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**THEME: Law Making, Oversight and Innovation: The Centrality of Legal
Offices in Legislatures**

WORKING IN A POLITICAL ENVIRONMENT: HOW TO MAINTAIN IMPARTIALITY AND PROFESSIONALISM

Introduction

1. Legal Counsel serving in legislative bodies face the unique challenge of navigating various political dynamics while maintaining impartiality and professionalism in their service.
2. This paper provides my reflections on what constitutes a political environment, the challenges such an environment presents to legal counsel and strategies for maintaining impartiality, constitutionalism and professionalism in such an environment.

Understanding the Political Environment

3. A political environment is generally characterized by the interaction between bureaucrats, political actors such as elected officials, government ministers and political parties, the public and other actors who drive the policymaking process.
4. In the legislative context, the political dynamics differ across jurisdictions and are influenced by multiple factors, such as those discussed below-

(a) **Competitive politics:** most of our legislatures are multi-party democracies. Members of Parliament get into office based on popular elections contested by different political parties. The numbers in the Legislature, therefore, dictate the power balance, and inter and intra-party affiliations, competition and interests will contribute to the political environment in the legislature.

In such competitive environments, the legal advice rendered by Counsel plays a crucial role in impacting partisan positions. It is essential for Counsel to provide neutral advice, even when it may not align with their clients' positions, thus adding pressure on Counsel.

Further, coalition governments are common in multi-party systems. In such circumstances, Legal Counsel must advise across a broad spectrum of competing interests. They may also be invited to provide middle-ground solutions to emerging challenges.

Additionally, power dynamics and interests may shift mid-stream an electoral cycle in competitive politics. In such circumstances, advice that had been previously popular may suddenly become unpopular. In some instances, neither side will support legally sound advice rendered by Counsel when it differs from what is politically expedient or convenient for the political class.

- (b) **Competing Manifestos and Ideological Divides:** Political formations often coalesce around different ideologies such as capitalism, socialism, liberalism, conservatism, nationalism, feminism, and populism. Legal Counsel may be caught in the crossfire of such competing interests.

Legal Counsel may also be called upon to advise on the implementation of competing manifestos, which may be premised on competing ideologies and priorities. These can influence the work of legislative counsel, especially in polarized environments where legal interpretations are closely scrutinized for bias or favouritism.

Legal Counsel also face pressure to conform to the political ideologies of those in power, which can compromise the neutrality required to serve different political formations.

- (c) **System of Government** - Presidential systems comprise a majority and minority side in the Legislature, while parliamentary systems comprise the government and the opposition sides. In many legislatures, the majority party controls much of the legislative agenda, while the minority parties often seek to challenge or amend the majority's proposals.

In some instances, one party may control the Executive while another controls the Legislature. In a bicameral setting, different parties may hold the majority and minority positions in the two Houses, and the Executive may consider one House to be sympathetic to its agenda. Legal Counsel may find themselves caught in the middle of this political dynamic.

- (d) **Ethnic, Age, Religious and Gender Dynamics:** Political environments are also shaped by ethnic, age, religious and gender issues. These differences often influence political decisions and legislative initiatives.

Legal Counsel may also be profiled on the basis of their age, gender, ethnicity, race, and region, among others and on that basis, in some instances, the clients determine whether or not to trust their legal advice.

- (e) **Bicameral relations:** Bicameral legislatures are often characterized by various differences between the Houses that affect the conduct of business and expectations of Legal Counsel. These include size (one House may be significantly larger than the other), mandate, constituency representation, tenure, priorities and interests. As

a result, each House tends to acquire a distinct flair and character, which in turn influences how its business is transacted in that House.

Further, rivalries may arise between the two chambers of the Legislature, especially where they have different mandates or where the majority parties differ. This rivalry can convolute legislative processes. Disputes may also arise over the content and focus of the legislation and interpretation of laws, including the Constitution, placing pressure on Legal Counsel. In Kenya, for example, the courts have been called upon to arbitrate over differing legal interpretations of the Constitution.

In unicameral systems, the law-making process is less complicated. However, Counsel may have a more direct influence on the legislative process but must also be more vigilant, as there is no second review of legislation.

- (f) **Election Cycles:** Election cycles often influence legislative programmes. For instance, at the beginning of a new cycle, focus may be on delivering on promises made during the campaign period, while towards the end of the cycle, the agenda may focus on what resonates most with the electorate in a bid to win them over and secure re-election. Such shifts in policy direction require flexibility on the part of Legal Counsel. Such pressures may also lead to a reduced timeline for legal counsel to deliver on assignments, potentially compromising thorough legal scrutiny.

In addition, Members of Parliament tend to concentrate on legislative business in the first half of the electoral cycle and may lose focus in the lead-up to elections.

Election cycles also heighten political sensitivity, as actions taken close to elections are often scrutinized for their potential impact on electoral outcomes.

Post-election litigation and related challenges may also impact the work of Legal Counsel. A high turnover of Members of Parliament may necessitate Legal Counsel to adjust their methods or styles as new Members familiarize themselves with the fundamentals of legislative business.

- (g) **Transition Periods:** During transitions, Legal Counsel are required to continue serving the outgoing Legislature while preparing for the incoming one. This requires balancing discretion and neutrality to ensure that their actions do not reflect partisanship.
- (h) **Administrative and Internal Governance Dynamics:** Most legislatures have embraced internal governance and administrative structures to manage the legislative process and staff. In many legislatures, governance is overseen by commissions or boards that include both politicians and non-political members.

Having legislators involved in institutional governance brings practical benefits, as they are familiar with the internal workings of the legislature and can guide decisions in line with the institution's mandate. On the converse, the presence of

politicians in the oversight of the administration introduces the possibility of political interference, as elected officials may bring their ideological goals into governance decisions.

Professionals in legislative environments, particularly legal counsel, thus face significant challenges when the leaders, who are also their employers, pursue conflicting political agendas. In addition, when leaders within the governance structure resist accountability or seek to use their roles for political leverage, it can be difficult for professionals to remain neutral and focused on serving the institution.

- (i) **Terms of service:** in some Legislatures, Legal Counsel may be appointed in the partisan establishment, while others may be appointed in the non-partisan establishment. Partisan legal counsel may face challenges in maintaining impartiality due to the expectations to align legal advice with political goals. On the other hand, Legal counsel in a non-partisan establishment serve the legislature as a whole rather than specific political parties and may need to work hard to maintain trust across political divides, especially in deeply polarised environments.

Challenges Arising from the Political Environment

- 5. Some of the challenges that have arisen from the interplay of the above factors and which legal counsel, particularly those in supervisory positions, face include-
 - (a) politicians want to work with legal officers they perceive as sympathetic to their political cause and reject counsel they see as politically opposed to their causes;
 - (b) legal counsel sometimes find themselves named on the floor of the House for giving professional advice that politicians find politically expedient to criticize;
 - (c) officers have been offered bribes or incentives to act in a particular way;
 - (d) officers have been threatened for acting professionally;
 - (e) political patronage creates a system where appointees feel protected by political leaders and fail to perform their duties effectively;
 - (f) the political class may seek to politicize the civil service for its own advantage;
 - (g) the working environment can be stressful as officers, particularly new officers, constantly navigate politically charged environments;
 - (h) ethical dilemmas also arise from providing politically sensitive advice that may conflict with public interest; and
 - (i) internal power struggles between boards/commissions/policy makers (often composed of political leaders) and management may result in conflicts that legal counsel must navigate.

What Strategies can be employed to promote impartiality and professionalism?

- 6. Some strategies that can help legal professionals maintain impartiality and professionalism in political environments are discussed below.

(a) The Nairobi Principles

7. The Nairobi Principles provide important guidelines to legal counsel working in parliaments. They enjoin Legal Counsel to uphold the rule of law and serve the public interest impartially, regardless of political pressures.
8. The principle of *Autonomy* provides that Legal Counsel should operate free from political interference to provide unbiased, legally sound advice.
9. The principle of *Professionalism* provides that Legal counsel shall maintain the honour and dignity of the legal profession, observe the rules of professional ethics, and carry out their duties with integrity. It also notes that Offices of Legal Counsel to parliaments are apolitical offices that serve in an impartial and non-partisan manner.
10. The principle of *Constitutionalism* provides that each individual legal counsel shall cultivate and foster a culture of constitutionalism and adherence to the rule of law.
11. These principles not only provide guidelines for ethical conduct but contribute to the norms for the conduct of legal counsel serving in legislatures.

(b) Institutionalize safeguards

12. Political neutrality and impartiality are necessary for maintaining professionalism in public service. Public servants are expected to refrain from partisan activities, expressing personal political views publicly, and must execute policy decisions loyally, regardless of their personal beliefs.
13. Entrenching these principles in the constitution, statute, codes of conduct, ethical guidelines, human resource manuals, and core values, among others, protects Legal Counsel as they can invoke these provisions while undertaking their duties and, at the same time, the political class is enjoined to honour these principles.
14. In the Kenyan Context, Article 10 of the Constitution provides for the national values and principles of governance which are binding on all arms of government. They include values such as inclusiveness, non-discrimination, good governance, integrity, transparency and accountability. Article 232 provides the principles of public service, which include *high standards of professional ethics, and responsive, prompt, effective, impartial and equitable provision of services*.
15. Section 5 of the Parliamentary Service Act of Kenya sets out the Parliamentary Service Values which include the *provision of non-partisan and impartial advice and services to Parliament, its committees and its members; the maintenance of honesty, accountability and integrity in the delivery of services, having regard to the principles of political neutrality, professionalism, economy, efficiency, equality and fairness, courtesy and discipline*.
16. In South Africa, the Constitution provides for the basic values and principles governing public administration which include *a high standard of professional ethics, transparency and accountability*.

17. Such legal and ethical frameworks that prioritize impartiality can serve as a shield to protect Legal Counsel when faced with undue pressure.

(c) Strengthen Ethical and Accountability Frameworks

18. Legal Offices should have clear procedures and ethical frameworks that safeguard them from inappropriate political demands to promote a transparent working environment.
19. For instance, legal offices can promote transparency and accountability by requiring documentation of instructions from clients and advisories. Whistleblower protection mechanisms and frameworks for reporting corruption or undue influence can be developed to ensure the protection of officers who expose unethical conduct.
20. Further, the establishment of independent oversight mechanisms, such as internal audits and assessment frameworks, can enhance integrity in the institution.

(d) Meritocracy

21. The role of meritocracy in the recruitment and appointment of legal counsel cannot be gainsaid in promoting integrity in ensuring impartiality and professionalism in the provision of legal services.
22. Developing and adhering to clear rules for appointments and promotions based on merit rather than political considerations is essential for maintaining professional integrity.
23. Legal Counsel can champion the development of policies that promote meritocracy and will be beneficiaries of such policies.

(e) Public Service Anonymity:

24. Public servants traditionally operate under a veil of anonymity under which institutional heads are responsible for departmental actions. This maintains the appearance and reality of a politically neutral public service.
25. Legal Counsel can uphold professionalism by remaining anonymous in their contributions so that elected officials take responsibility publicly for policy decisions, thus avoiding unnecessary political entanglements.
26. Standing Order and presiding officers can enforce this requirement by prohibiting the naming of officers, whether positively or negatively, on the floor of the House.

(f) Capacity Building

27. The Nairobi Principle of Capacitation advocates for continuous training and development to ensure that Legal Counsel are equipped to navigate complex political environments impartially.
28. Training Legal Counsel on such ethical standards can help Legal Counsel recognize and avoid potential biases or conflicts of interest. Further, Legal Counsel should stay updated

on best practices, emerging issues, and ethical guidelines. Facilitating Counsel to participate in events such as this colloquium, CPD events and workshops will contribute to a culture of professionalism.

(g) Office Culture

29. Legal Offices should promote a culture that prioritizes ethical behaviour over political gains. Further, Legal Counsel should be confident they can act with integrity if confronted with unethical practices without fear of reprisal.
30. Heads of legal offices should model ethical behaviour and promote a work environment in which all voices, regardless of political affiliations or hierarchy, are heard, and ethical concerns can be raised and addressed constructively.

(h) Guardians of Public Trust

31. Legal Counsel in Parliaments are guardians of public trust as they are entrusted with the duty to act constitutionally and in the public interest. Trust is thus fundamental to a successful Legal Office. This should act as the standard against which ethical dilemmas are resolved.
32. The Nairobi Principle of Public Service provides that *the Office of Legal Counsel and each legal counsel must always be cognizant of and operate with the understanding that they are in a fiduciary relationship with the public to whom they owe the highest quality of services.*

(i) Speaking Truth to Power

33. Speaking truth to power entails expressing honest, often difficult or uncomfortable, truths to those in positions of authority, regardless of potential risks or consequences. This may be done professionally by-
 - (a) building personal credibility by ensuring consistent ethical behaviour when working across party lines or politically sensitive situations;
 - (b) providing advice that is grounded in facts and objective analysis, and aligned with legal and ethical standards, and the broader goal of serving the public;
 - (c) communicating uncomfortable truths diplomatically by maintaining a calm, respectful and professional tone;
 - (d) avoid publicly challenging authority figures in a way that could embarrass them or appear confrontational;
 - (e) refraining from publicly engaging in political discourse or expressing personal political views to ensure long-term trust in the office;
 - (f) having the courage to do the right thing and speak the truth;
 - (g) providing defensible advice rather than personal opinions or emotions, including Counsel being confident that they would have rendered the same advice or service if they were advising the opposite side;
 - (h) respecting confidentiality by choosing an appropriate time and place to address sensitive issues;
 - (i) focusing on the broader good rather than catering to the demands of powerful groups;

- (j) going beyond mere legalistic compliance; and
- (k) being aware of the political context in which Counsel operates.

(j) Partisan Staff

- 34. In some Legislatures, Legal Counsel may be appointed to serve in political offices. Such Counsel are still public servants who should focus on maintaining professionalism, including transparency, ethics, and fairness in their duties, while acknowledging their role in the broader political system.

(k) Promotion of Wellness

- 35. Deliberate steps should be taken to promote wellness in the working environment because when officers are provided with a healthy work environment, access to stress management tools, and work-life balance strategies, they are more resilient and better equipped to handle the pressures of political dynamics without succumbing to partisan influences or burnout.
- 36. The Parliamentary Service Commission (Kenya) has made strides in this regard. Staff Wellness Committees are appointed to champion employee wellness. The Wellness Committee are allocated a budget for wellness activities, including workshops, health screenings, fitness initiatives, and sports days.

Conclusion

- 37. Working in a political requires Legal Counsel serving in legislative environments to constantly navigate competing interests to uphold impartiality and professionalism at work. It is, therefore, necessary that safeguards are put in place to empower them to competently navigate such environments confidently and to be equipped with the necessary skills and tools to build their credibility.

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