have been many amendments that aim to make the DT a credible and transparent institution with no influence in its operations. The theory intends to create legal institutions that can satisfy the consumers of the legal services that should command the confidence and respect of the public, institutions that are transparent and accountable.

<sup>56</sup> Douglas C. North, *Institutions, Institutional Change and Economic Performance*, (Cambridge press, (1990), published by Cambridge University press, New York. Available at <http://www.cambridge>.

<sup>57</sup> George, Stigler, "The theory of Economic Regulation", (Spring 1971) 2 No. 1 *The Bell Journal of Economics and Management Science*,3-21.

<sup>58</sup> Richard A. Posner, *Theories of economic Regulation*, *The Bell Journal OF Economics and Management Science*, Vol.5, No. 2 (Autum, 1974), page 343

<sup>59</sup> Section 53 of the Advocates Act, Amendment legal notice no. 507 of 1989.

## 1.6 CONCEPTUAL FRAMEWORK

The regulation of the Legal profession arises as a way of protecting the consumers of the legal services. The only issue as far as regulating legal profession is concerned has been the changing institutional and legal structure of the regulators. Whether the legal profession should regulate itself and/or should be regulated by the government has been a controversial debate.

In Kenya, the power to regulate the legal profession in 1901 to 1949 was by the Judiciary. The 1949, amendments ushered in self regulation and later 1989 amendments brought in the co-regulation which is in existence.

According to Stephen F.H. and Love, profession regulation is necessary due to the information asymmetric between the professionals and the consumers of the legal services which is an imbalance in favour of the professional.<sup>60</sup>

This research paper will examine the disciplinary regulatory process of the legal profession in Kenya as established by the two Acts, namely the Advocates Act and the Law Society of Kenya Act. The existing institutional regulatory legal framework of the lawyers' disciplinary system in Kenya is perceived by stakeholders as partial institution.

The research would focus as to whether the existing institutional legal framework which under the Advocates' Act section 53 establishes the Advocates' Complaints Commission, a government arm and Section 57 of the Advocates' Act establishes the disciplinary tribunal chaired by the Attorney General and whether it can effectively and impartially regulate the legal profession in Kenya.

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<sup>60</sup> Stephen F.H. and Love, J.H (1999)' Regulation of Legal Profession', University of Strathclyde, Glasgow, UK.

In line with the Kenya Constitution 2010, and in considering the need to have a credible and impartial regulatory system in Kenya, the current and existing structure has failed to fully regulate the profession. The current Lawyers' disciplinary framework where the profession is regulated both by the government together with members of the profession contravenes the provisions of the Kenya Constitution on separation of powers.

The Attorney General chairs the DT and in his absence, the Solicitor General or any other person deputed by the Attorney General. On the other hand, the Advocates Complaints Commission who are investigators and prosecutors at the DT, are government employees at the Office of the Attorney General. Members of the profession feel that the Office of the Attorney General who plays the role of investigator, prosecutor and adjudicator has failed in regulating the profession in Kenya.

The research will examine the concept of professional regulation as practiced in Kenya and how the existing legal and institutional structure has failed in its disciplinary system.

## **1.7 LITERATURE REVIEW**

Kenya's legal regulatory system can be categorized into three systems. The period from 1901 to 1949, the professional regulatory system in Kenya was under the independence regime.<sup>61</sup> During that time, the legal profession regulation was under the chief Justice. All complaints by then against the Advocates were referred to the High Court Judge. Any member of the public who was aggrieved by the conduct of the Advocate made an application to the High Court Judge for determination.

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<sup>61</sup> Yash P.Ghai, J.P.W.B McAuslan, Public Law and Political Change in Kenya 1970, (An Introductory to Legal System in East Africa), page 385

As a way of regulating the profession fully by then, some amendments were put in place that had made the profession to be exclusive to all trained advocates.<sup>62</sup> Among the amendments was the 1906 Legal Practitioners Act, which denied pleaders who had not been enrolled before the Indian High Court to practice in East Africa. Others were 1911 rules which omitted the licensing of non lawyers from practicing and the 1926 which brought in a requirement that one must be a resident of Kenya for six months before allowed to practice.

The Second regulatory regime ran from 1949 to 1989. The second regime was ushered in by enacting of the Law Society of Kenya Act, 1949. The Act brought the Legal profession under self regulations. By then the Law Society was mandated under the Act to maintain and improve the standards of the legal profession, protect their members and the members of the public in regard to the condition of practice.<sup>63</sup>

The Amendments to the Advocates Act introduced the advocates committee whose composition included the Attorney General, Solicitor General and three advocates from the Law Society and Remuneration Committee consisted of five members of the law society who were to work together with the Chief Justice. The Society was still not happy because at that time any complaint against an advocate lodged with the Advocates committee was heard by two judge bench. This made later in the amendments, the establishment of the disciplinary Committee with executive powers.<sup>64</sup>

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<sup>62</sup> Ibid at page 383.

<sup>63</sup> Ibid at page 383.

<sup>64</sup> Ibid at page 385.



The third regime of legal regulation in Kenya started in 1989. The 1989 Advocates Act amendments ushered in the regime of Co-regulation by establishing the Advocates' Complaints Commission (ACC), a department within the office of the Attorney General with the power to receive, investigate and prosecute professional misconduct before the DT. The 1989 amendments changed the regulation of the legal profession in Kenya from self regulation to Co-regulation. The establishment of ACC ushered in the fight between the government and the members of the Law Society of Kenya who felt that the government was unnecessarily interfering with the lawyers' regulatory system.

The researcher reiterates the need to legally create and establish independent institution that can be mandated to regulate the legal profession in Kenya. The existing structural and legal framework in place may not fully discharge its mandate well due to the conflicts so far witnessed. The need to regulate the legal profession is for purposes of protecting consumers of legal services and protection of the monopoly of services and privileges so far enjoyed by the members of the profession.<sup>65</sup>

The Legal profession was subject to a measure of public and state control exercised through the Chief Justice before 1949. Ghai and McAuslan describe the legal profession in Kenya prior to independence as wholly non-Africans. After 1949, the profession was self governing which shifted the power to control and regulate the profession from the State to the private Bar.<sup>66</sup> However, the position slowly changed to Co-regulation by virtue of the 1989 Advocates Act amendments.

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<sup>65</sup> Stephen F.H. and Love J. H (1999) in "Regulating of Legal Profession", University of Strathclyde, Glasgow, UK.

<sup>66</sup> Yash P. Ghai & J.P.W.B McAuslan, Public Law and Political Change in Kenya, 1970 (An Introductory to Legal System in East Africa pg 385

Kronman states that professional regulation is necessary as it sets a profession apart from other trades. Profession suggests certain stature and prestige and that a profession implies that the activity to which it is attached possess a special dignity that other non-profession does not possess.<sup>67</sup> Kronman supports the idea of having a regulatory regime that can efficiently regulate the legal profession. The researcher in this research paper will identify the flaws and/or conflicts with the existing structural and legal framework of the DT and its operations.

According to Dingwall and Fenn, self regulation arises from social institution of trust, a social contract between society and the profession which mitigates the moral hazard problem arising from the information symmetry.<sup>68</sup> He reiterates that institution created must have safeguards in place for any self regulatory legal framework to efficiently operate well. According to Dingwall and Fenn, there is need for self regulation of the legal profession by lawyers themselves without allowing non-lawyers to take part in the regulatory process. The current regulatory system in Kenya is conducted by the Government and the Bar, the researcher seeks to analyze whether the system is sustainable in Kenya.

According to Kailash Rai, the legal profession is one of the professions that exercise self-regulation in many Countries.<sup>69</sup> He reiterates that the profession is noble and honorable with rules of conduct and ethics which only its members can design and enforce. Kailash defines professional legal ethics as a code of conduct for regulating the behavior of practicing lawyers.<sup>70</sup>

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<sup>67</sup> A.T. Kronman, *The lost Lawyer. Failing ideals of the Legal Profession*, Cambridge (Mass): Belknap press 1998.

<sup>68</sup> Robert Dingwall and Paul Fenn, 'A Respectable Profession?: Sociological and Economic Perspectives on the Regulation of the Professional Services' (1987) 7 *International Review of Law Journal and Economics* 51.

<sup>69</sup> Kailash Rai: *Legal Ethics, Accountancy for Lawyers and the Bench Bar Relations*, 11<sup>th</sup> Ed(Rep) 2015, Published by Central Law Publications.

<sup>70</sup> Ibid.

The United Nations in 1990 through the General Assembly had endorsed the basic principles of the role of lawyers. According to the UN principles, lawyers shall be entitled to form self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The principles as well gave members of the professional power to elect themselves into office to exercise regulatory powers without external interference.<sup>71</sup> The UN principles put the regulation of the legal profession entirely on the members of the profession who must ensure that there are rules in place that must control and regulate the lawyers. The researcher as far as he agrees with the UN basic principles of the role of lawyers, there is need that some control should be put in place to ensure that the public who are the consumers of legal services trust the regulatory system put in place. The lawyers as long as they regulate themselves, making of their rules require public participation in order to ensure that the same rules and institutions established serve all stakeholders impartially.

According to Deborah Rhodes, the self regulation of the legal profession do not protect the public as to ensure the spoils of the victory to those who control the politics of the Bar.<sup>72</sup> Rhodes is of the opinion that self regulation is not consumer oriented and because of the lawyers' bar politics, the system serves the lawyers interest as an interested group rather than the consumers of the legal services. According to Rhodes, it is rather hard to convince the user of the legal services that their lawyers will not commit professional misconduct and yet they regulate themselves.<sup>73</sup> Rhodes reiterates the need for the public to regulate the bar in order to vouch for her integrity.<sup>74</sup>

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<sup>71</sup>United Nations, Basic Principles of the Role of Lawyers, 7 September 1990.

<sup>72</sup> Deborah L. Rhodes, The Delivery of the Legal Services by Non-Lawyers, 4 GEO. J. LEGAL ETHICS 209 (1990), Deborah Rhodes, "Why the ABA Bothers, A. Functional Perspective on Professional Codes, 59 TEX. L.REV. 689 (1981).

<sup>73</sup> Ibid at page 648.

<sup>74</sup> Ibid at page 648.

The appeal by the Lawyers that they are committed, in the words of the Preamble to the American Bar Association's Model Rules of Professional Conduct, to "cultivate knowledge of the Law beyond its use for clients,.....to improve the law,.....and to exemplify the legal profession's ideas of public service is by itself a failure and at best, an illusion."<sup>75</sup> According to ABA Preamble, the practical success of Lawyers is in part dependent on preventing the public from seeing clearly the true position behind self regulation.<sup>76</sup>

According to Rhodes, a structural form of professional hypocrisy suggests two facts about self regulations. First, only a few smaller numbers of Lawyers who are accused of professional misconduct are kept from the bar on grounds of character and fitness to continue serving, and two, structure of self regulator screeners is of little or no use at all.<sup>77</sup> Rhodes reiterates for the need for structural and institutional reforms that can phase out self regulation in order to establish State regulation which according to her, can create trust to potential customers of legal services. According to her, it will be hypocritical for one to supply the goods and services to the public, and at the same time be a judge of his/her own cause.<sup>78</sup>

According to the Mackay Report, the Legal Profession should be regulated by the Judicial branch of the government.<sup>79</sup> The ABA supports the Judicial regulations as noted in the recommendation one of the 1992 Mackay Report, which stated that regulation of the Legal Profession should remain under the authority of the Judicial branch of the government.<sup>80</sup> The ABA had found that the Judicial control offers better protection to the

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<sup>75</sup> Model Rules of Professional Conduct Preamble (1992).

<sup>76</sup> Deborah L. Rhodes, *The Delivery of the Legal Services by Non-Lawyers*, 4 *GEO. J. LEGAL ETHICS* 209 (1990), Deborah Rhodes, "Why the ABA Bothers, A. Functional Perspective on Professional Codes, 59 *TEX. L.REV.* (1981) at page 650.

<sup>77</sup> *Ibid* at page 555.

<sup>78</sup> *Ibid* at Page 665.

<sup>79</sup> Mackay Report (1992), at pages 2, 3.

<sup>80</sup> Mackay Report (1992) at page 1.

Public and allows the discriminatory system to operate independent of the political pressure of the executive and the Bar. The Judicial control of disciplinary systems offer a balance of control by insulating the Legal Profession from the political pressure of the interested groups.<sup>81</sup>

According to John C. Coffee, the consumers of Legal Services pay the greatest price because of the problem of structural disciplinary framework. The structural framework of self regulation permits, “the continued government of the guild, by the guild and for the guild”.<sup>82</sup> John C. Coffee reiterates that no any other entity can manage and regulate itself successfully without positioning itself towards achieving its goals regardless of the circumstances. Self Regulation therefore may lead to possible minimal structural and institutional reforms which may preserve the status quo.

According to Richard A. Abel, what is meant for the bar discipline in self regulation is too little focus on consumer protection, and too much focus on Lawyers reputational concerns. Too little unethical behavior in self regulation is named, blamed, claimed and punished.<sup>83</sup> Although Lawyers themselves tend to fault the system on precisely the opposite grounds, many see self regulations as unfair, oppressive, and counterproductive for those subject to regulation.<sup>84</sup> Richard A. Abel therefore reiterates for institutional reforms that can overhaul the self regulation to State regulation. He states that self regulation does not serve the consumers of the legal services better than State regulation.

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<sup>81</sup> Mackay Report (1992) at page 7.

<sup>82</sup> John C. Coffee, Jr., *The Attorney as Gatekeepers, An Agenda for the SEC*, 103 Colum. L. REV. 1293 (2003).

<sup>83</sup> Richard L. Abel, *Lawyers in the Dock: Learning from the Attorney Disciplinary Proceedings* 505 (2008).

<sup>84</sup> *Ibid* at page 505.

Lawyers in New South Wales have been under scrutiny largely because of perceptions that self regulating profession had taken inadequate account of consumers' concerns.<sup>85</sup> This Concern in Australia led to the Lawyers Disciplinary process to reform its structure. The Bar in Australia no longer self regulates but plays a more limited role delegated to it by an independent Commission.<sup>86</sup> The changes facilitated legislative reforms that had shifted powers from the profession to the Statutory independent regulators.

According to J.E. Moliterno, the legal profession and the society it claims to serve would be better served if the regulation of the legal profession were more open and viewpoint inclusive. No entity whether motivated by profit, altruism, or a mixture of the two can manage itself without an eye to the future. Successful businesses and institutions engage in forward looking, strategic planning, examines society's trend in order to predict the future markets, and modify their own ways in order to be well positioned to succeed in achieving their goals.<sup>87</sup>

Moliterno reiterates that it would be better for Lawyers to embrace institutional structural changes rather than resisting. The Legal Profession according to Moliterno, should welcome institutional reforms for its own benefits rather than its detriment. To be effective, the Legal profession must begin to see outside itself with open eyes rather than suspicious one.<sup>88</sup>

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<sup>85</sup> David Weisbrot, *Australian Lawyers* 210 (1990).

<sup>86</sup> Legal Profession, Department of Justice, (Vic) available at <http://www.justice.vic.gov.au/home/the+justice+system/legal+profession/C> last visited Jan. 24, 2012.

<sup>87</sup> James E. Moliterno, *Politically Motivated Bar Discipline*, 83, *WASH U.L.Q.* 731-34 (2005) (hereinafter Moliterno, *Bar Discipline*).

<sup>88</sup> *Ibid* at page 735.

## **1.8 JUSTIFICATION OF THE STUDY**

The findings of this research paper will be important towards assisting the key stakeholders in identifying the weak areas in the existing structural and legal framework establishing lawyers' disciplinary system in Kenya. The Research paper will inform the Stakeholders on the necessary missing gaps and on areas where the Advocate Act and Law Society of Kenya Act need to be amended in order to improve the existing structural and legal framework of the lawyers' disciplinary system in Kenya.

## **1.9 RESEARCH OBJECTIVES**

The main objective of this research is to examine the existing lawyers' disciplinary system in Kenya and the legal framework deficiencies as established under the Advocates Act and Law Society of Kenya Act.

### **1.9.1 SPECIFIC AIMS**

- i) To evaluate the operational institutional legal framework for the lawyers' Disciplinary Tribunal in Kenya.
- ii) To come up with recommendations to the legal and institutional framework that should take place in order to make the lawyers' Disciplinary Tribunal a fair institution Kenya.

### **1.9.2 HYPOTHESIS**

The purpose of Lawyers disciplinary process is to protect the public and the administration of justice from Lawyers who have not discharged well their professional duties to clients, the public, the legal system, and the legal profession. In the modern constitutional State, the

principle of an independent Tribunal has its origin in the theory of separation of powers whereby the Executive, Legislature and Judiciary constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society. This independence means that both the Tribunal as an institution and also the adjudicators deciding particular complaints must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature and/or the Law Society of Kenya.

Only an independent Tribunal is able to render justice impartially on the basis of law, thereby protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently the public must have full confidence in the ability of the Tribunal to carry out its functions in an independent and impartial manner. There is also need for strong, independent and impartial prosecutors willing resolutely to investigate and prosecute suspected professional misconducts against Lawyers.

The research is designed to assess the hypotheses of Advocates Act and the Law Society of Kenya Act in relation to Lawyers' Disciplinary process in Kenya. The researcher will focus on the kind of structure the two Acts have established and examine if the legal framework requires some legal changes

### **1.9.3 RESEARCH QUESTIONS**

The researcher would seek to answer in his research the following questions;

- i) Is the legal and institutional structure for Lawyers' Tribunal set up under the Advocates Act and Law Society of Kenya Act discharging its mandate fairly?
- ii) What are the changes necessary to the existing lawyers' Disciplinary Tribunal that can make it to discharge its mandate fairly?
- iii) Is there separation of power in the composition of lawyers' Disciplinary Tribunal membership?



iv) Is ACC as constituted under the Advocates Act discharging its Mandate fairly?

#### **1.9.4 RESEARCH METHODOLOGY**

In order to gather information for this research paper, the researcher will use the following data collection methods;

##### **1.9.4.1 Library Research**

The researcher will analyze the published textbooks of those authors who have written on Lawyers regulatory systems. Such information would be found in the existing libraries and the internet.

Few Statutes and journals both national and international relating to lawyers' regulatory system will be analyzed.

##### **1.9.4.2 Case laws**

Researcher will as well use case laws that have been determined in a court of law and/or before the disciplinary Tribunal touching the topic of research.

##### **1.9.4.3 Questionnaires**

Questionnaires were dispatched to the respondents as a way of collecting data required. The questionnaires were dispatched to both members of the DT, complainants and ACC staff.

##### **1.9.4.4 Observation method**

The researcher being a prosecutor at the DT, also used observation method as a mean of collecting the information required. This will include long observation of the DT proceedings and its operations.

### **1.9.5 LIMITATIONS**

Lawyers are a people integral to the working out of the law and the rule of law itself is founded on principles of justice, fairness and equity. Should lawyers not adhere and promote ethical principles, then the law will fall into disrepute making the public fully lose confidence in the profession.

The study of this research paper is limited to the lawyers' disciplinary system in Kenya between 1990 to 2014.

### **1.9.6 CHAPTER BREAKDOWN**

Chapter one contains the introduction, history of regulation of the legal regulation in Kenya since 1901, research problem research questions, hypothesis, literature review, justification of the study, conceptual framework, scope and limitation of the research and methodology used.

Chapter two examines the institutional legal framework established by the Advocates Act and the Law Society of Kenya Act in relation to Lawyers Disciplinary Tribunal in Kenya. The chapter also examines the structural deficiencies and challenges facing the Lawyers' Disciplinary Tribunal in Kenya.

Chapter three focuses on comparative practices of lawyers' disciplinary process, best practices drawn from South Africa, Australia and Pennsylvania where independent bodies have been put in place to investigate and prosecute advocates.

Chapter four looks on the necessary legal and institutional reforms that should be put in place in order to make the lawyers tribunal in Kenya a fair institution. Such legal reforms include measures that can make the lawyers' tribunal an independent institution, using mediation to settle complaints, complainant involved on which is the best sentence to be imposed to lawyers and assisting failed lawyers to improve in practice rather than imposing severe punishment them.

The researcher concludes with various recommendations such as independence of the tribunal, vetting of the tribunal members, amendment to the Advocates Acts and Law Society of Kenya Act in order to change composition of the tribunal members, members of the tribunal to leave practice when serving the tribunal and need to budgetary allocations to the tribunal have cited as a way of filling in the gaps that are existing.

## CHAPTER TWO

### LEGAL AND INSTITUTIONAL REGULATORY FRAMEWORK UNDER THE ADVOCATES' ACT AND LAW SOCIETY OF KENYA ACT

#### 2.1 INTRODUCTION

The institutional legal framework regulating the legal profession in Kenya is established by the Advocates' Act<sup>1</sup> and the Law Society of Kenya Act.<sup>2</sup> The Advocates' Act lays down the qualifications for one to be admitted as an advocate, professional and academic qualifications.<sup>3</sup>

The Lawyers' legal and regulatory framework in Kenya since pre independence period to date has been undergoing changes. The members of the legal profession are of the opinion that the profession should be self governing while the government feels it should have a hand in the lawyers' disciplinary system in Kenya. The DT however, would only act in accordance to the prevailing laws that exist and institutions that are set to discipline lawyers for any professional misconduct committed.

The legal profession ought to be dedicated to effectively serving the public who are the ultimate consumer of legal services. By so doing, strong and credible institution should be in place that can gain confidence from both the members of the profession and the public. The Advocates' Act established the Advocates' Complaints Commission and the Disciplinary Tribunal to enforce discipline in the legal profession. The two bodies and the Law Society of Kenya both work together as far as disciplining advocates is concerned.

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<sup>1</sup> Cap 16 Laws of Kenya.

<sup>2</sup> Cap 18 Laws of Kenya.

<sup>3</sup> Sections 12 & 13 of the Advocates' Act.

## 2.2 LEGAL FRAMEWOK UNDER THE ADVOCATES' ACT

The Advocates' Act establishes the Advocates' Complaints Commission and the Disciplinary Tribunal as institutions that are mandated to discipline Advocates.

### 2.2.1 The Structure and Functions of the Advocates' Complaints Commission

Under the Advocates Act, the ACC would consist of the Commissioners as shall be appointed by the president for purposes of enquiring into complaints against any advocate, firm of advocates, or any member or employee thereof.<sup>4</sup> One of the Commissioners shall be the chairperson of the Commission. Commissioners are appointed on a three years contract. Below the Commissioners is the Commission Secretary who is the administrative and Chief Executive officer. Under the Commission Secretary are the State Counsel and clerical officers.

The ACC can further summon witness in the process of investigation , examine witness on oath, order an advocate to produce all relevant documents relating to a matter under investigation, engage an accountant to assist in its investigations and make such orders of award as it shall consider just.<sup>5</sup> The ACC further has power to promote reconciliation and encourage and facilitate amicable settlement between parties to the complaint in cases which do not appear to be serious or aggravated in nature.<sup>6</sup> ACC has power to award to the complainant compensation or reimbursement not exceeding one hundred thousand shillings.<sup>7</sup> The ACC can further order the surrender to the complainant of all funds and/or property which the advocate does not dispute provided the complainant has not filed any suit against the advocate in a Court of Law.<sup>8</sup>

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<sup>4</sup> Section 53(1) of the Advocates' Act.

<sup>5</sup> Section 53(d) of the Advocates' Act.

<sup>6</sup> Section 53(5) of the Advocates' Act.

<sup>7</sup> Section 53(6) of the Advocates Act.

<sup>8</sup> Section 53(6B) of the Advocates Act.

## 2.2.2 The structure and functions of the Disciplinary Tribunal

The Disciplinary Tribunal is established under section 57 of the Advocates Act.<sup>9</sup> The composition of its members consists of the following;

- a) The Honorable Attorney General;
- b) The Solicitor General or a person deputed by the Attorney General; and
- c) Six advocates other than the Chairman, Vice-Chairman and Secretary of the Law Society of Kenya of not less than ten years standing. One of these Advocates should be an advocate who does not practice in Nairobi. They shall hold office for three years and are eligible for re-elections.

Members of the Council of LSK may sit at the DT if there is an issue of quorum. The Secretary of the LSK is the secretary of the Disciplinary Tribunal. Any person can file a complaint against an advocate before the DT.<sup>10</sup>

The DT has power to hear and determine matters of professional misconduct against advocates, firm of advocates and any employee thereof. The DT gives an accused advocate an opportunity to appear before the Tribunal and peruse relevant documents filed by the complainant.<sup>11</sup> Should the DT be of the view that the complaint does not disclose any *prima facie* case, the Tribunal at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint is made against to answer any allegations. Where the complaint has substance, it proceeds to full hearing.

The Tribunal after hearing of the complaint and considering relevant evidence may dismiss the complaint and where there is enough evidence in support of the complaint convict the advocate accordingly.

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<sup>9</sup> Act Numbers 2 of 2002.

<sup>10</sup> Section 60(1) of the Advocates' Act.

<sup>11</sup> Section 60(3) of the Advocates' Act.

Upon conviction, the DT may give the following orders;<sup>12</sup>

- a) that the advocate be admonished; or
- b) that such an advocate be suspended from practice for a period not exceeding five years; or
- c) that the name of the advocate be struck off the Roll; or
- d) that such advocate to pay a fine not exceeding one million shillings ;
- e) that such advocate pays to the aggrieved person compensation or re-imburement not exceeding five million shillings.

The DT further has power to award costs and fine. An order of the DT may be registered in Court and be enforceable as an order of Court.

The Act gives the aggrieved Advocate the power to appeal against the orders of the DT at the High Court.<sup>13</sup> The same Act further gives the Advocate the right to appeal against the decision or order of the High Court to the Court of Appeal.<sup>14</sup>

The advocates Act does not have any provisions which can give the aggrieved complainant the right to appeal against the orders of the DT. A system in law where one party to a dispute is given a right to appeal and on the other hand denies the other raises concern in any democratic country and cannot purport to administer justice impartially to all.

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<sup>12</sup> Section 60(4) (a) to (e) of the Advocates Act.

<sup>13</sup> Section 62 of the Advocates Act.

<sup>14</sup> Section 67 of the Advocates Act.

### **2.2.3 THE LAW SOCIETY OF KENYA**

The Secretary of the Law Society of Kenya is the secretary to the DT.<sup>15</sup> Complaints which are investigated by ACC and charges against advocate preferred are forwarded to LSK ethics and compliance department who opens DT file with new DT number. The LSK fixes the date for plea taking and communicates to all parties to attend. The Law Society being DT secretariat keeps all DT files and performs other secretariat functions.

### **2.3 STRUCTURAL DEFICIENCIES**

The Institutions established by law to administer justice must be based on public confidence and trust. The public confidence and trust is achieved when all stakeholders believe that institutions established serve both actors impartially. Lawyers regulatory system requires appropriate laws and proper institutions to be established which can control the disciplinary process. Such institutions established must be in a position to fully protect the legal profession, the consumers of legal services and promote the administration of justice. Any loophole in institutions created to administer justice would undermine the very purpose and function of its creation. The DT structural deficiencies would be analyzed as follows;-

#### **2.3.1 The Executive playing multiplicity roles in Lawyers' regulatory system**

In 1989, the ACC, an arm of government was established with the power to receive, investigate and prosecute advocates before the DT of any professional misconduct committed.

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<sup>15</sup> Section 58(3) of the Advocates Act.



The ACC which is composed of Commissioners appointed by the president is a department at the office of Attorney General Office. The Attorney General is directly concerned on how the ACC operates and who should be the Commission Secretary and other staffs.<sup>16</sup> The Act establishes the Disciplinary Tribunal to hear and determine complaints against advocates.<sup>17</sup> The Chairperson of the DT is the Attorney General. Other members are the solicitor General and six Advocates from private practice.

All the DT proceedings are chaired by the Attorney General when present or the Solicitor General. In their absence, the person deputed by the Attorney General chairs the meetings of the DT. Should none of the three be present, the Tribunal members present appoints the chairperson of the Tribunal.<sup>18</sup>

The Attorney General plays multiple roles in lawyers' disciplinary system. AG is the investigator at the ACC, prosecutor a role played by ACC and adjudicator, him being the chairperson of the DT. The AG is the state officer who is bound by the Constitution. The national values and principles of good governance as enshrined in the Constitution binds all state organs, state officers and all other persons.

The purpose of establishing the DT was to create an institution that would create public confidence and trust to all stakeholders in legal regulatory process. The AG playing multiplicity of roles in the disciplinary process of advocates denies advocates equal protection of law.<sup>19</sup>

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<sup>16</sup> Sections 54 of the Advocates Act, The Attorney General appoints the Commission Secretary, provides to the Commission public officers and makes rules regulating the structure and operation of the Commissions.

<sup>17</sup> Section 57 of the Advocates Act.

<sup>18</sup> Section 58(2) of the Advocates Act.

<sup>19</sup> Article 27(1) of the Kenya Constitution, 2010 provides that "Every person is equal before the Law and has a right to equal protection and benefit of the law".

The Kenya Constitution provides for separation of powers in the three arms of government. Separation of powers in its spirit promotes justice and fairness in solving disputes. Each arm of the government is given its responsibilities and functions to perform separate from the other. Every person has the right to have his/her dispute resolved by the application of law decided in a fair and by an independent and impartial tribunal.<sup>20</sup> The researcher reiterates that impartiality at the tribunal cannot be achieved as long as the AG is the investigator, prosecutor and adjudicator. The Advocates Act and the Law Society of Kenya Act has created a regulatory lawyers' structure where the AG becomes the judge of his own cause.

The spirit of the Constitution of Kenya, 2010 emphasizes the need for separation of powers. This doctrine of separation of powers was expounded by Montesquieu in his book, '*The spirit of Law*'

*"When the Legislature and the Executive powers are performed by one person or by the same body, there can be no liberty. There is no liberty unless until Legislative powers, Executive and Judicial powers are separated. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression. There would be ends of everything were the same man or the same body to exercise these three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals".<sup>21</sup>*

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<sup>20</sup> Articles 50(1) of the Constitution of Kenya, 2010.

<sup>21</sup> Montesquieu Del Esprit des Lois (1748) Livre XI Chapters VI,. 3-6)

Montesquieu "Separation" took the form, not of impassable barriers and unalterable frontiers, but of mutual restraints, or of what afterwards came to be known as "checks and balances". The three organs much act in concert, not that their respective functions should not ever touch one another

If this limitation is respected and preserved, "it is impossible for that situation to arise which Locke and Montesquieu regarded as the eclipse of liberty-the monopoly, or disproportionate accumulation of power in one sphere."<sup>22</sup>

According to John Locke;

*"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 exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage".<sup>23</sup>*

The moment Legislative, Executive and Judicial power is in one hand, a tendency of abuse arises. To prevent such abuse of power, it is necessary from the very nature of things that one power should be a check on another.<sup>24</sup> The existing DT structure and legal framework deficiency has led to the miscarriage of justice in the following ways;-

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<sup>22</sup> Carleton K. Allen: Law and Orders, Edn. 1965, Page. 10, 19.

<sup>23</sup> John Locke, Second Treatise of Civil Government, New York, New American Library, (1952). Chapters XII, Para 143

<sup>24</sup> E.G. Henderson, Foundation of English Administrative Law, as quoted in E.C.S Wade and Godfrey Philip, Constitutional And Administrative Law, New York, Longman, (1977), 45

### **a) Delayed justice**

The delay in concluding the complainant's matter is a matter of concern. The delay starts from the Advocates Complaints Commission who as investigators takes long time to investigate matters lodged before them. ACC at times are selective on matters which can be forwarded to the tribunal for determination. This become worse immediately after judgment is delivered and execution order issued. More than seventh five percent of execution of the Tribunal orders against errant advocates do not yield any fruit, hence complainant therefore do not enjoy fruits of his/her judgment.

This challenge arises by virtue that execution since 1990 has been conducted by an appointed private advocate of the law society of Kenya who other being busy managing his office, also has never been monitored and/or controlled by either Advocates Complaints Commission or Disciplinary Tribunal.

The execution process end up by matters being marked as "stood over generally" since the advocates cannot be found and/or does not possess any property to be attached. This arises by virtue that there is no law in Kenya that compels practicing advocates to provide security for the money they receive on behalf of their clients.

### **b) The Complainant denied the right to Appeal against DT orders**

The structural deficiency prevents the complainant to appeal against the orders of the DT. The Advocates Act gives the advocate a right to appeal against the orders of the DT.<sup>25</sup> The Advocate as well can apply for judicial review against the orders of the

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<sup>25</sup> Section 62 of the Advocates Act.

Tribunal.<sup>26</sup> Therefore, the complainant who is denied with such right to appeal is denied justice should the DT rule against him/her. This is a barrier to access to justice and against the principle of fair administrative trial.<sup>27</sup> Such will be against the spirit of the constitution which requires every person has a right to have his/her dispute resolved by application of law before a court or, if appropriate before an independent and impartial Tribunal.<sup>28</sup>

### **2.3.2 Access to goods, services and information**

The members of the public have a right to the provisions of goods and services of reasonable quality and information necessary for them to benefit from goods and services.<sup>29</sup> The legal profession lacks codes of conduct which can make members of the public to know the expectations from the legal profession. The spirit of the constitution towards providing consumer protection, competent services and information is not realized since the DT services are not devolved.

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<sup>26</sup> Section 53 (6C) of the Advocates Act, An advocate against whom an order is made under this section who has not appealed against the order under section 62, may apply to the DT for a review of the order.

<sup>27</sup> Article 47(1) of the Kenya Constitution, 2010, Provides “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

<sup>28</sup> Article 50(1) of the Constitution of Kenya, 2010.

<sup>29</sup> Article 46(a) and (b) of the Constitution of Kenya, 2010.

The services of advocacy are in all counties although the DT and ACC only have offices in Nairobi. The two institutions mandated to regulate the legal profession are not therefore accessible to the poor and vulnerable residing in rural areas. There is need for the DT to devolve its services to all counties as a way of enhancing justice to the poor and vulnerable members of the society who cannot reach Nairobi.

### **2.3.3 Election of the Tribunal members**

The Attorney General and Solicitor General are permanent members at the disciplinary tribunal. Other members consist of six advocates of not less than ten years standing who remain in office for a period of three years. Under the Advocate's Act, these advocates after the expiry of the three years are eligible for re-election.<sup>30</sup> These advocates are elected during the Law Society of Kenya elections by the advocates. Such an arrangement makes the elected members to be a judge to have electorates and/or constituents. The advocates will have complaints brought against them before the Tribunal whom they elected. It becomes difficult at times for the advocates sitting at the Tribunal to make a ruling against their electorates by fear of losing votes.

The manner in which these advocates are elected contravenes the provisions of Article 10 of the Constitution of Kenya. The processes of electing advocates who serve at the Tribunal should undergo the process of vetting. Any State Officer should apply for the job, sit for the interview and before appointed he/she should be vetted. Institution that retains or hires individuals with serious integrity deficits, which would fundamentally impair the institution's capacity to deliver its mandate.

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<sup>30</sup> Section 57(1) (C) of the Advocates' Act.

Vetting is important aspect of personnel reform in democratic governance.<sup>31</sup> Vetting can be defined as assessing integrity to determine suitability for public employment.<sup>32</sup> The -institution that retains or hires individuals with serious integrity deficits, which would fundamentally impair the institution's capacity to deliver its mandate.

Some of the advocates who are elected to serve as members of the tribunal for three years have integrity issues. Few for example, have complaints filed against them before the tribunal and at the Advocates' Complaints Commission.

Any institution which accepts officers into office with integrity issues will erode public confidence. Such an institution would be deemed to be unfair and contrary to the spirit of the Kenya Constitution. The concept of integrity is of utmost importance. It not only requires that the person have the capacity and aptitude to fulfill the particular job description, but it also looks deeper into the individual's past history with regards to human rights violations, criminal activity, fraudulent or corrupt behavior, and any other sort of malicious behavior.<sup>33</sup> This is especially important in the context of lawyers' disciplinary members who occupy a position in society that demands the highest level of ethical and professional acumen

#### **2.3.4 Establishment of a tribunal and not a Committee**

The Advocates' establishes the lawyers' Disciplinary Tribunal to consist the Honorable Attorney General, Solicitor General and six Advocates.<sup>34</sup>

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<sup>31</sup> E/CN.4/2005/102/Add.1, principle 36 (a); see also E/CN.4/2005/102, para. 68.

<sup>32</sup> See also S/2004/616, para. 52: "Vetting usually entails a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary."

<sup>33</sup>. Duthie, Roger, 2007"Introduction' in Mayer-Rieckh, A. and de Greiff, P., 2007, Justice as prevention: Vetting Public Employees in Transitional Societies, International Center For Transitional, Social Science Research, Council, New York, USA.

<sup>34</sup> Section 57 of the Advocates Act

The composition as it is may not enhance confidence to the members of the public. The Legal profession in many jurisdictions is self governing. In Kenya, legal profession is regulated by both the government and the members of the profession. Such structural and legal framework envisages fighting between the members of the profession and the government on who should be in charge of the DT operations.

Under the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.<sup>35</sup> The Miscellaneous Amendment Act 2012 amended provisions of the Advocates' Act and the Law Society of Kenya Act dealing with the advocates disciplinary processes.<sup>36</sup> The amendments replaced the disciplinary committee with the disciplinary tribunal.

Whereas the intention was to create a tribunal, many questions are left unanswered regarding the mode of operation of the envisaged tribunal. It is discernible that the introduction of the word "tribunal" should also have paved way for further amendments to the Advocates' Act for purposes of precisely providing for the proper structure of the tribunals and ways on how the said tribunal members ought to be appointed.

Under Section 57 of the Advocates Act, the conversion of the committee to a tribunal leads to creation of a subordinate court. The Amendment Act does not specify how members of the tribunal will be appointed. It is not clear (from the Act) on whether or not there will be representation from the judiciary. Under the Constitution of Kenya, 2010, Subordinate Courts includes any other Court or local Tribunal as may be established by an Act of parliament.<sup>37</sup> The creation of a tribunal would mean that the same should be under Judiciary which is not the case at the moment

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<sup>35</sup> Article 159 of the Kenya Constitution, 2010

<sup>36</sup> Miscellaneous Amendments Act No. 12 of 2012

<sup>37</sup> Article 169 (1) (d) of the Kenya Constitution, 2010.



Further, for an independent tribunal to exist, it requires an independent secretariat though the Amendment Act 2012 did not make a provision for the same. Moreover the section does not specify on who will be responsible to make rules governing its operations. Such an ambiguity has created a lacuna leaving the lawyers' disciplinary system with fragmented structural framework which is making its operation difficult. For a tribunal to exist, the Act should be precise and clear on its daily administrative operation, budgetary allocation and the criteria of members' appointment to office.

The researcher reiterates for the need for state regulation and not the co-regulation. The State in consultation with all stakeholders should establish an independent body which should be mandated to disciplinary process of Lawyers. This independent State body should not have any influence from either the government or the Law Society of Kenya.

## **2.4 CHALLENGES FACING THE LAWYERS' DISCIPLINARY TRIBUNAL**

The structural deficiencies of the lawyers' regulatory system have contributed to the Disciplinary Tribunal in Kenya face the following challenges;

### **2.4.1 Delayed justice**

The delay in concluding the complainant's matter raises concern. The delay starts from the Advocates' Complaints Commission who as investigators takes long time to investigate matters lodged before them. This become worse immediately after judgment is delivered and execution order issued. More than seventh five percent of execution of the tribunal orders against errant advocates do not yield any fruit, hence complainant therefore do not enjoy fruits of his/her judgment.

This challenge arises by virtue that execution since 1990 has been conducted by an appointed private advocate of the law society of Kenya who other being busy managing his office, also has never been monitored and/or controlled by either Advocates Complaints Commission or disciplinary tribunal.

The execution process end up by matters being marked as “stood over generally” since the advocates cannot be found and/or does not possess any property to be attached. This arises by virtue that there is no law in Kenya that compels practicing advocates to provide security for the money they receive on behalf of their clients.

#### **2.4.2 Multiplicity of institutions**

The powers to discipline lawyers in Kenya are bestowed to the Court, the Law Society of Kenya, the Advocates’ Complaints Commission and the disciplinary tribunal.

The multiplicity of institutions involved in regulating legal profession in Kenya at times brings confusion as far as disciplinary process is concerned. The law society of Kenya and the Advocates’ Complaints Commission investigates the complaints against advocates. Most cases investigated and prosecuted by the Commission are those one already investigated and dealt with by the Law Society of Kenya. The Act as well establishes the LSK regional Committees in five representative regions which have jurisdiction concurrent to that of the disciplinary tribunal.<sup>38</sup> The DT at times encountered problems when adjudicating the matters already investigated and decisions taken by two different institutions. There is no clear mechanism of communicating to each other on issues of disciplinary matters. The Court retains the final power to discipline advocates. Advocates who are not satisfied by the tribunal orders appeal in the High Court by filing an application for a judicial review.

The researcher reiterates that there is need to reduce the number of institutions regulating the legal profession in order to create confidence to the consumers of the services the profession serves.

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<sup>38</sup> Section 58A of the Advocates Act.

### **2.4.3 Lack of human resources**

The Tribunal continues to experience difficulties as a result of shortage of staffs. Given the huge numbers of matters before the Tribunal, it is imperative that there should be adequate and suitable staffing to cope with the work in place. The Advocates Act lays down the number of staffs who are members of the tribunal.<sup>39</sup> A staff of eight members who at most sit three members per sitting which takes place once in a week cannot be expected to serve the whole Kenyan effectively.

Lack of capacity has made the tribunal not to discharge its mandate effectively. With the few staffs available, the tribunal only sits at Nairobi once in a week. This denies the vulnerable an opportunity to lodge matters and attend the hearings of their matters in Nairobi.

At the Moment, the Tribunal's hearing is conducted in Nairobi although many complainants come from areas outside Nairobi. Therefore, the tribunal's services are poor oriented and must taken closer to the poor, vulnerable and marginalized people.

### **2.4.4 Financial constraints**

The disciplinary tribunal's work is affected by lack of finance which compromises its independence. The issue of funding for the Tribunal activities need to be rationalized. Under Advocates Act, the responsibility of paying remuneration, fees or allowances for expenses for members of the Tribunal is bestowed to the Attorney General.<sup>40</sup>

The Attorney General's office only pays the tribunal members remuneration allowances and the Law Society of Kenya pays travelling and accommodation expenses.

Under the law Society of Kenya Act, the Council of the Law Society is only responsible to reimburse travelling and others expenses to council members as well those of other committees and sub committees appointed and approved by the council.<sup>41</sup>

<sup>39</sup> Section 57(1) (a) to (c) of the Advocates Act.

<sup>40</sup> Section 57(1A) of the Advocates Act.

Lack of rationalized budget to cater for the Tribunal's activities compromises the independence of the tribunal. The researcher therefore recommends that a budget for the tribunal should be prepared and submitted to the office of the Attorney General each year to cover for the entire tribunal's activities.

#### **2.4.5 Lack of proper mechanisms to enforce the orders**

The Tribunal lacks proper mechanisms of enforcing its orders against the convicted advocates. This is because the execution process is conducted by the Law Society of Kenya appointed advocate who only acts according to the Law Society's instructions.

The tribunal does not have an inspectorate unit who can have the mandate of inspecting Advocate's books of accounts in order to verify whether they are kept properly. The inspectorate unit would assist to ascertain whether the advocate comply with the orders of the tribunal and maintain ethical standards.

The inspectorate unit would as well ensure that once an advocate is struck off and/or suspended from the Roll of advocates, would be prevented from active practice and that his names is circulated to other advocates both to prevent him/her from continuing to practice.

The same body would monitor the execution process and ensure that advocates convicted refund the complainants the money in accordance to the Tribunal's orders.

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<sup>41</sup> Sections 14 and 15 of the Law Society of Kenya Act.

#### **2.4.6 Frustration through the judicial review applications in the High Court**

Any advocate who feels aggrieved with the decisions or orders of the tribunal under the Act may make application to High Court for appeal and/or Judicial Review if such orders which were made are amenable through that venue.<sup>42</sup>

Most convicted advocates wait the tribunal to give their orders and thereafter as a way of frustrating the tribunal, make an application to the High Court and leaving the same application not attended and many of such have never been finalized.

The good examples are matters where some senior advocates have been struck off/suspended and later make an application to the High Court for Judicial Review. Such an application remains pending in Court for many years frustrating the tribunal's orders.

#### **2.4.7 Conflict of interests**

After the orders are issued by the disciplinary tribunal, the law society is given the power to execute the orders. The process of execution is carried by attaching the movable property of the errant advocate which is then sold so that the complainant can get his/her money back. The law society does the execution by engaging the services of an auctioneer who should attach movable properties of the errand advocate.

The process of carrying out execution after the orders have been issued by the disciplinary tribunal is commenced by the law society of Kenya through their appointed advocate who then instructs the auctioneers. The charged advocates in most cases are the best clients of the auctioneers wherein advocates on daily basis use them to conduct execution of court orders. This amounts to conflict of interest, a situation where an auctioneer is instructed to execute her potential client. Such an arrangement defeats justice as the auctioneers may not be willing to execute the tribunal orders against their potential clients.

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<sup>42</sup> Section 62(1) of the Advocates Act

Justice therefore is defeated since the complainant end up by not benefiting from the orders of the tribunal. Surprising enough, the said advocate of the Law Society of Kenya has discretion to decide which matters can be given priority for execution. There are matters which take too long for execution to take place. Most cases under execution end up marked “stood over generally” since auctioneers end up saying that the whereabouts of the advocate is not known and/or advocate has to assets to be attached.

#### **2.4.8 Advocates leaving Kenya after conviction to practice in other jurisdictions**

Most advocates who are convicted of swindling clients’ money leave Kenya to other Countries to practice there in order to defeat execution process. According to the Advocates Act and Law Society of Kenya Act, there is no provision of how advocates who have been convicted can be barred to practice in other jurisdiction.

Lawyers’ Disciplinary process should be interested in the proper administration of justice, both in securing of convictions against the guilty, and the acquittal of those who are not guilty. One ought to be concerned about access to effective justice. The tribunal would not serve anyone's interest if prosecution before it does not have reasonable prospects of success after conviction. The Complainant is denied the benefits of enjoying the fruits of judgment by the advocates who frustrate the process of execution by leaving Kenya in order to practice in other jurisdictions.

#### **2.4.9 Lack of attachable assets**

One of the difficult things facing execution process is the fact that auctioneers do not find movable property to be attached. Nearly all advocates in Kenya do not own any property. Mostly, they invest using names of third parties making it hard for auctioneers to identify any property registered in their names.

Other than banking institutions in Kenya, advocates are among individuals who receive a lot of money from the citizens. It’s unfortunate to note that there is no security given to protect citizens from advocates who may swindle such money received from their clients. Nor is

there any law that requires advocate in active practice to maintain particular records of assets which can be given as security for receiving clients' money. The lacuna in law has facilitated advocates to invest using third parties as a way of frustrating execution process.

#### **2.4.9.1 Lack of budgetary allocation**

The allocation of the lawyers tribunal budget only carter for the payment of the members of the Tribunal who are paid their remunerations by the Office of Attorney General.<sup>43</sup> The prosecutors who are state counsel are as well paid by the office of the Attorney General. There is no money for the secretariat to conduct any administrative work. Lack of fund has not made the Tribunal not to have its own secretariat nor does it have building of its own. The budgetary allocation do not carter for execution process. The LSK pays for the Tribunal members' accommodation and travelling expenses. Law Society of Kenya had been conducting execution process till October 2014 when they surrendered the same to the Advocates Complaints Commission. The complainants whose files were under execution are suffering since the Commission could not conduct any execution due to lack of money and execution policy guidelines.

Lack of budgetary allocation denies the complainant an opportunity to enjoy the benefits of the orders of the disciplinary tribunal. Lack of finance has affected the way execution ought to be conducted which has made most matters remain under execution for many years.

#### **2.4.9.2 Lack of monitoring of execution**

The Law Society of Kenya is the secretariat of the disciplinary tribunal which is mandated to execute the orders of the tribunal against the errant advocates. The execution is done by the advocate appointed by the Law Society of Kenya who in turn instructs auctioneers to attach movable property of the advocate.

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<sup>43</sup> Section 57(1A) of the Advocates Act.

The single law society appointed private prosecutor who as well conducts execution of all matters before the tribunal is overwhelmed with work load. The private appointed prosecutor who is an advocate in active practice has his own office to manage. The most striking element in such would be a continuous increase of matters under execution which are never concluded.

The Tribunal and the Advocates Complaints Commission have no say and/control on how execution is conducted. The entire process is left the advocate appointed by the law society who is not monitored and/or controlled by anybody. The same advocate who devote most of his time in managing his private firm in most cases end up not conducting any execution. This has made so many matters under execution be pending before the Tribunal as there is no body which monitors execution process.

Monitoring execution process is facilitated by finance which can efficiently computerize data bases of all those matter under execution. Some cases require enhanced supervision in order to speed execution process. Therefore without money to facilitate such, the orders of the Disciplinary Tribunal have not been attended well by virtue of leaving the workload to the law society private prosecutor to conduct it alone.

## **2.5 CONCLUSION**

The Lawyers' Disciplinary Tribunal is a creation of the Advocates' Act and the Law Society of Kenya Act. From the above analysis, the researcher reiterates that the existing structure and legal framework has flaws which in one way have affected the regulation of the legal profession in Kenya. The existing structure and legal framework has so far not achieved much in its mandate since its establishment and the researcher recommends the Statutes creating it be amended for it to be in line with the Kenya Constitution.



Ordinarily, regulation of legal profession was self regulation.<sup>44</sup> Under this Model, it's the government which had conferred self regulation to the professional associations. The professional therefore should determine standards that their members should adhere to.

The existing structure which had ushered in co-regulation is perceived by the members of the profession as bringing in the government to interfere on how the profession should regulate itself.

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<sup>44</sup> 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".

Self regulation according to many is seen as a cure to the problem at hand because it would ensure the independence of the profession from government interference although the structure is not consumer oriented. The researcher therefore supports State regulation as the same protects the consumer of legal services.

In addressing the structural and legal framework deficiencies of lawyers regulatory system in Kenya, the researcher in chapter three would examine regulatory of legal profession in other jurisdictions and how they have managed to create regulatory framework which consumers of legal services have confidence in.

## CHAPTER THREE

### COMPARATIVE ANALYSIS WITH THE BEST PRACTICES DRAWN FROM SOUTH AFRICA, AUSTRALIA AND PENNSYLVANIA

#### 3.1 INTRODUCTION

In order for the researcher to demonstrate that the structural and legal framework of lawyers' disciplinary system has flaws, comparative analysis with other best practices in the world would be examined in this chapter. The chapter will focus on the comparative practices of the lawyers' regulatory system, the best practices drawn from Australia, South Africa and Pennsylvania. The researcher chose the three jurisdictions for they have best practices as far as Lawyers Disciplinary process is concerned.

The researcher considers the comparative practices with the above jurisdictions as a way of focusing on the improvement and exploiting the best practices rather than merely measuring the best practices. The aim of researcher's comparative analysis is to identify, analyze and adopt the best practices which can result to culture change.

The major aim in this chapter would be to gather information from other jurisdictions with best practices than can be used to improve our Lawyers Disciplinary Tribunal in Kenya. Comparative practices with the aforementioned countries will highlight areas of practice requiring attention and improvement, identifies strength and weaknesses and accelerates change and restructuring by using tested and proven practices. The comparative analyze will as well establish the true position of Lawyers Disciplinary process in Kenya verses the best three states which can be used to improve our system.

In South Africa and Australia, the legal profession is streamlined and members of the legal profession adhere to ethical standards set. This has made the two jurisdictions to have the best institutional legal framework of lawyers' disciplinary system in the world. The chapter will focus on the comparative practices in the lawyers' disciplinary process.

According to Pityana;

*“Effective lawyering takes a great of patience, diligence, hard work,*

*systematic drilling and strategy, and always a measured temperament.  
There are no shortcuts, no instant gratification and no guaranteed wealth  
but only diligence and sheer hard work.....one earn respect by adhering  
to professional standards and integrity”.<sup>1</sup>*

### **3.2 THE LEGAL PROFESSION IN SOUTH AFRICA**

The legal profession in South Africa was characterized by conservatism, white domination, division and the system discriminated the majority black population.<sup>2</sup> The apartheid regime in South Africa had legislations that were oppressive and discriminatory to the Africans.

In the year 1953, the apartheid regime in South Africa enacted the Bantu Education Act which ensured that education in South Africa was divided along racial lines in order to oppress and discriminate the Africans.<sup>3</sup> Entry to the university in South Africa was based by then on racial discrimination and admission restricted on the basis of race.<sup>4</sup>

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<sup>1</sup> Pityana, Principal and Vice Chancellor, university of South Africa, in an address to mark the 30th Anniversary of the Black Lawyers Association, delivered at Emperor’s palace, Kempton Park, Gauteng, on Friday 9 November, 2007.

<sup>2</sup> P.F. Iya, Reforms 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, colored and black South Africans.

<sup>3</sup> The Bantu Education Act, No. 47 of 1953.

<sup>4</sup> The Extension of the University Education Act, No. 45 of 1959.

### 3.2.1 Admission to the Legal profession

The Admission of Advocates Act in South Africa provided that for one to be admitted in the legal profession, he must be older than 21 years, be a fit and proper person, have the right academic qualification and be a permanent citizen of South Africa.<sup>5</sup> Under the Attorneys Act, the Court may enroll an applicant to the attorneys' profession only if that person, in the discretion of the Court, is a fit and proper person to be so admitted and enrolled.<sup>6</sup>

The Legal profession in South Africa is divided into two namely; Attorneys<sup>7</sup> and Advocates.<sup>8</sup> Attorneys are required by law to be members of the law Society which exercises professional control over them.<sup>9</sup> All attorneys are required to register with the provincial law society where they practice. There are four provincial law societies in South Africa namely; the Kwazulu Natal Law Society, the Cape of Good hope law Society, the Law Society of the Orange Free State and, the law society of the Northern Province. The provincial law societies are the regulatory and disciplinary bodies for the attorneys.

Any person may lodge his/her complaint before the provincial law society where the attorney is registered. The provincial law society will form the special committee to hear the complaint and if there is substance refer the matter to the full council of the society. Should the full Council of the Law Society be satisfied that there is *a prima facie case*, refer the matter to the Provincial Division of the High Court with recommendations of suspending or striking the name of the attorney from the roll of advocates

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<sup>5</sup> Section 3 of the Admission of Advocates Act, No. 74 of 1964.

<sup>6</sup> Section 15 of the Attorneys Act, No. 53 of 1979.

<sup>7</sup> An Attorney means any person duly admitted to practice as an attorney in South Africa.

<sup>8</sup> An Advocate of the Supreme Court are specialist Advocates who are experts in trial, motion Court, appellate and opinion advocacy.

<sup>9</sup> The Attorneys Act, No. 53 of 1979

### 3.2.2 Suspension and/or striking off the Advocate from the Roll of advocates

In South Africa, the Admission of Advocates Act only gives the Court power to remove from the roll of advocates, any advocate, if the Court “*is satisfied that he is not a fit and proper person to continue to practice as an advocate*”.<sup>10</sup>

The Attorneys Act states that “a practicing attorney may be struck off the roll if that attorney in the discretion of the Court, is not a fit and proper person to continue to practice as an Attorney”.<sup>11</sup>

In deciding whether to remove the attorney from the roll, the Court in South Africa would be guided by three criteria cited in *Jasat verses Natal Law Society*,<sup>12</sup> namely;

- i. That the Court ought to decide if the alleged offending conduct has been established on a preponderance of probabilities.
- ii. That the Court must consider if the person concerned is in the discretion of the Court not fit and proper person to continue to practice, and;
- iii. That the Court must inquire whether in all of the circumstances, the person in question is to be removed from the roll of attorneys or whether an order of suspension from practice would suffice.

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<sup>10</sup> Section 7(1) (d) of the Admission of Advocates Act 1964.

<sup>11</sup> Section 22(1) (d) of the Attorneys Act, 1979.

<sup>12</sup> 101 2000 (2) All SA 310 (SCA) Para 10.

The researcher reiterates that striking and/or suspending an advocate off from the roll of advocates is one of the serious penalty imposed upon an advocate and such should be done by the Court after considering all appropriate ways in arriving that the said person is not a fit and proper advocate to be left to continue practicing. An institutional framework like the one existing in Kenya where practicing advocates presides over the disciplinary tribunal and has discretion to either struck off the advocate from the roll without any guidelines to follow leave a lot to desire. Practicing advocates who are members of the tribunal may use that opportunity to score goals by striking off their opponents in private practice. The researcher proposes the need for the law to be amended in order to give guidelines on suspension and striking off the advocates from the roll.

### **3.2.3 The Lawyers Disciplinary process in South Africa**

Once the complaint is lodged, the Council of the provincial law society enquires into cases of professional misconduct on the part of attorney or notary within that province of the society.<sup>13</sup> The Attorney is informed by the Law Society with such particulars of the complaint which may enable him to reply to the complaint through an affidavit. The council may require the advocate in its investigation produce for inspection books, documents and records in his possession which may be required relating to the complaint.<sup>14</sup>

Once the special Committee is satisfied that there is a professional misconduct, the committee refers the matter to the full council of the society with its recommendations. Should the full council of the Law Society be of the opinion that there is a *prima facie* case and that the Attorney is not a proper and fit person to continue practicing as an attorney, make an application to the provisional Division of the High Court to struck off that Attorney from the roll of Attorneys.

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<sup>13</sup> Section 71 of the Attorney Act. 1979.

<sup>14</sup> Section 70 of the Attorney Act, 1979.

The provincial Division of the High Court in South Africa while exercising its powers in suspending and/or striking the Attorney off the roll would be guided by the provisions of the Attorneys Act.<sup>15</sup>

In the researcher's opinion, the disciplinary structural framework in South Africa is very strong and transparent as far as lawyers' disciplinary process is concerned. It's therefore recommended that in Kenya, there should be necessary amendments to the Advocates Act which should aim to bring out institutional reforms to the lawyers' disciplinary process such as like the one of South Africa.

### **3.3 LAWYERS' DISCIPLINARY REGULATORY SYSTEM IN AUSTRALIA**

In Australia, other than the qualification and competency, lawyers are required to be persons who should be trusted by the members of the public.<sup>16</sup> The system in Australia requires any person with questionable characters to be prevented in entering into legal profession. The system in Australia considers integrity and criminal conduct of one who may require to be admitted in the bar.<sup>17</sup>

In Australia, the legal system has created a self regulatory legal profession or an independent ombudsman. The function of this body is to independently investigate and prosecute lawyers before a specialist tribunal dominated by practicing lawyers.

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<sup>15</sup> Section 22(1) (d) of the Attorneys Act, 1979

<sup>16</sup> Gino Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (1996) 30

<sup>17</sup> *Re Davis* (1947) 75 CLR 409 and *Ex parte Lenehan* (1948) 77 CLR 403 on dishonesty and Criminal Misconduct



In Australia, the standard of admission to the Bar is strict compared to the ones in Kenya. Other than the academic qualifications, one must also be a person of great integrity, good morals and character for him/her to be admitted to the Bar.

The office of the legal service Commissioner in Australia is a self regulatory legal profession or an independent ombudsman. The office receives all complaints and independently investigates and prosecutes lawyers before a special tribunal dominated by practicing lawyers.

The superior Court in Australia retains inherent jurisdiction to discipline lawyers. The profession and the lawyers regulatory system is rather based on ethical foundation. The system in Australia has given priority to the consumers' interest in the justice system.

In Australia, the profession had brought changes in the legal profession which served the best interest to the consumers of legal services and administration of justice. Under the regulatory system, non lawyers were thought to lack expertise to comment on the ethics of legal practice.<sup>18</sup> The enactment of the legal profession Act, 2004 in Australia changed the structural legal framework of the lawyers' disciplinary system to be handled by the independent legal services Commissioner.<sup>19</sup> In Kenya, the lawyers' regulatory system is not independent and is controlled by the Advocates' Complaints Commission, the Disciplinary Tribunal and the Law Society of Kenya.

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<sup>18</sup> David Wilkins, "Who should Regulate Lawyers?" (1992) 105 Harvard Law Review 799

<sup>19</sup> The legal profession Act No. 112 of 2004.

### 3.3.1 Lawyers Disciplinary System in Queensland

In Queensland, the Law Society Act established the Queensland Law Society as an incorporated body and created a tribunal of the law society (the Statutory Committee) to hear complaints against the solicitors with powers to strike solicitors off the roll.<sup>20</sup> By then, the Court retained inherent powers to discipline solicitors and anybody who was aggrieved by the decision of the tribunal would appeal to the Courts. The Queensland Bar Association had failed to fully regulate the legal profession as it had no direct powers to its members.

This had made the public by 1970s to raise questions that affected the structural framework of lawyers' disciplinary system in Australia. Self regulation in Australia had failed as consumers of legal services were not having trust in the existing system. The system slightly changed in 1985 through the Law Society Amendment Act which in itself established the Solicitors Disciplinary Tribunal<sup>21</sup> with membership of two solicitors and one layperson.<sup>21</sup>

The Statutory Committee and Solicitor Disciplinary Tribunal were later replaced in 1997 by a single Solicitors Complaint Tribunal composed of two solicitors and one lay person. It was later recommended that an independent body should be established to handle and regulate the legal profession in order to avoid conflict of interests.<sup>22</sup>

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<sup>20</sup> Sections 3, 5 of the Law Society Act, 1927.

<sup>21</sup> Queensland Law Society Amendments Act, 1985.

<sup>22</sup> Legal Ombudsman, *The Queensland Law Society and Baker Johnson Lawyers* (2003), at 2, 5.

This led to the enactment of the Legal Profession Act, 2004 with powers to appoint Attorney General of Legal Services Commissioner who may not be necessarily a lawyer<sup>23</sup>. Under the Act, the Legal Services Commissioner has power to receive all complaints against lawyers, dismiss and prosecute any complaint.<sup>24</sup> The Act, as well divided the complaints into three categories namely; first, complaints of professional misconduct which according to the Act, would justify that the lawyer being held not fit and proper person to practice. This included consistent failure to maintain a reasonable standard of competence.<sup>25</sup> Secondly, complaints of unsatisfactory professional conduct, which included legal services below the standard of competence that a member of public is expected to receive from a lawyer<sup>26</sup>, third, complaints involving consumer disputes between a person and a legal practitioner that do not involve an issue of unsatisfactory professional misconduct.<sup>27</sup>

The legal profession Act established two separate tribunals with the mandate of hearing complaints against legal practitioners. The professional misconduct is heard by the Legal Practice Tribunal with members composed of the Queensland Supreme Court.<sup>28</sup>

The single justice, who alone constitutes the legal practitioner Tribunal, can sit with one lay person and a member of the practitioner to hear and determine complaints against lawyers.<sup>29</sup> Any person who may be aggrieved by the decision of the Legal practice tribunal may appeal against such decision to the Queensland Court of Appeal.<sup>30</sup>

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<sup>23</sup> Section 414 of the Legal Profession Act, 2004.

<sup>24</sup> Section 259 of the Legal Profession Act, 2004.

<sup>25</sup> Section 245(1) of the Legal Profession Act, 2004.

<sup>26</sup> Section 244 of the Legal Profession Act, 2004.

<sup>27</sup> Section 263(2) of the Legal Profession Act, 2004.

<sup>28</sup> Section 249 of the Legal Profession Act.

<sup>29</sup> Section 280(1) of the Legal Profession Act, 2004.

<sup>30</sup> Section 292(1) of the Legal Profession Act, 2004.

On the other hand, unsatisfactory professional misconducts are heard by the Legal Practice Committee with the composition of two lawyers and a layperson.<sup>31</sup> Any person aggrieved by the orders of the Legal Practice Committee may appeal to the Legal Practice Tribunal with the leave from the Court of Appeal.<sup>32</sup> The cases against advocates in Queensland are managed through a computerized system which can be accessed both by the Law Society and the Legal Service Commissioner.<sup>33</sup> Most Complaints that are unsatisfactory professional conduct in nature are at times settled informally with the Legal Services Commission should the Lawyer take necessary steps such as apology to the complainant.

The Legal service Commissioner in Queensland is appointed by the Attorney General through tabling a report in Parliament about the appointment and may be in office for less than 10 years.<sup>34</sup> The Legal Service Commission is funded by payments from the Legal Profession interest of trust accounts fund whose payment is approved by the Attorney General.<sup>35</sup> The Legal Service Commission is independent from those it investigates and prosecutes and even the judiciary does not interfere with its operations.

#### **3.4. LAWYERS' REGULATORY SYSTEM IN THE STATE OF PENNSYLVANIA**

All lawyers admitted to practice in the commonwealth of Pennsylvania are bound by the Rules of Professional Conduct. The rules set forth minimum ethical standards for the practice of law. The Disciplinary Board of the Supreme Court of Pennsylvania and the Office of the Disciplinary Counsel has the responsibility to ensure that the rules are observed.

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<sup>31</sup> Sections 282(1) and 469(2) of the Legal Profession Act, 2004.

<sup>32</sup> Sections 293(1) and 294(2) of the Legal Profession Act, 2004.

<sup>33</sup> John Briton, The Legal services Commission-One Year on, 26<sup>th</sup> October, 2005 at 18.

<sup>34</sup> Section 415 of the Legal Profession Act, 2004.

<sup>35</sup> Sections 208-211 of the Legal Profession Act, 2004.

Under the Constitution of Pennsylvania, the Supreme Court of Pennsylvania has exclusive jurisdiction to oversee the conduct of lawyers.<sup>36</sup> It has created the Disciplinary Board of the Supreme Court of Pennsylvania (the Disciplinary Board) and the Office of Disciplinary Counsel to assist in carrying out this function. Under Rule 103, the Supreme Court declares that it has inherent and exclusive power to supervise the conduct of attorneys its officers and in furtherance thereof promulgates these rules. This power is further re-asserted in Sec 10(c) of Article V of the Constitution of Pennsylvania.<sup>37</sup>

### **3.4.1 The Disciplinary Board of the Supreme Court of Pennsylvania**

The Disciplinary board is composed of eleven members of the bar from the State of Pennsylvania and two non-lawyer electors. One of the members is designated by the Court as the Chair and another as the Vice-Chair. The members of the Board sit for a regular term of three years and they cannot serve for more than two consecutive three year terms.

The Disciplinary Board administers the rolls of lawyers admitted to the practice of law and it operates as a tribunal for hearing complaints of serious misconduct by lawyers and makes recommendations to the Supreme Court of Pennsylvania on cases where public discipline by the Supreme Court may be appropriate.

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<sup>36</sup> Section 10(c) of Article V of the Constitution of Pennsylvania.

<sup>37</sup> Ibid at section 10(c).

### **3.4.2 The Office of the Disciplinary Counsel**

The Disciplinary Counsel is defined as the Chief Disciplinary Counsel and assistant disciplinary counsel. Under Rule 207(a) Disciplinary Counsel shall not be permitted to engage in private practice except where the Board may agree to a reasonable period of transition after appointment.<sup>38</sup>

The Office of Disciplinary Counsel is responsible for receiving and evaluating all complaints about the conduct of lawyers. The Office of Disciplinary Counsel investigates all complaints and prosecutes those cases where it finds various violations of the Rules of Professional Conduct before the Disciplinary Board and the Supreme Court.<sup>39</sup> The Office of Disciplinary Counsel does not handle fee disputes but are referred to the Fee Dispute Committee of the county bar association where the attorney's office is located. Complaints about prosecutors and defense counsel in criminal cases must first be determined by the court. The Office of Disciplinary Counsel has the power to open and conduct investigations under its own authority.<sup>40</sup>

### **3.4.3 The Pennsylvania Bar Association**

The Pennsylvania Bar Association and the various county bar associations of lawyers play no role in regulating the conduct of lawyers in Pennsylvania, although the Office of Disciplinary Counsel relies on the bar associations to assist in certain functions such as providing remediation in fee dispute matters. In order for a lawyer to be found to have committed misconduct, it must be shown that the lawyer's acts have violated the Rules of Professional Conduct by clear and convincing evidence.

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<sup>38</sup> Rule 207(a) of the Pennsylvania rules of Disciplinary Enforcement, cap 83.

<sup>39</sup> Ibid at Section 207 (3).

<sup>40</sup> Ibid at section 27(b) (1).

### 3.5 CONCLUSION

From the comparative practices from other jurisdictions above, the researcher concludes that the structural legal framework of Australia, South Africa and Pennsylvania established the independent lawyers' Disciplinary institution that have created trust and confidence to the users of legal services in these countries. The institutions are transparent making complaints against practitioners be investigated, prosecuted and decisions made by an independent agency.

The lawyers' disciplinary system in South Africa, Australia and Pennsylvania are overseen by transparent and credible institutions. Their institutions are consumer oriented and aiming to protecting the consumers of legal services. There is need for Kenya to adopt such a system by creating an independent and transparent lawyers' disciplinary tribunal which can enhance public trust and which can be seen as credible and transparent in its operation.

## CHAPTER FOUR

### LEGAL AND INSTITUTIONAL REFORMS TO THE LAWYERS' DISCIPLINARY TRIBUNAL

#### 4.1 INTRODUCTION

The Lawyers' Disciplinary Tribunal institutional structure is established by the Advocates' Act and the Law Society of Kenya Act. Though there have been several amendments to the two Acts, much is required towards making the tribunal a trusted institution that can create confidence to the members of the public.

The processes for resolving lawyers' disciplinary grievances pay little attention to the relationships that have been damaged. Instead, the organized bar's Lawyers' disciplinary proceedings treat respondent lawyers in much the same way our criminal systems treat defendants, the action is framed as a prosecution, operating between the state and the defendant.

Thus, the process designed to remedy the grievance actually adds insult to injury and further estranges the parties from each other and from the legal system. Clients lose trust both in the individual lawyer who failed them and in lawyers as a group. At times, this make the lawyers themselves begin to doubt the integrity of their profession as the public lose confidence in this noble profession.

According to James C. Turner, the Executive Director of HALT;

*“Despite decades of calls for reform, the attorney discipline system is still badly broken . . . . The vast majorities of consumer complaints are not even investigated or are dismissed on technicalities, while only handfuls lead to more than a slap on the wrist. Unscrupulous or incompetent*



*lawyers should be held accountable to the clients they victimize, but the current system fails to do so”.*<sup>1</sup>

Turner and other consumer advocates thus call for prompt investigations, open deliberations, and effective quality control that “weeds out” unethical or incompetent lawyers.<sup>2</sup> These reformers are probably right that individual attorney and the profession as a whole cannot gain the public trust fully until such reforms are achieved.

As far as the researcher appreciates the role played by the DT in Kenya in regulating the legal profession, this chapter would focus on further necessary structural and legal reforms that if implemented, can improve the operations and services of the DT.

#### **4.2 Disciplinary Tribunal and Restorative Justice**

The Lawyers Disciplinary system in Kenya should envision a specific structure and form for public participation in disciplinary processes. The system should be based upon theory and practice in the field of Restorative Justice. Developed primarily in the context of criminal justice, Restorative Justice animates diversionary programs such as victim offender mediation and sentencing circles.<sup>3</sup>

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<sup>1</sup> 2002 Lawyers Discipline Report Card, HALT, [http://www.halt.org/reform\\_projects/lawyer\\_accountability/report\\_card\\_HALT](http://www.halt.org/reform_projects/lawyer_accountability/report_card_HALT). (Last visited January 12, 2012).

<sup>2</sup> 2006 Lawyers Discipline Report Card, HALT, [http://www.halt.org/reform\\_projects/lawyer\\_accountability/report\\_card\\_2006/index\\_2.Php](http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/index_2.Php) (last visited January 12, 2012).

<sup>3</sup> Victim offender mediation administered by prosecutors, probation officers, or cooperating private agencies, allows offenders in criminal cases to mediate with their victims, sometimes in lieu of trial or as part of sentencing. See generally Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994) (offering a general description and critique of victim offender mediation).

The lawyers' disciplinary system should embrace two important elements that are currently undervalued in the lawyers disciplinary process in Kenya namely deliberation and decision making by a diverse group of stakeholders and two, discussion that focuses on repairing the damage caused by the offender. A restorative approach sees that 'justice' can only be realized when the stakeholders most directly affected by a specific offence, the victim, the offender and the community have the opportunity to voluntarily work through the consequences of the offence with the emphasis on repairing the harm and damage done.<sup>4</sup>

The legal profession both constitutes and creates community. By strengthening that community, a more restorative disciplinary process can in turn improve the morale of practicing lawyers, prevent ethical misconduct, and protect the public.<sup>5</sup> Several jurisdictions in line of making lawyers' disciplinary system a fair institution, have embraced legal reforms such as discipline by consent, consumer protection models, and a diversion programs using mediation and arbitration. The spirit of the Constitution of Kenya<sup>6</sup> read together with Advocates Act<sup>7</sup> aim to promote this spirit of mediation in settling disputes between parties.

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<sup>4</sup> Eugene McLaughlin et al., Introduction: Justice in the Round—Contextualizing Restorative Justice, in *RESTORATIVE JUSTICE: CRITICAL ISSUES* 1, 9–10 (Eugene McLaughlin et al. eds., 2003).

<sup>5</sup> Clark Freshman, Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation, 44 *UCLA L. REV.* 1687, 1692–93 (1997) (recognizing a tension between a “private ordering” aspect of mediation (which allows parties to articulate their own values and adopt consistent resolutions) and a “community enhancing” aspect that uses mediation to encourage individuals to order their activities and resolve their disputes according to the norms of some relevant community).

<sup>6</sup> Article 159(2)(c) of the Kenya Constitution, 2010.

<sup>7</sup> Section 53(5) of the Advocates' Act.

The Model Rules for Lawyer Disciplinary Enforcement suggests that disposing of a grievance in this way is often in the mutual best interest of the public and disciplinary agencies. The agency is relieved of the time consuming and expensive necessity of prosecuting a formal proceeding.<sup>8</sup> This would alleviate the problem in the Kenyan system where most lawyers who are convicted at the Tribunal are later found during execution process that they do not own any attachable asset, hence complainant ends losing and never enjoys the fruits of his/her judgment.

The researcher reiterates for the need that the DT should make decisions by involving a diverse group of stakeholders and that the decisions made should focus on repairing the damage caused by the offender. The aim of the complainant is not have the advocate suspended and/or struck off the roll of advocates but rather to be compensated in order to recover his/her money back. Settling the dispute through mediation or conferencing would allow the offenders to mediate with their victims, sometimes in lieu of trial or as part of sentencing.

#### **4.3 Consumer protection Model**

The consumer protection model assumes that “consumers of legal services should be entitled to the same types of protections afforded consumers of goods and services.<sup>9</sup> This approach focuses on legitimate consumer expectations rather than lawyers’ professional norms; the prime object is to insure reasonable standards of “cost, promptness, and quality of service” rather than to “identify and weed out unethical behavior.<sup>10</sup>

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<sup>8</sup> Model Rules for Lawyers Disciplinary Enforcement Rule 21(A) (2002).

<sup>9</sup> Levin SA (1999), *Fragile Dominion: Complexity and Commons* (Perseus Books Reading MA) at pg 25.

<sup>10</sup> Deborah M. Chalfie, *Dumping Discipline: A consumer Protection Model for Regulating Lawyers*, 4 *Loy. Consumer L. Rev.* 4 (1999) at pg 9 available at <http://lawecommons.luc.edu/crl/vol4/iss1/2>.

According to this model, imposing discipline on offending lawyers misses the point, according to the consumer protection model: “just as jailing a criminal does absolutely nothing of consequence for a criminal’s past victims; the discipline system does nothing of consequence for a lawyer’s past victims.<sup>11</sup> The process would be radically different from current disciplinary procedures because the focus in this model is on compensating people who have been harmed and protecting the public from future harm.<sup>12</sup> For example, lawyers would be removed from all regulatory panels because, from a consumer protection perspective, lawyer self-regulation is a serious conflict of interest.

According to the consumer protection model, complainants are far too marginalized in traditional grievance hearings, relegated to the role of witness only and given fewer rights and protections than the respondent.

Disciplinary agencies often fail even to inform the complainant of important developments such as the dismissal of the complaint.<sup>13</sup> To empower individuals who complain about attorney misconduct, the consumer protection model would establish a neutral, out of court forum where non-lawyers would control the regulatory process<sup>14</sup>. The model would require lawyers to make disclosures to clients regarding various options available to the client, the amount of time it would take to achieve the client’s objectives, the costs associated with expected work, and the chances of success.<sup>15</sup>

The researcher reiterates that for lawyers disciplinary Tribunal in Kenya for it to be a fair institution, it should accord the consumers of the legal services same protection as those given to the consumers of goods and services.

The DT should ensure that Consumers of legal services are provided with quality legal services and complainants compensated rather than unnecessarily imposing severe punishment the advocates who end up quitting practice without compensating complainants.

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<sup>11</sup> Ibid at page 6.

<sup>12</sup> Ibid at page 8.

<sup>13</sup> Ibid at page 7.

<sup>14</sup> Ibid at page 10.

<sup>15</sup> Ibid at page 9.

#### 4.4 An ideal Lawyers' Disciplinary system

The purpose of the disciplinary processes is protecting the public by decreasing the likelihood of similar misconduct in the future. Unfortunately, significant misconduct often slips through the system unaddressed, allowing misbehaving lawyers to get away with and even persist in their wrongdoing. Moreover, innovative programs designed to grant relief to individual complainants may do so at the expense of the profession's ability to enforce ethical norms and hold lawyers accountable to a larger community beyond the damaged client. Thus, some of the "reforms" may actually reduce the system's deterrent effect. A second, oft-cited purpose of attorney discipline is to protect and uphold the fair and efficient administration of justice by holding lawyers accountable when they break the rules.<sup>16</sup>

Upholding the fair administration of justice is seen as a goal independent of its effect on individual clients or third parties, it is an interest of the justice system itself. When the legal profession uses lawyers discipline to mark and sanction unethical attorneys, it helps to define and enforce a standard of ethicality for its own sake. Unfortunately, the disciplinary system's inability to keep up with complaints filed and process them in a transparent way prevents it from setting this standard effectively.<sup>17</sup>

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<sup>16</sup> Gerald Brown, Jennifer and Wolf, Liana G.T (2012) "The Paradox and Promise of the Restorative Attorney Discipline", Nevada Law Journal: Vol. 12 Iss.2, Article 2. Available at <http://scholars.law.univ.education/nlj/vol12/iss2/2>

<sup>17</sup>. Ibid at page 274.

Another important goal of lawyers discipline is to restore and maintain the public's confidence in lawyers, the legal profession, and the rule of law. Under current systems, large numbers of complaints go unaddressed; to make matters worse, lawyers conduct these proceedings with no involvement from lay people or the community in arriving to any sentencing.<sup>18</sup> This worsens Lawyers disciplinary system in Kenya rather than improving the public view of the legal profession.

#### **4.5 Balancing the extremes**

Lawyers' disciplinary system is a regulatory system that must balance control with support. Discipline exerts control when it asserts professional values and holds accountable the lawyers who fail to honor those values. Discipline offers support when it assists failing lawyers to correct their errors, improve their practice, and come into compliance with professional norms. Control is expressed in the promulgation and enforcement of the rules of professional conduct, the clear articulation of conclusions that particular behavior complies with or runs afoul of those rules, and punishment for violators. Support interestingly enough is also expressed in the promulgation and enforcement of the rules of professional conduct, as the rules help to educate lawyers and nurture their professionalism.<sup>19</sup>

Towards making the Lawyers Disciplinary Tribunal a fair institution in Kenya, three criteria that have been missing from accounts to date should be considered. First, the Tribunal should ask more pointedly what complainants want out of the disciplinary process. Second, the Tribunal should focus ethicality not only as a characteristic of the regulated individual, but of the system as a whole. And third, the lawyers' disciplinary system itself sets an example for the lawyers it regulates.<sup>20</sup>

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<sup>18</sup> Ibid at page 274

<sup>19</sup> Ted Wachtel & Paul MacCold, Restorative Justice in Everyday Life, In RESTORATIVE JUSTICE AND CIVIL SOCIETY 114,116 (Heather Strong and John Braithwaite eds., 2001).

<sup>20</sup> Ibid at page 117.

Lawyers' disciplinary system constructs professional responsibility as an attribute of individual lawyers. Individuals behave ethically or not, and the system responds to the failures of individuals. Another, complementary way of conceptualizing professional responsibility is to see it as an aggregate quality, something the profession has as a body and demonstrates in its actions, including its regulatory procedures. This view requires the system to possess and live out the same values it demands of the individuals it regulates. Scott Burris and Clifford Shearing have applied this philosophy to public health systems, observing the ways that the regulatory and social service system may itself exhibit symptoms of illness.<sup>21</sup>

In the circumstances aforementioned of lawyers' disciplinary process, "sickness" translates to professional failure in the form of unethical or incompetent lawyering. The Tribunal should look for the markers of illness in the system as a whole, for purposes of identifying where the entire system is failing to live the standards it sets.

Many stakeholders are of the view that there exist ethical softness spots in lawyers' regulation and discipline. This is by virtue of the conflict of interest inherent in self regulation. Some argue that the very standards set as a profession are self serving, designed more for lawyers' own convenience and profit than for the service of the public.<sup>22</sup> Lawyers' self-regulation creates a conflict of interest raising issues on fairness on the administrative of justice, the kind of judgment given and the enforcement of the Tribunal orders.

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<sup>21</sup> Michael Kempa, Clifford Shearing, & Scott Burris, Changes in Governance: A Background Review, (unpublished manuscript prepared for the Salzburg Seminar on the Governance of Health), available at [http://www.temple.edu/lawschool/phrhcs/salzburg/Global\\_Health\\_Governance\\_Review.pdf](http://www.temple.edu/lawschool/phrhcs/salzburg/Global_Health_Governance_Review.pdf).

<sup>22</sup> Jennifer Gerarda Brown, Rethinking "The Practice of Law", 41 EMORY L. J. 451, 459 (1992) (giving examples of profit-reducing rules of professional conduct).

According ABA Model Rule 8.3 imposes upon lawyers a duty to report misconduct if they know another lawyer has violated the rules.<sup>23</sup> This is a sensible rule, since many violations will be visible only to lawyers working closely with, or in opposition to, the misbehaving lawyer. In addition, since many rules violations will be somewhat technical in nature and difficult for lay people to detect, it makes sense to impose upon lawyers the duty to police each other as they have best access to the information, and have the greatest ability to process that information to determine whether, on the face of it, a violation appears to have occurred.

In practice, lawyers are very reluctant to report each other's misconduct. The most important reason is that lawyers in many specialties and geographic locations operate within a fairly tight network. A sense of community and interdependence develops among lawyers who interact frequently. A lawyer who reports another's misconduct may be seen as defecting from the system of mutual cooperation that prevails in many places and fields of practice. Such a lawyer may fear that other lawyers will not want to cooperate with him once he becomes known as a "rat." A slightly more sinister way of putting this point is that a lawyer may expect that someday he might need another lawyer to look the other way when a minor violation occurs; this is an example of the "you scratch my back, I'll scratch yours" mode of practice.<sup>24</sup>

The structure of lawyers discipline can be termed as a closed system, in which lawyers judge fellow lawyers with little or no input from the lay member of the public. This undermines the system's moral authority. Just as the ABA Model Rules used to suggest that lawyers ask themselves what a "disinterested lawyer" would do when faced with a potential conflict of interest<sup>25</sup>,

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<sup>23</sup> model Rules of Professional Conduct R 8.3 cmt.5 (1998).

<sup>24</sup> Gerarda Brown Jeniffer and Wolf, Liana G.T. (2012) "The Paradox and Promise of Restorative Attorney Discipline," *Nevada Law Journal*: Vol. 12 Iss. 2, Article 2 availavle at <http://scholars.Law.univ.edu/nlj/vol12/iss2/2>.

<sup>25</sup> Model Rules of Proffessional Conduct R 1.7 (2009).



so too the profession as a whole might benefit from the views of parties and entities with differing perspectives to deal with the potential conflict of interest inherent in self-regulation.

Therefore, researcher reiterates that being “ethical” is a task not just for individual lawyers in their dealings with clients, courts, and third parties, but for the profession as an entity in its dealings with the public. It’s therefore the responsibility of lawyers to police one another and report any misconduct as a way of maintaining the face of the legal profession. The Disciplinary Tribunal should not be seen as an institution where lawyers fight against the members of the public but as an institution which is put in place to safeguard and regulate the profession for the benefit of the community as a whole.

#### **4.6 Using Lawyers Disciplinary Process to Model good Lawyering**

Lawyers’ disciplinary process should be seen as a quality control mechanism and a teaching tool towards modeling and regulating lawyers and the public it serves, the kind of professional and procedural values it wants to nurture. Two such professional values the disciplinary process could teach have to do with the dynamics of lawyers-client relationships. ABA Model Rules give lawyers some guidance about how the lawyers-client team should make decisions about the representation, with clients deciding the “objectives” of representation and lawyers consulting with clients about “means” to be used to achieve those ends.<sup>26</sup>

This sort of consultation and decision making requires various skills and activities on the part of the lawyer and the client. Law, how it might apply to the facts, and what the legal implications of certain decisions might be. The ABA Model Rule says that lawyers must communicate with a client, giving the client information the client needs to make decisions.<sup>27</sup> The client must share information about the facts underlying the legal problem, about her preferences in resolving the problem, and about the consequences he/she sees flowing from the problem and its resolution.

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<sup>26</sup> Ibid at R. 1.2, 1.4 (2009)

<sup>27</sup> Ibid. at R. 1.4.

According to Stephen Garvey, the experience of guilt can lead to a larger series of actions that bring an offender back into a right relationship with the community. Garvey states;

*“The offender must truly feel guilty, for the experience of guilt is the proper moral response to one’s wrongdoing. Second, he must willingly undertake steps to expiate his guilt, which he can only do through a series of undertakings designed to repair all the damage material and moral alike resulting from his crime. Accordingly, he must apologize for his conduct, thereby providing an outward manifestation and declaration of his repentance. He must make reparations in order to repair any material injury he has caused. Finally, he must bear some tangible burden or hardship through which he expresses his remorse, humbles his will, and thereby repairs the moral injury he has caused. A retributivist might call this last undertaking punishment, but that would be a mistake. A punishment is imposed on an offender. Here, in contrast, the offender accepts the burden, and indeed, welcomes it as the necessary price to be paid to expiate his guilt. We should therefore call it what it is: a secular penance”.*<sup>28</sup>

Currently, the lawyers’ disciplinary process in Kenya is not structured to facilitate this cycle from guilt to apology, reparation, and penance. In hearings, lawyers facing disciplinary action understandably concentrate on putting the disciplinary authority to its proof. This is a sensible move in a prosecutorial system, but lawyers often launch a vigorous defense even if some or all of the allegations are true. Such a structure is not for the best interest of the public.

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<sup>28</sup> Garvey, Stephen P. “Restorative Justice, Punishment and Atonement”(2003), Cornell Law Faculty Publications, Paper, 279. Available at <http://scholarship.law.cornell.edu/facpub/279> at page 313–14.

#### 4.7 Enhancing the Openness and Transparency in the Appointment Process of the Tribunal Members

Currently, the procedure in place used to appoint members of the Tribunal are not transparency and are contrary to Article 10 of the Constitution of Kenya.<sup>29</sup> There is need that appointment of the Tribunal members should be open and transparent. The exercise should all inclusive. The experience shows lack of an optimally open and transparent appointment process for tribunal members which can be a contributing factor to the public's lack of confidence and skepticism about lawyers' disciplinary system.<sup>30</sup> The current process is perceived by the public as creating or perpetuating an insular system.

The vacant posts at the lawyers disciplinary tribunal should be advertized on daily newspapers and those interested to apply. The exercise should be competitive in nature where all Kenyans with the required qualifications can be free to participate. Those shortlisted ought to be vetted before they are appointed to serve at the Tribunal.

The current system of appointment is not open and this make the system not trusted as some of those serving the tribunal have integrity issues. The researcher therefore is of the opinion that ACC Commissioners and Tribunal members should be appointed in a transparent manner in order to create confidence to the members of the public on the entire system.

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<sup>29</sup> Article 10 of the Constitution of Kenya, 2010.

<sup>30</sup> R. Bond, "ASIC Must Get Tough on Managers", *The Australian* (Sydney), 6 January 1999, 26; D. Carrigg, "Fund Woes Hang over Lawyers", *Hobart Mercury* (Hobart), 1 May 1999; R. Campbell, "Disciplinary Plan for Lawyers; Will Incident Prompts MLA's Move", *Canberra Times* (Canberra), 30 August 1997, A6; Haller, *supra* n. 12, 158 n. 180.

According to A. Tomkins,

*“With greater transparency comes greater accuracy and objectivity in record keeping generally and as regards personal files in particular. Secondly, there is a constitutional argument, which posits that greater transparency supports the legal and constitutional roles of national bodies in law-making or in administrative oversight. Thirdly there is the legal argument : namely reasons and openness in decision making are essential if citizens and others are to be able to determine whether and if so on what grounds, they might have a right to some form of legal redress against an allegedly disproportionate or procedurally unfair decision. Fourthly there is the policy argument. This supposes that greater openness somehow leads inexorably to better decision-making that mistakes will be fewer or smaller if decisions and the decision-making process are opened up to a greater public and media scrutiny, and that fraud will be hard to conceal. Finally, the popular or political argument has it that greater transparency enhances the ability of informed citizens meaningfully to participate in a democracy”.*<sup>31</sup>

According to European Ombudsman, the principle of transparency should have the following elements,<sup>32</sup>

- i. The processes through which public bodies make decisions should be understandable and open;
- ii. The decisions themselves should be reasoned; and,
- iii. As far as possible, the information on which the decisions are based should be available to the public.

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31 A. Tomkins, “Transparency and the emergence of European administrative law”, in Yearbook of European Law, 1999-2000, Vol.19, Oxford University Press, 2000.

32 European Ombudsman, “Transparency as a Fundamental Principle of the European Union”, 2001 <http://www.euro-ombudsman.eu.int/speeches/en/2001-06-19.htm>.

Therefore the disciplinary tribunal should be an institution that is transparent, giving judgment with legal reasoning and the same decisions should be available to the members of the public. Currently, the disciplinary Tribunal decisions are too brief and not available to the members of the public. Such brief decisions can not develop legal jurisprudence in the legal profession. The Tribunal ought to develop precedent to follow in order to avoid variance in awarding judgment with those disciplinary matters of similar facts.

The lawyers' disciplinary tribunal members should embrace the principle of accountability often serves as a conceptual umbrella and has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics<sup>33</sup> and the most concise description would be the obligation to explain and justify conduct.<sup>34</sup> Accountability can be defined as a social relationship in which an actor feels an obligation to explain and to justify his or her conduct to some significant other.<sup>35</sup> This usually involves not just information about performance, but also the possibility of debate and judgment and the imposition of formal or informal sanctions in case of mal-performance.

The researcher reiterates that the lawyers disciplinary members should be held accountable for their conducts and for any decision they make while exercising their duty. The Tribunal members are required to account for their conduct in fulfilling public tasks.

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<sup>33</sup> Bovens Mark, 2006. "Analysing and assessing public accountability", A conceptual framework. European Governance paper (EUROGOV) No. C-06-01. At p.8 Available at <http://connex-network.org/eurogov/pdf/egp-connex-C-06-01pdf>.

<sup>34</sup> Ibid at page 9.

<sup>35</sup> A. Meijer and M. Bovens , "Public accountability in the information age", in E-Government. Workshop in conjunction with JURIX 2003, M. Palmirani, T. van Engers & M.A. Wimmer (eds.), International Federation for Information Processing, Laxenburg (Austria), 2003, pp. 16 – 28.

In fulfilling their role they ought to dedicate themselves to aspects of lawfulness, effectiveness, as well as other aspects of properness towards promoting administration of justice in the legal profession.

The legitimacy of such institution would depend on its capacity and trust the public would have and the overall system of governance through the accountability mechanisms it would deploy towards fulfilling its functions in a way that is demonstrably impartial and non-partisan.

#### **4.8 Establishing an Independent Tribunal.**

According to the Preamble to the ABA Model Rules of Professional Conduct;

*“An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice”.*<sup>36</sup>

In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (the Clark Committee) concluded that the state of lawyer discipline was “scandalous” and that public dissatisfaction required immediate redress or the public would take matters into its “own hands.”<sup>37</sup>

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<sup>36</sup> Model Rules of Prof'l Conduct pmb. (2013), available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html).

<sup>37</sup> Special Comm. on Evaluation of Disciplinary Enforcement am. Bar ass'n, Problems and Recommendations in Disciplinary Enforcement xii (1970), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark\\_Report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/reports/Clark_Report.authcheckdam.pdf)

In USA, the McKay Commission studied the advantages and disadvantages of legislative versus judicial regulation. In doing so, The Mackay Commission examined several state agencies created by legislatures to regulate other professions in the public interest and compared them to lawyers' disciplinary agencies.<sup>38</sup> The McKay Commission concluded that legislative regulation of other professions did not result in more public protection, and that legislative regulation of the legal profession, specifically, would not be an improvement over judicial regulation as it would jeopardize the independence of the legal profession.<sup>39</sup>

In order to strengthen the lawyers' disciplinary system in Kenya, there ought to be a reformative structure that can separate the lawyers' disciplinary tribunal from the executive and law society of Kenya interference. The lawyers tribunal should be an independent body separate from executive and with a separate secretariat from that of the Law Society of Kenya. The tribunal should be under the Judiciary and any member serving the Tribunal should be interviewed and vetted like any other person in accordance to the Constitution of Kenya. Establishing a disciplinary tribunal like the one in Kenya where both the executive and members of the profession work together to regulate the profession creates conflict of interest and the structure is not for the best interest of the consumers of the legal services.

Under the Constitution, all tribunals are subordinated courts and should be under the Judiciary.<sup>40</sup> The judicial branch of government is better suited to regulate the legal profession than the LSK and executive branches because the other two branches of government are more subject to political influence. Regulation of the legal profession by the executive branch thus jeopardizes the independence of the legal profession. The tribunal should be either under judiciary or the profession to be left to regulate itself.

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<sup>38</sup> Robert B. McKay, Report of the Commission on Evaluation of the Disciplinary Enforcement (1989-92), New York.

<sup>39</sup> Ibid.

<sup>40</sup> Article 169(1) (d) of the Kenya Constitution, 2010.

The researcher as well asserts that the Commissioners who are appointed by the president as Commissioners to the Advocates' Complaints Commission should not be necessarily be lawyers. In most cases, those appointed are from active practice who serves a term of three years contract. According to prevailing circumstances, a person serving three years contract may not bring positive changes as the same changes may affect him when his/her three years contract expires and the same person returns back to practice.

In Australian state Attorneys-General recognized the need for more serious structural changes in lawyers' regulation and some jurisdictions began to move lawyer discipline out of the control of the professional associations.<sup>41</sup> Efforts to implement significant structural changes in lawyer discipline were accelerated during the late 1990s due to scandals involving lawyers or inadequate lawyer discipline.

The new institutional structure should represent a significant departure from the prior system, not only because the researcher proposes the establishment an independent agency to handle complaints about lawyers and fully regulate the profession, but also an institution which should be consumer-oriented. The researcher proposes two ways on how the Trinunal should be left independent. One, either the tribunal should be left to be under the control of the judiciary in accordance to the provisions of the Kenya Constirurtion, 2010.<sup>42</sup> All tribunals should be under the control of judiciary. Secondly, either the word '*tribunal*' to be replaced by the '*Committee*' so that the profession can control and regulate itself without involmnet of any arm of government. The tribunal independence will solve the problem of conflict of interests and unnecessry confrontations between the government and the members of the legal profession.

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<sup>41</sup> Legal Profession Act 1996 (Vic), 138, 143.

<sup>42</sup> Article 169(1) (d) of the Kenya Constitution, 2010.



#### 4.9 Tribunal developing Precedents and/or Sentencing guidelines

The judgments delivered by the disciplinary tribunal members in Kenya are not consistent nor do they have any legal precedent jurisprudential development. Each member of the tribunal gives his/her own judgment as there is no precedent to be followed. Such system of justice which lack judicial precedent opens a lacuna at the time on pronouncing judgments. The Advocates Act does not neither guide the members of the tribunal on which professional misconduct attracts which penalty.

The doctrine of precedent declares that cases must be decided the same way when their material facts are the same. Obviously it does not require that all the facts should be the same. In the flux of life all the facts of a case will never recur, but the legally material facts may recur and it is with these that the doctrine is concerned.<sup>43</sup> The doctrine of precedent refers to the doctrine that the court is to follow judicial decisions in earlier cases, when the same questions or points are raised before it in subsequent matters. What is binding in judicial decision is not the entire decision but the reasons or principles based on which a decision is reached or the ratio decidendi. The ratio decidendi (reason of deciding) of a case can be defined as the material facts of the case plus the decision thereon.

In *Welch v. The Department of Highways*, Middleton J.A. for the Ontario Court of Appeal stated:

*“But, in my view, liberty to decide each case as you think right, without regard to principles laid down in previous similar cases, would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what Judge his case would*

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<sup>43</sup> Glanville Williams, *Learning the Law* (9th ed. 1973),

*come and could guess what view that Judge would take on a consideration of the matter, without any regard to previous decisions”.*<sup>44</sup>

The doctrine of stare decisis is related to justice and fairness may be appreciated by considering the observation of American philosopher William K. Frankena as to what constitutes injustice:

*“The paradigm case of injustice is that in which there are two similar individuals in similar circumstances and one of them is treated better or worse than the other. In this case, the cry of injustice rightly goes up against the responsible agent or group; and unless that agent or group can establish that there is some relevant dissimilarity after all between the individuals concerned and their circumstances, he or they will be guilty as charged”.*<sup>45</sup>

Certainty and uniformity in decisions at the tribunal would help to maintain trust and enhance public confidence to all stakeholders on the operation of the DT. The researcher therefore reiterates that the lawyers disciplinary tribunal should develop the system of precedent.

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<sup>44</sup> (1933) O.W.N. 783 (CA).

<sup>45</sup> William K. Frankena, *Ethics*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall Inc., 1973) at 49.

According to Charles Newbold;

*“a system of law requires a considerable degree of certainty and uniformity, and that such certainty and uniformity would not exist if the courts/tribunals were free to arrive at a decision without regard to any previous decision”.*<sup>46</sup>

The lawyers' disciplinary system in Kenya has since its establishment failed to develop a system of precedents that can be followed in awarding similar sentence to similar cases. Lack of precedents and/or sentencing guidelines leave the tribunal members to pronounce any sentence without regard to previous sentence. Such scenario creates disparities in sentencing of similar cases with similar facts.

*“It is simply unworkable to leave everything up for grabs all of the time. One is the moral desirability of equal treatment. It seems arbitrary for a case to be decided one way this year, perhaps leading to a prisoner's execution or other serious consequences, and for an identical case to be decided the opposite way next year simply because of a change in tribunal personnel”.*<sup>47</sup>

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<sup>46</sup> Per Charles Newbold P. in C.A Dodhia Vs National & Grindlays Bank Ltd (1970) E.A. 195 at Page 199.

<sup>47</sup> Frederick Schauer on stare decisis at Page 595-97.

This call for uniformity is not an unshakeable imperative, but it does caution against departing from precedent too quickly. Given the critical issues that often come before the tribunal, consistency seems especially important.

A related reason for adhering to precedent is that only by following the reasoning of previous decisions can the tribunal provide guidance for the future, rather than a series of unconnected outcomes in particular cases. If all we know is that a tribunal affirmed some convictions and reversed others, we can have very little confidence in guessing what rule applies in the future.<sup>48</sup>

By articulating standards that are binding for the future, tribunals can offer some semblance of what has been called the "law of rules, which is one aspect of the rule of law."<sup>49</sup> Adherence to precedent does not mean simply refusing to overrule past decisions, it means taking them seriously as starting points for analysis in future cases. This notion derives partly from reasoning by analogy based on similarities between the facts of cases, but more importantly, it reflects a need to give credence to the reasoning in earlier opinions.

#### **4.9.1 Controlling Discretionary Powers in Sentencing of Advocates**

The term discretion means the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives.<sup>50</sup> Lawyers' disciplinary tribunal in Kenya is charged in making discretionary decisions in the discharge of their duties which ought to be based on section 60(4) of the advocates Act.

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<sup>48</sup> Ibid at page 595-597.

<sup>49</sup> Antonin Scalia, *The Rule of Law as a Law of Rules* 56 U CHI L. REV. 1175 (1989).

<sup>50</sup> Henry McGee, *Discretionary Justice: A preliminary Inquiry*, 4 GA. L. REV 633 (1970). Available at <http://digitalcommons.law.seattleu.edu/faculty/611>

The Advocates Act only gives the type of orders that can be given by the tribunal members if a professional misconduct on the part of advocate has been proved. The Advocates' Act does not specify which professional misconduct if committed by the advocate attracts which kind of sentence. Under the Advocates Act, any professional misconduct committed by the Advocate and proven attracts any sentence listed in the Act. Tribunal members have discretion to choose the kind of sentence from the ones listed to be imposed on the advocate. All discretionary decisions made are subject to some kind of review and are subject to reversal if there has been an abuse of discretion.

Discretion characterizes powers delegated within a system of authority to an official or set of officials where they have some significant scope for settling their reasons and standards according to which that power is to be exercised and for applying them in the making generally of specific decisions.<sup>51</sup> In exercising their discretion under the Advocates Act, members of the tribunal should exercise their discretion in a fair and neutral manner.<sup>52</sup>

Due to the element of personal choice inherent in discretion, certain criticisms have been made against its use in public affairs. For example, it has been argued that there is always the danger that discretionary powers will be used arbitrary. Dicey, for example equated discretion with arbitrariness.<sup>53</sup>

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<sup>51</sup> T.R.S. Allan (1987). Review of D.J Galligan 'Discretionary Powers: A legal study of Official Discretion' The Cambridge Law Journal, 46, pp 531-533. Doi: 10.1017/S00008197300117593.

<sup>52</sup> Section 60(4) (a)- (e) of the Advocates Act.

<sup>53</sup> A.V.Dicey, The Law of the Constitution, London, 1961 edn. p. 188. See also Lord Hewart, The New Despotism, London, 1929, ch. iv.

K.C. Davis has argued that discretionary decisions can be arbitrary in the sense that officials may take decisions based on irrelevant factors.<sup>54</sup>

The major aims of guiding discretion are defined by the Committee in these terms, to eliminate arbitrariness in the decision making process, to promote fairness, to stabilize relations between the citizens and the State and to enunciate policy where necessary.<sup>55</sup>

In exercising discretion in sentencing, one should eliminate unjustified disparity. Disparity in sentencing can be justified only if there are good grounds for differentiating between offences and offenders. While exercising their discretion, the Tribunal members should impose similar punishment for similar offences committed by offenders in similar circumstances.<sup>56</sup>

Discretion leaves decision making open to irrelevant influences. The Law Reform Commission adopted the view that, whatever the position in relation to unjustified disparity in sentencing, the process by which sentences were determined did not promote consistency in any systematic way. The selection of a level of sentence within the maximum requires of discretion by the Tribunal which is largely unregulated and which permits very extensive freedom to choose the type of quantum of punishment in individual cases.<sup>57</sup>

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<sup>54</sup> K.C. Davis, *Discretionary Justice*, Louisiana, 1969. See also J.L. Jowell, 'The Legal Control of Administrative Discretion', 1973 P.L. pp. 186-192, and D.J. Galligan, 'Arbitrariness and Formal Justice in Discretionary Decisions', in: D J. Galligan (ed.), *Essays in Legal Theory*, Melbourne UP,

<sup>55</sup> T.R.S. Allan (1987). Review of D.J Galligan 'Discretionary Powers: A legal study of Official Discretion' *The Cambridge Law Journal*, 46, pp 531-533. Doi: 10.1017/S00008197300117593.

<sup>56</sup> Law Reform Commission, Report No. 44, *Sentencing*, 1988 page 80.

<sup>57</sup> *Ibid* page 81.

The abuse of discretion occurs which a decision is not an acceptable alternative. The decision may not be unacceptable because it is logically unsound, arbitrary and clearly not supported by the facts at hand or because it is explicitly prohibited by a statute or rule of law.<sup>58</sup> Discretion in decision making can be viewed from the perspective of the flexibility and choices granted to the decision maker based on the decision being made.<sup>59</sup> Discretion in making of decision involves three elements namely finding of facts, settling the standards to be applied to the facts and applying the standards to the facts.<sup>60</sup>

#### 4.9.2 Narrowing Discretionary Powers

There has been a concern about the role of discretion in criminal administration, the extent to which subjective judgment of an official determines what would be done with a suspect, defendant or convict.<sup>61</sup> The basis of this concern has been the fear that peoples' lives, liberty and wellbeing depend on arbitrary, discriminatory or corrupt decisions. Discriminatory decision making can either soften and/or make the stakeholders to the lawyers' disciplinary process lose confidence in it thereby weakening the entire lawyers' disciplinary system in effectively regulating the legal profession.<sup>62</sup>

Narrowing discretion in lawyers disciplinary system in Kenya would provide a setting in which major improvements would take place through amending the Advocates' Act so that any offence identified as amounting to professional misconduct has to attract a particular penalty.

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<sup>58</sup> Henry McGee, Discretionary Justice: A preliminary Inquiry, 4 GA. L. REV 633 (1970). Available at <http://digitalcommons.law.seattleu.edu/faculty/611>.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Gregory Bassham, Freedom's Politics: A review Essay of Ronald Dworkin: Freedom Law: The Moral Reading of the American Constitution 72 Notre Dame L. Rev.1235 (1997).

<sup>62</sup> Duke Law Journals (Vol. 1976:651).

This would enhance confidence in the entire disciplinary process as major stakeholders would know which particular professional misconduct attracts which penalty as may be given the Statute

#### **4.9. 3 Introducing the concept of vetting to the Tribunal Members**

The word vetting refers to ‘the processes for assessing an individual’s integrity as a means of determining his/her suitability for employment.’<sup>63</sup> The process involves an examination of an individual personal history in order to determine his/her suitability to occupy the said office and serve the public. The process must suit the historical, political and institutional contexts in order to put in office men and women of great integrity.<sup>64</sup>

The word integrity refers to a person’s adherence to relevant standards of professional conduct. The vetting processes are aimed at the screening of those meant to occupy public offices in order to determine if their prior conduct warrants their exclusion from occupying such public offices.<sup>65</sup> Vetting process aim at excluding from public office persons with serious integrity deficits in order to re-establish trust and confidence to the members of the public.<sup>66</sup> Vetting has an institutional impact and is therefore an element of institutional reform which if conducted well will change the image and structure of an institution.<sup>67</sup>

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<sup>63</sup> Duthie, Roger, 2007”Introduction’ in Mayer-Rieckh, A. and de Greiff, P., 2007, Justice as prevention: Vetting Public Employees in Transitional Societies, International Center For Transitional, Social Science Research, Council, New York, USA.

<sup>64</sup> Fithen, C. , 2009, ‘The Legacy of Vetting Programs: An Empirical Review’, International center For Transitional Justice, New York.

<sup>65</sup> Duthie, Roger, 2007”Introduction’ in Mayer-Rieckh, A. and de Greiff, P., 2007, Justice as prevention: Vetting Public Employees in Transitional Societies, International Center For Transitional, Social Science Research, Council, New York, USA. At pg 17.

<sup>66</sup> Ibid at page 17.

<sup>67</sup> Ibid at page 31.



Any systems which fail to establish an effective vetting mechanism would represent one important dimension of the culture of impunity. Permitting abusive officers to remain in office jeopardizes the legitimacy of the disciplinary tribunal in Kenya and raises serious doubts about the sincerity of the institution in discharging its mandate.<sup>68</sup>

The researcher reiterates for the need to establish an independent body with the mandate to vet the tribunal members. This independent body should be controlled by the Council of the Law Society of Kenya who after advertising the vacant position and applications made, should put the names of those invited for interviews in one of the daily newspapers. The public then would be invited to raise any complaint against those invited for interviews. By so doing, the exercise will make the public participate in the vetting and appointment process as a requirement of the Constitution.<sup>69</sup> Vetting will therefore ensure that those in office are men and women of integrity who the consumers of legal services can have trust in.

#### **4.9.4 CONCLUSIONS**

From the discussions above, the researcher reiterates on the need to embrace the institutional legal reforms. The missing gaps in the existing structural and legal framework can be remedied through reforms that can either be implemented administratively and/or by amending the Advocates Act and the Law Society of Kenya Act. The reforms if implemented would bring rejuvenation, coordination and uniformity in both procedure and sanctions.

The reforms would be a key way to establishing transparent and credible lawyers' disciplinary tribunal in Kenya. By so doing, it will achieve the paramount concern of the lawyers' disciplinary process which is to protect the consumers of the legal services.

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<sup>68</sup> Advocacy Forum and Redress. *Held to Account: Making the Law work to fight Impunity in Nepal* (Kathmandu and London: Advocacy Forum and Redress, December, 2011) 22-24.

<sup>69</sup> Article 10 (2) (a) of the Constitution of Kenya, 2010.

## CHAPTER FIVE

### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

The researcher in chapter five focus on the summary, conclusions and recommendations of his reseach paper. The chapter will examine the missing gaps that exist in its structural and legal framework which has affected the operation of the tribunal in its mandate to fairly regulate the legal profession. The reseacher in this chapter as well will cite recommendations which if adopted would make the lawyers' disciplinary tribunal in Kenya a fair institution towards exercising its regulatory mandate.

#### 5.2 SUMMARY

In chapter one, the reseacher outlined the historical perspectives of the regulation of the legal profession in Kenya and objectives of this research. The chapter gave the scope of the research paper and what it would achieve.

Chapter two examined in detail the existing institutional and legal framework of the Lawyers' Disciplinary Tribunal in Kenya as established by the two Acts; namely the Advocates Act and the Law Society of Kenya Act. The discussion in the chapter demonstrated the inherent weaknesses that have made the current lawyers' disciplinary tribunal be a weak institution which has made the public who are the consumers of the legal services not to trust the lawyers' disciplinary system in Kenya. The existing legal framework ought to be changed in order to remedy the existing conflicts.

Chapter three examined the lawyers' disciplinary system practices in other jurisdictions, best practices drawn from South Africa, Australia and Pennsylvania. The aforementioned

jurisdictions have a self regulation and independent institutions in charge of lawyers disciplinary system. The structural legal framework in these countries is trusted by the stakeholders and the members of the public who are consumers of the legal services. The public have developed trust and confidence in the disciplinary system set up in these countries. In this comparative practices, the researcher demonstrated that in Kenya where there is co-regulation of lawyers' disciplinary system, the office of Attorney General which plays the role of investigation, prosecution and adjudication contravenes the principle of separation of power as enshrined in the Constitution of Kenya.

Chapter four discussed on the various legal and institutional reforms that the researcher proposed to be implemented should the Lawyers' disciplinary tribunal become a fair and trusted disciplinary system in Kenya. These reforms are necessary in order to enhance public confidence and for purposes of improving Tribunal operation. The legal reforms aim at establishing an independent lawyers' disciplinary Tribunal in Kenya which can encourage offender to feel guilty and be willing to undertake steps to expiate his guilt and which can assert professional values and assist those who violate them to improve in their practice.

Chapter five the researcher proposes various recommendations which if implemented would restructure the existing lawyers' disciplinary tribunal in Kenya to enable it create confidence and trust to the consumers of legal services and to effectively discharge its mandate in a transparent and trusted way.

### **5.3 CONCLUSIONS**

The structural defect in lawyers' disciplinary system is to blame for the failure of the lawyers' regulation in Kenya. A profession's most valuable asset is the collective reputation and confidence it inspires to the public and the consumers of the legal aservices. The current institutional structural defect of the lawyers' diciplinary tribunal has created public mistrust between the members of the profession and the consumer of the legal services.

The institution is composed mainly of members who are not vetted and some of them have integrity issues. Worse is the fact that the Attorney General is the chairperson of the tribunal at the same time is the investigator, prosecutor and adjudicators at the tribunal. This contravenes the Kenya constitution on the principle of separation of powers making the members of the legal profession perceive the executive as interfering with the regulation of the legal profession in Kenya.

Changes and/or institutional and legal reforms should take place which can oversee institutional structural changes of the composition of the members of the tribunal. There ought to be a foundation for an oversight framework that is more responsive to the public interest. Such new institution would promote greater transparency and accountability and create a potential for ongoing revision in light of experience. Legal profession in Kenya needs to re-evaluate their values, objectives and priorities. Such would make the lawyers' tribunal an independent institution with fully powers to handle and manage its own operations.

## **5.4 RECOMMENDATIONS**

The research paper recommends the following;

### **5.4.1. Need to vet the Tribunal Members and ACC Commissioners**

Reforming institutions contributes to achieving a central objective of an effective and legitimate transitional justice policy and the prevention of future miscarriage of justice. One important aspect of institutional reform efforts any democratic country is vetting processes to exclude from public institutions persons who lack integrity. The lawyers disciplinary system for decades has never vetted members who are elected to serve it.

This in most cases has opened a lacuna where members with integrity issues get elected to the tribunal in order to protect their own interests and those of their friends. This has made the public and all stakeholders not to have trust in the entire system.

Vetting would help restore confidence among citizens in national institutions by confirming that no one is above the law. It would also improve the national standing of the tribunal members and make lawyers' tribunal a more credible institution.

Other than the lawyers who are members of the tribunal who are not vetted, the Commissioners who are appointed by the president to serve as Commissioners at the Advocates' Complaints Commission are never vetted before occupying office. These Commissioners presently in office are those who were appointed from private practice and the constitutional requirements require that Commissioners who occupy government offices should undergo vetting process in order to confirm that they are men and women of integrity.

The researcher therefore recommends for the amendment of sections 53 and 57 of the Advocates Act which can ensure that the ACC commissioners appointed by the President and LSK appointees are vetted before occupying the office.

#### **5.4.2 Need for Institutional Independence**

The law lawyers' disciplinary body in Kenya is not an independent body in its operation due to the role played by the office of the Attorney General. The institution lacks the principle of separation of power as enshrined in the Kenya Constitution. Under the Advocates' Act, the office of the Attorney General is given multiplicity of roles to play as far as lawyers' disciplinary process is concerned. The Attorney General is the investigator through Advocates' Complaints Commission, the prosecutor and the adjudicator. An arrangement where same person in the executive umbrella plays multiplicity of functions contravenes the constitutional principle of separation of powers.

Such an arrangement leaves the tribunal as an institution to be entirely under the mercy of the executive (office of the Attorney General) who then can influence the entire disciplinary process. There are no checks and balances since one office is left to conduct multiplicity of functions.

The research recommends for need to re-evaluate and re-structure the lawyers' disciplinary legal framework in order to make the tribunal as an independent body. In Australia, the Queensland has established an independent disciplinary system known as Legal Service Commissioners who are mandated to regulate the legal profession which Kenya should emulate. The Attorney General in Kenya should appoint an independent body to regulate the legal profession like the one existing in Queensland.

#### **5.4.3 Lawyers' Disciplinary Tribunal calendar to be controlled by an independent secretariat**

Lack of independence of the lawyers' tribunal is further occasioned by virtue that the operational calendar of the tribunal is solely in the hands of the law society of Kenya.

After the Commission has finalized its investigation, the charges are forwarded to the Law society of Kenya who at their own discretion decides when the matters forwarded to them can be listed for plea taking. At times, matters forwarded to the LSK stay for long before they are listed for plea taking.

The LSK as well pays the tribunal members transport and accomodation allowances making the tribunal members be under the influence of corruption. The lawyers' Tribunal basically is left under the control the law society of Kenya and the office of Attorney General as it does not have its own budgetary allocation and secretariat.

The researcher recommends that lawyers' disciplinary tribunal should be an independent institution. The new establishment of this institution should be guided by the principle of separation of powers. There is need that the institution should be given its own budgetary allocation and that it should maintain its own secretariat. The independent secretariat will independently be in a position of controlling the tribunal operations without any influence from the OAG and LSK.

#### **5.4.4 Members of the Tribunal to leave practice when in office**

The monkey cannot decide the fate of the forest. Lawyers who are elected to serve the tribunal for three years are at the same time operating their own private firms. The Tribunal members enjoy no immunity. The same members who serve at the tribunal and are in active practice end up having disciplinary matters filed against them before the Tribunal. Few of them are elected at the time when they have disciplinary matters pending before the tribunal.

Can one be a good judge when he/She has issues pending against his/her conduct before the same tribunal he/she presides? Some of these tribunal members are influenced by their constituents who elected them with an aim of seeking re-election.

These influences the tribunal members in arriving to decisions that favor their constituents, hence affecting the way legal profession is regulated in Kenya.

There researcher therefore reiterates that it would be good for the Tribunal members to leave practice during the time they serve at the tribunal. This would enhance independence in decisions making as far as profession misconduct is concerned. The same would as well see a scenario where tribunals are vetted before occupying office and be deemed to state officers at the period when serving the tribunal. Section 57 of the Advocates Act should be amended to make those serving the Tribunal to leave practice at the time they are serving the Tribunal.

#### **5.4.5 Budgetary allocation to the Tribunal**

The lawyers disciplinary system in Kenya is not allocated any budget which it can use to manage its own affairs. The office of the Attorney General and LSK funds the tribunal. The tribunal should be an independent institution with its own funds to be able to effectively manage its operation without any interference from any other person and/or institution.

The Attorney General pays the tribunal members allowances has may be agreed with treasury. On the other hand, the law society of Kenya pays the tribunal members transport and accomodation allowances.

Any institution which does not have its own budget to manage its own operation can have the financiers manipulate its decisions. Worse enough is the lacuna created between the Law Society of Kenya and the office of the Attorney General on the control of the lawyers Tribunal. The two institutions that finance the tribunal have conflict of interest, hence would each try to manipulate the entire system.

The office of the Attorney General provides the personnel of investigation, prosecution and adjudication before the lawyers tribunal. Attorney, who investigates, prosecutes and adjudicate matters before the tribunal also pays allowances to the Tribunal members.

The law society on the other hand who are the secretariat to the Tribunal controls the entire operation of the Tribunal and pays the tribunal members their transport and accomodation allowances.

Such an arrangement to the institution that administers justice cannot be trusted as decisions reached are likely to be influenced and/or manipulated by the financiers. The researcher therefore recommends that lawyers' disciplinary tribunal should be allocated its own budget which can enable it as an institution to manage and control its own operations without any influence from other agencies.

Other jurisdiction like lawyers disciplinary tribunal in Australia-Queensland has its own budget that enables it to control its operation. In Queensland, the Legal Services Commissioner receives its funding from the Exchequer and makes its returns to parliament. Kenya should embrace an example of Queensland and allocate money to the lawyers'tribunal to enable it control its own operation. There is need for Section 57(1A) of the advocates Act to be amended in order to for parliament to set aside funds for the Tribunal.

#### **5.4.6 Judiciary to have a representative at the Tribunal.**

All other Tribunals in Kenya are under Judiciary. Under the Constitution of Kenya Article 159, Tribunals should be under the jurisdiction of the Judiciary. Under the Advocates Act



section 60(5) and 60(8), the lawyers' tribunal in Kenya has status of the Subordinate Court. Under the Constitution of Kenya, 2010, Article 169(d), the Tribunal has status of the subordinate Court.

In Kenya there is confusion as to which agency the lawyers' disciplinary tribunal falls. There is a silent fight between the law society of Kenya and the Office of the Attorney General on the controls the Tribunal. Even advocates who are the most learned in the legal profession are not aware as who controls the lawyers' tribunal.

The Miscellaneous Amendment Act to the Advocates Act, 2012 brought confusion by deleting the word 'Committee' and replaced the same with 'Tribunal'. The amendment is not clear on the mischief that the Tribunal would have cured although the DT operation and procedure remain the same. Whereas the intention was to create a tribunal, many questions are left unanswered on its mode of operation. Changing the Committee to a tribunal opened quarrels between the office of Attorney General and the Law Society of Kenya which has affected the proper operation of the DT since its creation to date.

According to the aforesaid amendments, the intention of creating a tribunal was that the same should be under Judiciary as all tribunals are under the control of Judiciary. The 2012 amendments to the Advocates Act were not received well by the Law society of Kenya who according to them, saw the government as taking control of the private legal profession.

The researcher recommends that section 57 of the Advocates Act be amended in order to have the Judiciary have a representative at the Lawyers Disciplinary Tribunal in Kenya. This will make it as an institution be an independent organ not manipulated by the normal politics from the law society and the office of the Attorney General. The Judiciary representative will create checks and balance and minimize the politics of the LSK and the Office of Attorney General. Such would create trust and confidence to the members of the public who are longing for justice.

The Judiciary will cure the idea that Lawyers have formed their own group to regulate themselves and protect their own interest rather than the interest of the public. Judiciary as well would restore the public confidence to the members of the public who perceive the Lawyers Tribunal as an institution which has been established not administer justice fairly but to protect Lawyers interests. The process would set in place an independent body separate from the executive and the Law Society of Kenya that can be trusted by all stakeholders who are the consumers of the legal services.

#### **5.4.7 Both parties to Appeal/Judicial Review**

The Advocates Act does not accord both parties an equal opportunity to a fair hearing. In any fair hearing, both parties have to be given equal opportunity to lodge an appeal should one not be satisfied by the judgment given. The complainant under the Act, does not have a right to appeal against the orders of the tribunal.

The Advocates Act has lacuna which in itself give advocates who have been convicted to appeal in the High Court and/or do an application for a judicial review against the orders of the tribunal. In most cases, advocates take this advantage and lodge appeals or make application for judicial review as a way of frustrating tribunal orders and/or defeat the execution orders. The right to appeal is legal and acceptable which both parties must enjoy and not one party.

Unfortunately, the Advocates Act does not grant to the complainant the right to appeal against the orders of the tribunal. Any law which creates institutions to administer justice should accord both parties equal rights in defending themselves. Why should the Advocates Act grant to the advocate an opportunity to appeal and deny the complainant the same. Well structured institutions like that which exist in Australia under the Legal Profession Act 2004, Advocates and complainants are granted equal opportunity to appeal against orders of the lawyers tribunal.

The researcher recommends that the Advocates Act should be amended so that it grants both parties an opportunity to appeal against any order given by the lawyers disciplinary Tribunal. Such would amount to a fair hearing and would enable both parties be satisfied by exhausting all avenues of justice. This would enhance confidence and trust to the public by treating tribunal as an institution which do not favor one side. Its therefore necessary that that sections that sections 62 and 67 of the Advocates Act be amended in order to give both parties the right to appeal against the orders of the Tribunal to the High Court and the decisions of the High Court to the Court of Appeal.

#### **5.4.8 Tribunal to Control Execution process**

Since early 1990s, the law society of Kenya has been conducting execution against errand advocates who do not comply with the orders of the tribunal. The law society has been conducting it through a private advocate appointed to that effect.

This advocate who conducts execution is at the same time busy running his private office while in active practice. The law society conducts solely execution without any control and/or say from the tribunal or Advocates Complaints Commission. Such an arrangement has made nearly all matters under execution bear no fruit making the complainants wait in vain. Ordinarily, it becomes hard for an advocate appointed by the law Society to execute against colleagues in private practice. As it stands, the execution process against errand advocates is not functioning well making the orders of the tribunal not complied with. Such leaves convicted advocates to peacefully continue in their practice as if no orders of the tribunal existed.

The researcher therefore recommends that the government should employ its own independent auctioneers who should be used to execute its orders received from different judicial bodies. Independent auctioneers would not be associated with advocates who in most cases compromise private auctioneers. This according to the researcher would make execution of the tribunal orders more effective and transparent as it will be executed by an independent auctioneer.

#### **5.4.9 Operation of the Tribunal/ACC be devolved**

Kenya has more than 41 million people. Most of these populations are poor and marginalized people who are likely not to access justice unless the same is taken near to them. The disciplinary tribunal as an institution was established to serve all Kenyans and any other person who may be living in Kenya and who may have a reason to complain against the misconduct of the advocate.

The disciplinary tribunal has jurisdiction extending to the whole of Kenya since the advocate can open offices anywhere within the republic of Kenya. Advocates as well serve any other person within the republic of Kenya who may require their services.

The lawyers disciplinary Tribunal in Kenya only sits in Nairobi. The services of the tribunal to date have not been devolved to enable the poor and marginalized to access justice easily. Anybody wanting to lodge a complaint has to travel to Nairobi. Even the Advocates' Complaints Commission which is a government investigating and prosecutorial body has only its office in Nairobi.

The Kenya Constitution 2010 requires essential facilities to be devolved so that the members of the public can have access to them. The Tribunal as an institution that serves all Kenyans should be devolved to enable members of the public access them easily. The lawyers disciplinary tribunal should therefore be devolved to all forty seven counties for purposes of serving all members of the public in Kenya effectively. Other jurisdiction such as Australia, lawyers disciplinary process is devolved in all states and provinces and Kenya should embrace that example.

#### **5.5.0 Multiplicity of roles**

Currently, there is more than one body which is mandated to receiving complaints where professional misconduct is alleged against the advocate. The law society of Kenya, the

Advocates Complaints Commission, the disciplinary tribunal and Ethics Committee of the law society of Kenya all handle disciplinary matters.

Where more than one institution handle same problem, members of the public at times do not know exactly which among them has which mandate. Even some advocates who are presumed to know get confused in differentiating between the institutions aforementioned. There are no legal mechanisms and guidelines in regard to which body does what in the disciplinary process. Such is a duplication of functions which causes confusion to the members of the public. Many complainants do not differentiate between the ACC, LSK and DT.

The researcher reiterates that the four bodies aforementioned should be merged to create one big and independent body in charge of handling disciplinary matters. The body should be allocated enough funds and have an independent secretariat which can manage its daily activities.

#### **5.5.1 Declaration of Wealth and Liabilities by Advocates**

In any society that grows, members of the society who occupies various offices must declare their wealth to enable the public know their assets and liabilities. This is the constitutional spirit requiring all members to undergo the process whether in public or private offices.

Other than banking institutions, lawyers are the people who receive and handle their clients' money with no proper legal mechanism on how their clients' money would be safeguarded. Lawyers only receive and handle clients' money without warrant of any proper security given.

The indemnity cover protects professionals from legal liability from any acts of negligence that they may commit in the course of their duty. In Kenya, no evidence so far from the lawyers disciplinary tribunal that the cover aforementioned can be used to cover professional misconducts committed by the advocates.

In most cases where errand advocates never honors the orders of the tribunal and matters proceed to execution, auctioneers never find any assets to attach in order to recover the benefits of judgment. The simple reason being, advocates in Kenya invests in other peoples name and they own no property in their names.

This makes execution difficult because most advocates in Kenya have nothing registered in their names to execute. How would then the law entrust money from the public to be in the hands of one who does not own anything? .

Advocates therefore should be compelled under the law that before one enters in practice; one should declare his/her wealth for members of the public to know. This would make the public to have confidence to engage one who has assets which would act as security of any money of the clients that may come into the hands of the advocates. Declaration of wealth by the advocates in private practice should be done annually and during the period when they are in active practice. This would be an assurance to the members of the public who are the consumers of legal services be sure that their money which the advocates would receive will be in safe hands.

### **5.5.2 Tribunal Members to be held accountable for their decisions**

It has been that tribunal members are never held accountable for decisions they make while serving the tribunal. Not that the law protect them but the judgment they make in many years have never been open to the members of the public for scrutiny.

Such for a long time has made few of the tribunal members use their powers to score goals against their colleagues who never voted for them and/or who are their competitors in practice. Giving an example of withholding of clients money as a professional misconduct, all other facts remaining the same, one member of the tribunal can have the name of the advocate struck off, another case of the same facts advocate suspended, while another can have an advocate pay fine and another admonish the advocate.

There is no development of legal jurisprudence of precedents in the lawyers' disciplinary tribunal. Each member is left in his/her own to come with any sentence to impose so long as it is that which is in the Advocates Act. Advocates committing same professional misconduct are not sentenced same way. The variance in sentencing is because members of the tribunal are not accountable to the decisions they award.

The tribunal should adopt guidelines for imposing disciplinary sanctions to promote equity and consistency in the disciplinary process, consistent with or similar concept with the tribunal's lawyer's sanctions. Such would provide both flexibility and consistency in relating the facts of a case to sound disciplinary policy. Like the ABA standards for imposing lawyers sanctions which provide an analytical framework for determining the appropriate disciplinary sanctions based on facts on individual case, Lawyers tribunal in Kenya should embrace the same.

The researcher therefore recommends that members of the Tribunal should be accountable for decisions given by them. In each decision given, they should site reasons for their decisions. There is also need for the members to develop their own precedent to guide them in order to award same sentence to same professional misconduct committed. This would enhance trust and confidence and make the advocates predict the outcome of their professional misconduct on matters pending before the tribunal.

The researcher as well recommends that the judicial service Commission should be the one to employ and make the Tribunal Members be held accountable for any decisions given by them. The members of the public should be sensitized as well in order to know what they expect from the outcome of the Tribunal to enable them lodge any complaint before the Judicial service Commission should they feel that their complaints were not handled well.

### **5.5.3 Procedure in lieu of discipline for minor misconduct.**

The lawyers' disciplinary institution in Kenya should adopt procedures in lieu of discipline for matters in which lawyer's actions constitute minor misconduct. The Tribunal should define criteria for matters involving minor misconduct which may be resolved by non-disciplinary proceedings and/or through alternative dispute resolution.

The procedure should provide for the disciplinary counsel to determine if the matter falls under minor misconduct in order to reach an agreement with the respondent that the matter can be resolved through a non-disciplinary process.

The advocate should be given freedom to agree that matters should be subjected to such non-disciplinary process or reject the same to prefer disciplinary system. Where the parties have agreed to subject the matter to non-disciplinary process, the lawyer should comply with the terms of the agreement and failure to comply to the agreed terms, disciplinary counsel should forward the matter to the disciplinary tribunal for determination.

The lawyer should have a right to refuse a non-disciplinary proceeding in order to have a hearing. The refusal should not constitute misconduct, nor should it be considered as an aggravating factor before the tribunal. Like The ABA standards, the minor misconduct should not be that which involves lawyers misappropriating clients funds, where lawyers has serious past convictions, misconduct involving same misconduct for which respondent has been disciplined in the past and where the misconduct include dishonesty, deceit. fraud and/or misconduct that constitute a felony under any applicable laws in Kenya.

Such an arrangement according to the researcher would reduce the number of disciplinary matters before the Tribunal and would enhance trust and confidence to both advocates and members of the public.



#### **5.5.4 Permanent record of complaints and their processing**

The lawyers Tribunal as an institution mandated in regulating the legal profession should retain permanent disciplinary records. As an institution, it should be able to maintain complete records of its operations and statistics to aid in the administration of the system and to facilitate trust and confidence.

This would facilitate quick case tracking and record keeping procedures. For Tribunal to achieve this, there is need for automation and avoid continue reliance on manual record keeping which in itself creates unnecessary administrative burdens. Lack of automated recordkeeping also hinders the ability to track and administer case loads and to compile useful statistics.

#### **5.5.5 Lawyers' duty to report Misconduct**

The Disciplinary Tribunal should seek amendment of the existing laws to impose a duty to the Lawyers to report any misconduct committed by any lawyer practicing in Kenya.

The public's perception is that "lawyers protect their own "is unfortunate for lawyers are uncomfortable reporting the misconduct of another unless it directly affects them. The failure of lawyers to report the misconduct of other lawyers who have committed misconduct has resulted to the increase harm to the clients, the justice system and legal profession at large.

The Tribunal should inculcate programs that should emphasize the professional duty to report misconduct and commence disciplinary case where a lawyer has failed to report professional misconduct. This would demonstrate to the legal profession the seriousness of failing to report misconduct.

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APPENDIX.

QUESTIONNAIRE

My name is, **Oure Daniel Onderi** an LLM student at University of Nairobi (UON). I am undertaking a study on “**Towards a Fair Lawyers Disciplinary Tribunal in Kenya**”. Kindly do assist me in your contribution towards this study by filling in the questionnaire below.

**SECTION 1: General Information**

Please Mark with an(x) or () in the box with the appropriate response. Mark one box only

**1. Gender**

- Male
- Female

**2. In Which bracket can you be categorized?**

- 18-24
- 25-35
- 36-45
- 46-55
- others

**3. Highest level of education attained**

- Primary
- Secondary
- Certificate
- Diploma
- Bachelors
- Masters
- PHD

Others (specify).....

**4. Which department do you belong?**

- State Actor (Government agencies)
- Non State actors (NGO, Civil society)
- Religious based organizations
- Civilian
- Others (specify).....

**5. Duration of service in current department/organization**

- 0-5 years
- 6-10 years
- 11-15 years
- above 16 years

Others(specify).....

**SECTION B: ADVOCATES' DISCIPLINARY TRIBUNAL**

1. Are you aware of the existence of the Lawyers Disciplinary Tribunal in Kenya?

Yes [ ]

No [ ]

2. Do you know the mandate of the Lawyers Disciplinary Tribunal?

Yes [ ]

No [ ]

3. Have ever appeared as a complainant/participant before the Lawyers Tribunal?

Yes [ ]

No [ ]

4. How do you rate the conduct/proceedings of the Lawyers Disciplinary Tribunal?

Excellent [ ] Very good [ ] Good [ ] Fair [ ] Poor [ ]

Others

(Specify).....  
.....

5. The Lawyers Disciplinary Tribunal in Kenya is presided over by the Hon. Attorney General (or his deputed person) as a chair and elected advocates. Do you think such composition would accord the parties a fair hearing?

Yes [ ]

No [ ]

Others

(specify).....  
.....

6. The Hon Attorney General is the investigator of any professional misconduct committed by advocates, prosecutor and adjudicator. What is your opinion about such functions in regard the fair hearing?

.....

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

7. In most cases proceedings before the lawyers Disciplinary Tribunal in Kenya is presided over by advocates from active practice elected by other advocates during the LSK meetings. Do you think such composition can lead to a fair hearing?

Yes [ ]

No [ ]

Additional comment if any.....

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

8. Failure by the tribunal to develop jurisprudential precedents to follow when pronouncing judgments has left advocates to the mercies of the tribunal members. In your opinion, are judgments of the Tribunal consistent?

Yes [ ]

No [ ]

9. Do the members of the Tribunal wisely use their discretion well and fairly when sentencing convicted advocates.

Yes [ ]

No [ ]

Give reasons your answer if any.....

.....  
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10. The execution process of the orders of the tribunal since 1990 has been conducted by the LSK through their appointed advocate in active practice. Has the process in your own opinion been going well?

Yes [ ]

No [ ]

Give reasons for your answer if

any.....  
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11. The lawyers' tribunal in Kenya should be an independent body operating under Judiciary but not under office of Hon. Attorney General and LSK. Do you agree?

Yes [ ]

No [ ]

Give reasons for your answer if

any.....  
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12 In your own opinion, has the lawyers Disciplinary Tribunal respected the "principle of separation of powers" as enshrined in the Constitution of Kenya?

Yes [ ]

No [ ]

13 The number of cases pending before the Disciplinary tribunal keeps on increasing yearly. In your own opinion, what may be the reason for such increase?

- (a) Lack of proper guidelines to sentencing repeated offenders [ ]
- (b) Lack of proper reforms to fully regulate the legal profession [ ]
- (c) Lack of established code of conducts within the legal fraternity [ ]
- (d) Leniency in sentencing repeated offenders [ ]
- (e) I agree with factors (a) to (d) above [ ]
- (f) I do not agree with factors (a) to (d) above [ ]

14. Members serving the Tribunal should apply for Tribunal vacant position, be vetted and if successful leave active practice during the time when serving the Tribunal. Do you agree?

- (a) Strong agree [ ]
- (b) Agree [ ]
- (c) Neutral [ ]
- (d) Disagree [ ]
- (e) Strongly disagree [ ]

15. Services of the Tribunal should be devolved for quick and faster adjudication of cases and for purposes of taking services near to the people. Do you agree?

Yes [ ]

No [ ]

16 The Lawyers Tribunal in Kenya is currently financed by the Office of Attorney General and Law Society of Kenya. Does such an arrangement have influence to the outcome of cases before the Tribunal? Or does the two institution influence outcome of cases?

- (a) Strong agree [ ]
- (b) Agree [ ]
- (c) Neutral [ ]
- (d) Disagree [ ]
- (e) Strongly disagree [ ]

17. How you rate the effectiveness of the Lawyers Tribunal in Kenya?

- (a) Excellent [ ]
- (b) Very Good [ ]
- (c) Good [ ]
- (d) Poor [ ]
- (e) No Comment [ ]

18. Lack of separation powers, lack budgetary allocation, failure to conduct vetting to tribunal members and lack of independence are among the challenges that hinder the effectiveness of the Tribunal operation? Do you agree?

Yes [ ]

No [ ]

Any other challenges hindering the tribunal if any in your own  
opinion.....  
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THANKING YOU.