The Africa COLLOQUIUM

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Law-making, Oversight and Innovation:
The Centrality of Legal Offices in Legislative Bodies

LEGAL COUNSEL TO
PARLIAMENTS
Publication

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On the cover: Members of the Council of the Africa Colloquium of Legal Counsel to Parliaments with the Patron, Mr. J. M. Nyegenye, CBS (seated, centre), at the Parliament of Kenya, Nairobi, February 2025.



Mr. J. M. Nyegenye, CBS, Patron of the Africa Colloquium

FROM THE PATRON

Patron's Foreword

"I urge you to continue upholding the values enshrined in the Nairobi Principles and to build on the momentum of the Colloquium."

It is with great pleasure that I write this foreword for this edition of the Colloquium Newsletter. This publication continues to contribute to the body of knowledge in parliamentary legal practice and to the professional development of Legal Counsel serving in Parliaments. It is also a reflection of the commitment of the Members of the Colloquium and the Secretariat, whose steadfast efforts have kept the spirit of this forum alive and thriving.

The theme of this edition, **"Law-making, Oversight and Innovation: The Centrality of Legal Offices in Legislatures,"** highlights the deeply entrenched and integral role of Legal Counsel in the functioning of our Legislatures, a role that is now widely recognised as critical to their smooth operation and effectiveness. This theme also offers an opportunity for Legal Counsel to introspect and share insights on how they are navigating new challenges and promoting innovation in the areas of law-making and oversight.

I therefore wish to acknowledge and commend all the Counsel who have generously shared their insights and expertise through the papers published in this Newsletter. Your contributions embody the objectives of the Colloquium, which include sharing modern trends and best practices in the provision of legal services to Parliaments and promoting the capacity building of Legal Counsel serving in Parliament.

In conclusion, I urge you to continue upholding the values enshrined in the Nairobi Principles and to build on the momentum of the Colloquium by embracing the spirit of networking and collaboration.

I trust that you will enjoy reading this edition of the Colloquium Newsletter, and I look forward to the conversations that will ensue from the thought-provoking and rich contributions of the various authors.

J. M. NYEGENYE, CBS
Clerk of the Senate / Secretary, Parliamentary Service Commission
Patron of the Africa Colloquium of Legal Counsel to Parliaments

TRIBUTE

Honouring a Legacy of Excellence

Former Secretary-General, Hon. Justice (Dr.) Johnson Okello, Appointed to the Court of Appeal of Kenya

From Parliament to the Bench: Hon. Justice (Dr.) Johnson Okello's new judicial chapter



Hon. Justice (Dr.) Johnson Okello takes the oath of office as a Judge of the Court of Appeal of Kenya.

The Africa Colloquium of Legal Counsel to Parliaments celebrates a momentous milestone as Dr. Johnson Okello, our long-serving former Secretary-General, embarks on a distinguished new chapter. Following his appointment as a Judge of the Court of Appeal of Kenya, Dr. Okello was officially sworn in on 3rd February, 2026.

To dedicate himself fully to his new judicial responsibilities, Dr. Okello has stepped down as Secretary-General of the Colloquium. The Council is, however, delighted that he will remain an active member of the Colloquium, ensuring that the organisation continues to benefit from his deep institutional knowledge.

VISIONARY LEADERSHIP

During his exemplary tenure, Hon. Justice (Dr.) Okello guided the organisation through monumental structural and institutional advancements. Key milestones achieved under his leadership include:

- the formal institutionalisation of the Colloquium, by overseeing its registration as a distinct legal entity; and
- continental growth, by organising and hosting successful regional and biennial conferences across several African nations, including Kenya, South Africa, Zanzibar (Tanzania), Zimbabwe and Libya.

Beyond his transformational stewardship of the Colloquium, Dr. Okello has had an illustrious career as Director of Legal Services in the Senate of Kenya, a pioneer lecturer of Legal Writing and Legislative Drafting at the Kenya School of Law, and President of the Commonwealth Association of Legislative Counsel (CALC). His international contributions also include drafting the landmark African Union Protocol on Free Movement of Persons.



Ms. Elizabeth Muhia, Secretary-General

Welcoming Ms. Elizabeth Muhia as Secretary-General

Following Dr. Okello's elevation to the Bench, the Council, during its 7th meeting held on 26th February, 2026, passed a formal resolution appointing Ms. Elizabeth Muhia as the new Secretary-General.

Ms. Muhia brings exceptional institutional memory, legal expertise and administrative dedication to the role. Having diligently served as Secretary to the Secretariat, she is uniquely positioned to drive the Colloquium's strategic agenda forward. The entire Colloquium community extends its warmest welcome to Ms. Muhia as she assumes leadership.

We wish Hon. Justice (Dr.) Johnson Okello every success at the Court of Appeal, and stand firmly behind Ms. Elizabeth Muhia as she guides us into a bright, innovative future.

REGIONAL OUTREACH · BENGHAZI, LIBYA

Libya Hosts Inaugural Northern Region Conference as Council Convenes In-Person Session



Colloquium delegates and hosts on the steps of the Libyan House of Representatives in Benghazi.

The Africa Colloquium of Legal Counsel to Parliaments marked another significant milestone in its journey to strengthen legislative governance across the continent. From 29th to 30th April, 2026, the Colloquium gathered for the Inaugural Northern Region Conference at the Libyan House of Representatives in Benghazi, Libya. The Council concurrently held its 9th meeting in a hybrid format, allowing for both in-person deliberations and virtual participation.

This landmark gathering underscored the Colloquium's unwavering commitment to expanding its footprint, fostering cross-regional integration and providing an interactive platform for Legal Counsel across African legislatures.

EXPANDING HORIZONS IN NORTH AFRICA

The regional conference, centred on the theme "Bridging Global Commitments and National Law," served as a vital outreach initiative to engage the Northern African region.

In his welcoming remarks, Dr. Rassmi Beruwien, the Acting Secretary-General of the Libyan House of Representatives, applauded the Colloquium's strides in building continental synergies and urged Legal Counsel to continue executing their advisory roles with the utmost integrity. Mr. Fares Hamad, the Colloquium's Northern Region Representative, warmly welcomed delegates to Benghazi, reiterating Libya's steadfast support as a "second home" for the organisation.

NAVIGATING LEADERSHIP TRANSITIONS

The Benghazi session marked a seamless and historic transition in the Colloquium's executive leadership. The Council paid glowing tribute to the outgoing Secretary-General, Hon. Justice (Dr.) Johnson Okello, following his recent appointment as a Judge of the Court of Appeal of Kenya, and noted his foundational guidance during the Colloquium's period of growth. Ms. Elizabeth Muhia, the incoming Secretary-General, formally stepped into her new role, pledging to build on this solid momentum in the next phase of the Colloquium's development.

THE NAIROBI PRINCIPLES AND TREATY SYSTEMS

The hybrid sessions featured insightful presentations and discussions focusing on the evolving role of parliamentary counsel.

The deliberations revisited the Nairobi Principles, which serve as the foundational framework of the Colloquium. The discussions emphasised that establishing autonomous, integrated and highly professional parliamentary legal offices is crucial to maintaining legislative continuity and the rule of law during volatile political transitions.

A presentation on Kenya's constitutional experience offered an insightful comparative analysis, tracing the shift from a dualist framework (where international law requires explicit domestication) to a monist orientation (where ratified treaties directly form part of domestic law), and exploring the historical transition from a colonial-inherited dualist system to a modern monist orientation.

The presentation sparked vibrant plenary debate on how parliamentary Legal Counsel can effectively navigate treaty domestication and balance State sovereignty with international law obligations. Key areas of deliberation included the pre-ratification scrutiny of treaties by Parliament for approval before executive ratification, ensuring that public participation and sovereignty safeguards are fulfilled. The deliberations also underscored that parliamentary counsel must possess a deep understanding of domestic legislation and constitutional boundaries, and the technical expertise required to draft critical treaty reservations.

NAIROBI MEETING · FEBRUARY 2025

Council in Session

KEY PROGRESS AND RESOLUTIONS FROM THE NAIROBI MEETING

AFRICA COLLOQUIUM COUNCIL HOLDS STRATEGIC MEETING AT THE PARLIAMENT OF KENYA

The newly elected Council of the Africa Colloquium of Legal Counsel to Parliaments successfully held its first physical meeting of the term in Nairobi, Kenya, from 19th to 21st February, 2025.

Hosted by the Parliament of Kenya, the session provided a crucial platform for the Council to review the outcomes of the 7th Colloquium in Zimbabwe and to set the strategic agenda and timelines for the next two years.

THE PATRON'S WELCOME REMARKS

The presence of the Colloquium Patron, Mr. Jeremiah Nyegenye, CBS, Clerk of the Senate and Secretary to the Parliamentary Service Commission of Kenya, provided a substantial endorsement and elevated the Council's proceedings.

Mr. Nyegenye welcomed the Council Members to Nairobi on behalf of the Parliament of Kenya, which hosts the Colloquium's Secretariat. He commended the Council for its proactive stance on institutional strengthening and its dedication to the Nairobi Principles — the foundational code guiding parliamentary Legal Counsel across the continent. He encouraged the Council Members to continue championing legislative innovation, leveraging digital technologies and fostering unity and experience-sharing among African Parliaments to enhance legislative capacity continent-wide.

COUNCIL DELIBERATIONS

The meeting was chaired by the then Secretary-General, Dr. Johnson Okello, and attended by the President, Ms. Sena Atsu, the Vice-President, Mr. Asaph Arinaitwe, and all the regional representatives. Their deliberations centred on three pillars: the organisation of the 8th Colloquium, strengthening the institutional framework, and enhancing communication and cooperation among African Parliaments.

1. **Planning the 8th Colloquium (2026):** A primary focus was laying the groundwork for the 8th Colloquium, scheduled to be hosted by the Parliament of Ghana in October 2026.
2. **Institutional strengthening, networking and collaboration:** The Council resolved to actively collaborate with established global parliamentary associations to increase the Colloquium's visibility and reach, including the Commonwealth Association of Legislative Counsel (CALC) and the Commonwealth Parliamentary Association (CPA). The Council further resolved to hold regional conferences periodically, as well as virtual trainings and workshops for purposes of capacity building.
3. **Enhancing digital presence and member engagement:** Following the resolutions of the 7th Colloquium on leveraging technology, the Council took concrete steps to improve digital communication with its members through an increased presence on platforms including Facebook, X (formerly Twitter), Instagram and LinkedIn. To support this expanded presence, the Council resolved to develop a comprehensive communication strategy to ensure regular and engaging content updates across all platforms, including the website.

The positive atmosphere and decisive resolutions underscore the Council's strong commitment to advancing the legal and legislative capacity of African Parliaments.

Charting the Future

KEY TAKEAWAYS FROM THE 7TH AFRICA COLLOQUIUM IN VICTORIA FALLS, ZIMBABWE

The Africa Colloquium of Legal Counsel to Parliaments successfully held its 7th biennial conference from 19th to 23rd October, 2024, in the magnificent setting of Victoria Falls, Zimbabwe. Under the theme **"Law-making, Oversight and Innovation: The Centrality of Legal Offices in Legislatures"**, the conference brought together delegates from across the continent to deliberate on the evolving role of Legal Counsel in enhancing parliamentary efficiency and democratic governance.

The Colloquium's discussions were robust, focusing on two critical areas, to wit, embracing digital technology, and navigating the complex political environment while upholding professional ethics.

1. EMBRACING DIGITAL TRANSFORMATION AND ARTIFICIAL INTELLIGENCE

A major thread running through the conference was the imperative for African Parliaments to leverage digital technologies, especially Artificial Intelligence (AI), in order to improve legislative processes.

Participants recognised the need for targeted capacity development among Legal Counsel, particularly in the application of AI to assist in legislative drafting, petitions, research and the analysis of complex international agreements and treaties. While embracing AI, Legal Counsel were urged to ensure human oversight and the ethical use of the technology, including having regard to confidentiality, data privacy, data protection and security. Legal Counsel were further tasked with ensuring a coordinated African approach by promoting the harmonisation of AI policies and standards and fostering collaboration with other Parliaments on digital technology initiatives.

The Council was also encouraged to advocate for the establishment of specialised committees in Parliaments focusing on digital technologies and innovation, similar to the Zimbabwe Parliament's "Committee of the Future". The Colloquium further encouraged Parliaments to increase budgetary allocations specifically for AI technology and digital infrastructure to support parliamentary business.

2. NAVIGATING THE POLITICAL ENVIRONMENT: PROFESSIONALISM AND IMPARTIALITY

Significant focus was placed on the unique challenges faced by Legal Counsel operating within a political environment, emphasising the need to maintain independence and to uphold constitutionalism and the rule of law in the discharge of their professional duties, in accordance with the Nairobi Principles. Legal Counsel were urged to ensure that their service is guided solely by the public interest. Counsel were further guided to uphold high standards of ethics in the workplace, act professionally and, specifically, steer clear of political interference and patronage to preserve the integrity of their office.

3. COLLOQUIUM LEADERSHIP AND WAY FORWARD

The conference concluded with the election of new office bearers who will guide the Council's agenda for the next term:

1. President: **Ms. Sena Atsu**
2. Eastern Africa Region Representative: **Mr. Asaph Arinaitwe**
3. Northern Africa Region Representative: **Mr. Fares Hamad**
4. Southern Africa Region Representative: **Ms. Connie Sefo**
5. Western Africa Region Representative: **Ms. Tangella Sam**
6. Regional Parliaments Representative: **Ms. Thoko Gumedze**
7. Pan-African Parliament Representative: **Mr. Clement Mavungu**
8. Co-opted Council Member: **Mrs. Elizabeth Hove**

The Council will now focus on the immediate action points, including enhancing cooperation among Legal Counsel working in African Parliaments.

The success of the 7th Colloquium was anchored by the gracious hospitality of the Parliament of Zimbabwe, which hosted the conference and facilitated a memorable and productive session for all participants.

In Pictures

The Council and the Colloquium at work



Dr. Okello and Mr. Hamad during the 4th Council meeting held in Benghazi, Libya, in January 2024.



Delegates at the 7th Colloquium of Legal Counsel held in Victoria Falls, Zimbabwe, from 19th to 23rd October, 2024.



Colloquium Council meeting in Benghazi, Libya.



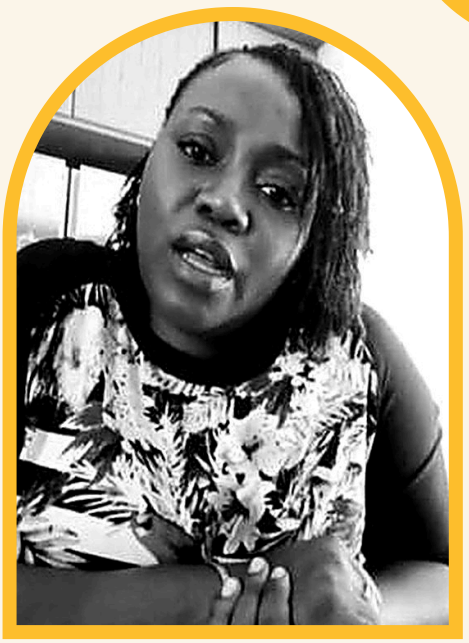
Participants following a presentation during the 6th Colloquium in Zanzibar.



Mr. Samuel Njoroge, Clerk of the National Assembly of Kenya, leads a session of the Africa Colloquium Council meeting at the Parliament of Kenya, 19th–21st February, 2025.

LEGISLATURE & JUDICIARY · ZIMBABWE

My Take on the Judiciary and Parliamentary Procedure



SUBMITTED BY

Elizabeth

Kwinha-Buyegi Hove

Co-opted Council Member and Immediate Former President (Zimbabwe)

Entering the legal world brought with it a wide selection of career options. I was blessed to have landed straight in government, where mental stimulation and platforms for comprehensive and productive discussion existed. Once we have attained our Bachelor of Laws degree, we all know about the three Arms of State; but to be involved in them directly gives one a profound perspective. Having worked in the Executive and now in Parliament, one area of law I have always found intriguing is the interface between the Judiciary and Parliament. I will centre this article on the laws of Zimbabwe and some of her judicial precedents as they currently subsist.

Being a member of the United Nations, Zimbabwe logically subscribes to the Principles of Good Governance, which are enshrined in section 3 of the Constitution of Zimbabwe ("the Constitution"). These principles are pivotal to all, including the manner in which the Judiciary and Parliament conduct themselves. Explicitly, these principles amply exhibit the effectiveness of having separate tiers of government while noting instances in which checks and balances must be applied. That being said, it is impossible to discuss the Judiciary and Parliamentary Procedure without drawing on the Doctrine of Separation of Powers, bearing in mind that the principal objective of the doctrine is to bring into existence a free and democratic society, flowing from a clear distinction between the three tiers of State.

The Zimbabwean Parliament is bicameral in nature, comprising two Houses, namely the Senate and the National Assembly. Parliament, in conjunction with the President, forms the Legislature as established in Chapter 6 of the Constitution. A member of the Executive usually sponsors the bulk of legislation initiated in the Zimbabwean Parliament. This has been the norm for decades. However, of late, a shift has been noted, with members bringing forward Private Members' Bills, which the Executive has been seen to agree with and carry forward once Cabinet approval has been granted.

Parliamentary procedure, by definition, is a body of well-proven rules, ethics and customs governing sessions, sittings, meetings and other operations of legislative bodies, whilst maintaining order and controlling the communication process.[1] It is governed by the four founding principles of Robert's Rules of Order, that is:

1. focusing on one thing at a time;
2. extending courtesy to everyone, that is, all members have equal and basic rights – the right to vote, the right to be heard and the right to oppose;
3. observing the rule of the majority; and
4. protecting the rights of the minority.

These principles facilitate the smooth flow of the procedures for debate and the general conduct of business of Parliaments and are ordinarily captured in Standing Orders.[2]

Having made that introduction of the Zimbabwean parliamentary system, it is now pertinent that I focus on the guidance of the Judiciary in the parliamentary

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procedures of Zimbabwe. Interfaces between the Judiciary and Parliament take place in strict compliance with the Constitution and the law, and in a spirit of mutual respect for their independence. "The separation of powers is a fundamental element of good governance and the rule of law..."[3] I must point out that this relationship is inherently delicate. The Judiciary, as provided in Chapter 8 of the Constitution, is charged with interpreting, developing and adapting the law, taking into consideration the changing circumstances of the local, social and economic environment, but without going beyond refining and developing the existing legislation.

Over the years, we have seen the hand of the Judiciary in the enactment of legislation through the issuance of mandamus orders. To put this in perspective, Justice Hlatshwayo stated that:

> *"A mandamus is a judicial remedy available to enforce the performance of a specific statutory duty or remedy the effect of an unlawful action already taken ... The requirements the applicants must prove for a mandamus are that: 1. a clear or definite right — this is a matter of substantive law; 2. an injury actually committed or [reasonably] apprehended — an infringement of the right established and resultant prejudice; and 3. the absence of similar protection by any other ordinary remedy."*[4]

This brings me to my initial illustration. In the case of *Ignatius Chombo v Parliament of Zimbabwe et al*,[5] the then Minister of Local Government made an application to the court in terms of section 24(1) of the then Constitution. The order sought the Court's declaration that the introduction of the Urban Councils Amendment Bill H.B. 5, 2011 ("the Bill") was null and void on account of it being inconsistent with sections 18 and 18(1a) and Article 20.1.2 of the Eighth Schedule of the Constitution. The key issue the Court was to determine was whether a private member could lawfully introduce a Bill in Parliament. The issue before the Court was one of interpretation. The Court cited Chidyausiku CJ in *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe*, who stated that:

> *"It is trite that in interpreting statutes, including the Constitution, the golden rule is that in order to ascertain the intention of the legislature, the words of a statute or legislation are to be given their ordinary or primary meaning. It is only where that primary meaning of the words is obscure or leads to absurdity that other principles of interpretation are invoked to assist in the ascertainment of the intention of the legislature."*

In summary, the Court concluded that the wording of clause 20.1.2 was clear: Cabinet has the responsibility to formulate all government policies and programmes, including preparing and presenting to Parliament such principal and subsidiary legislation as may be necessary to implement those policies and programmes.

It would be remiss of me not to mention the particular instance in which Parliament appeared, so to speak, to have been sued by its own Members. Innocent Gonese and Fungayi Jessie Majome were Members of the Eighth Parliament of Zimbabwe. They jointly made an application against Parliament in terms of section 167(2)(d) of the Constitution.[6] The application related to whether the Constitution of Zimbabwe Amendment (No. 1) Act, 2017 had been properly passed by Parliament. The Court found that there had been the necessary two-thirds majority in the National Assembly, but only 53 affirmative votes in the Senate – one vote short of a two-thirds majority (54 of the 80 Senators stipulated in the Constitution as constituting the Senate). In a judgment written by Chief Justice Luke Malaba, the Court held that section 328(5) had been misinterpreted as referring to the affirmative votes of two-thirds of the members of the Senate at the time of the vote [79, by reason of a death] rather than two-thirds of the 80 Senators stipulated in the Constitution.

Finally, the Court held that the Senate should be given the opportunity to conduct the vote again with a full appreciation of what is required for a Constitutional Bill to be passed, and further ordered that this be done within 180 days. This led to an interesting development in the enactment of legislation, as the Eighth Parliament that had passed the Bill had ceased to exist. At some point, the order was suspended pending the requisite number of Senators. Nonetheless, the Senate of the Ninth Parliament proceeded to implement the order of the Court in April 2021.

My last case in point centres on the need to harmonise policies that deal with sexual and gender-based violence against children in order to enhance their relevance and ensure that both sexes are catered for, as previously only girls were regarded as victims. The full Bench of the Constitutional Court declared unconstitutional the provisions of the Criminal Law Code[7] governing the age at which children can consent to sexual intercourse.

This was realised in the case of *Kawenda v Minister of Justice, Legal and Parliamentary Affairs et al*,[8] where the Court discovered an anomaly in the law regarding the age of sexual consent and ordered that the Legislature align the Criminal Law Code with the Constitution within six months. The Legislature accordingly enacted the requisite law in the Criminal Law (Codification and Reform) (Amendment) Act of 2024. The Act sets 18 years as the age of sexual consent, thus aligning with the provisions of the Constitution.

In light of the above cases, I have discovered that although the core business of Parliament is to represent the people, oversee State institutions and make laws, Parliament is subject to diverse scrutiny. The independence of the Judiciary is fundamental and plays a dynamic part in the delivery of justice and good governance. The Judiciary must apply the law impartially, expeditiously and without fear, favour or prejudice, and promote the rule of law. An order or decision of the Court is binding and must be adhered to; that is to say, any law passed by Parliament that is in violation of, or in conflict with, the Constitution is subject to review and can be declared null and void by the Judiciary in terms of section 167(2)(d) of the Constitution.

Consequently, I must conclude that, in view of the above and by virtue of the Constitution being the supreme law that governs the State, and although they form different tiers of government, Parliamentary Procedure and the Judiciary operate hand in hand, silently yet explicitly, odd as it may sound. This intertwined nature of the two tiers is necessitated by the need for a platform to perform checks and balances. As the years go by, more lessons will be learnt from judicial precedent that will see Parliamentary Procedure adapting. It cannot be doubted that judicial decisions will continue to shape future legislative action and, as such, parliamentary actions will remain grounded at all times in the principles of good governance, transparency and accountability. ■

NOTES

1. https://mrsc.org/explore-topics/public-meetings/procedures/parliamentary-procedure
2. Established in terms of section 139 of the Constitution.
3. "Checks and Balances: Independence of Judiciary and Parliaments", IDLO — https://www.idlo.int/news/highlights/checks-and-balances-independence-judiciary-and-parliaments
4. Chironga & Anor v Minister of Justice, Legal & Parliamentary Affairs et al, CCZ-14-20, Hlatshwayo JCC, at pp. 15–16.
5. Ignatius Chombo v (1) Parliament of Zimbabwe (2) the Speaker of Parliament (3) the President of the Senate (4) the Clerk of Parliament (5) Tangwara Matimba (6) Honourable Simon Hove — Supreme Court of Zimbabwe, Chidyausiku CJ, Ziyambi JA, Garwe JA, Gowora JA & Omerjee AJA, Harare, 24 January & 20 May 2013.
6. CCZ 2020-04 — Gonese & Another v Parliament of Zimbabwe & 4 Others — Constitutional Court Judgment of 31 March 2020.
7. Criminal Law (Codification and Reform) Act [Chapter 9:23].
8. Kawenda v Minister of Justice, Legal and Parliamentary Affairs and 2 Others (3 of 2022) [2022] ZWCC 3 (24 May 2022).



Mrs. Elizabeth Hove joins a meeting of the Council virtually.

> *Parliamentary Procedure and the Judiciary operate hand in hand, silently yet explicitly, odd as it may sound.*
>
> — ELIZABETH KWINHA-BUYEGI HOVE

I am the *Parliamentary* **Draftsman**



A light-hearted look at the drafter's craft, from *Poetic Justice* (1947)

"I'm the parliamentary draftsman,
I compose the country's laws,
And of half the litigation
I'm undoubtedly the cause.
I employ a kind of English
Which is hard to understand.
Though the purists do not like it,
All the lawyers think it's grand.

I am the parliamentary draftsman,
And my sentences are long.
They are full of inconsistencies,
Grammatically wrong.
I put parliamentary wishes
Into language of my own,
And though no one understands them,
They're expected to be known.

I compose in a tradition
Which was founded in the past,
And I'm frankly rather puzzled
As to how it came to last.
But the civil service use it,
And they like it at the Bar,
For it helps to show the laity
What clever chaps they are.

I'm the parliamentary draftsman,
And my meanings are not clear,
And though words are merely language
I have made them my career.
I admit my kind of English
Is inclined to be involved,
But I think it's even more so
When judicially solved.

I'm the parliamentary draftsman,
And they tell me it's a fact
That I often make a muddle
Of a simple little Act.
I'm a target for the critics,
And they take me in their stride.
Oh, how nice to be a critic
Of a job you've never tried."

J.P.C.
"The Parliamentary Draftsman",
Poetic Justice (London: Stevens & Sons Ltd., 1947), pages 31–32.

SEPARATION OF POWERS · KENYA

Judicial Overreach

Are Courts Messing with the Role of Parliament?

Submitted by: Ms. Faith Wangui Kamau

Ms. Wangui is an Advocate of the High Court of Kenya. She works for the Parliament of Kenya in the Senate, where she drafts Members' Bills and serves as legal counsel to the Standing Committee on Delegated Legislation and the County Public Investments and Special Funds Committee.

Prior to joining the Senate, she worked in the private sector as a litigation advocate. She is a member of the Law Society of Kenya and the Commonwealth Association of Legislative Counsel.



One cannot discuss the separation of powers without crediting the concept to the 18th-century philosopher Charles-Louis de Montesquieu ("Montesquieu"). He observed the unsatisfactory nature of people and stated that "a people like this, being always in ferment, are more easily conducted by their passions than by reason, which never produced any great effect in the mind of man. Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go."

In recognition of this, many common law jurisdictions around the world have adopted the separation of powers to create three arms of government, namely the executive, the legislature and the judiciary. These arms are each bestowed with distinct powers and roles to operate independently and interdependently, enabling the entire government to operate seamlessly. It has, however, been observed in developing countries that executive arms have accumulated excessive power and wield this power over the legislature and the judiciary. The question is whether the judiciary can be said to overreach the legislature's role.

Article 1(3) of the Constitution of Kenya provides that sovereign power is delegated to State organs, including Parliament and the legislative assemblies in the counties, the national executive and the executive structures in the counties, and the Judiciary and independent tribunals. The role of Parliament in Kenya is set out in Articles 94 to 96 as representation (through elected representatives), legislation and oversight. The judicial system in Kenya is divided into the superior courts, that is, the Supreme Court, the Court of Appeal, the High Court and courts of equal status as the High Court; and the subordinate courts, that is, the Magistrates' Courts, Kadhis' Courts and Courts Martial.

The legislature–judiciary interplay does not happen at the subordinate courts, since these courts are not vested with the power to determine constitutional questions. This power is vested in the superior courts, starting with the High Court. Article 165(3)(d) provides for the jurisdiction of the High Court to hear any question on the interpretation of the Constitution, including the determination of, inter alia, whether any law is in contravention of the Constitution and whether anything said to be done under the Constitution or any law is inconsistent with the Constitution. The US Supreme Court held in *Marbury v. Madison*, 5 U.S. 137 (1803) that "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

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CONSTITUTIONAL GUIDELINES ON THE LEGISLATIVE PROCESS

Acts of Parliament in Kenya enjoy a presumption of constitutionality. The High Court has, however, on many occasions been called upon to determine whether Acts of Parliament are inconsistent with the Constitution. It is possible to challenge the constitutionality of a statute on both its content and the process leading to its enactment and, in determining the question, courts are required to consider both the objective or purpose of the legislation and its effect.

In *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya, Attorney General & 7 others* [2015] eKLR (the SLAA judgment), the Petitioners challenged the constitutionality of various sections of the Security Laws (Amendment) Act (SLAA), an omnibus legislation that amended the provisions of twenty-two other Acts of Parliament in the security sector. The Bill was published on 11th December, 2014, debated on 18th December, 2014 and passed. It received Presidential assent on 19th December, 2014 and commenced on 22nd December, 2014. The Petitioners successfully challenged certain parts of the Act on the apparent violation of the freedom of expression and of the media, the rights of an arrested person and the right to a fair hearing.

Courts have declared entire statutes unconstitutional for being enacted without adequate public participation, an important principle enshrined in Article 10 of the Constitution. To guide legislative business, the Supreme Court in *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited) v Cabinet Secretary for the Ministry of Health & 2 others* [2019] KESC 15 (KLR) set out guidelines for meaningful public participation, including the sensitisation of the public, the use of a simple medium of engagement, obtaining balanced responses and the provision of adequate time and opportunity for public engagement.

Most recently, in *National Assembly & Another v Okiya Omtatah Okoiti & 55 Others* [2024] eKLR, the courts emphasised that public participation should be meaningful and that, therefore, the legislature should give reasons for rejecting or adopting the proposals received from the public during the public participation process. Parliament should also refrain from introducing significant amendments to a Bill at the Committee of the Whole House stage, since those amendments would be enacted without going through the normal reading stages and public participation.

PARLIAMENTARY PRIVILEGE

For Parliament to function effectively, there needs to be freedom of debate. Article 117 of the Constitution recognises the freedom of speech, privileges and immunities of Parliament and its members.

Article 2 of the Constitution upholds the supremacy of the Constitution. The Court in the SLAA judgment stated that, under the doctrine of constitutional supremacy, it is not the courts that limit Parliament but the Constitution itself, which sets limits on the acts of the three arms of government while giving the Court the jurisdiction to interpret the constitutionality of any act said to be done under the Constitution.

The Petitioners in the SLAA judgment alleged that the legislative process of the SLAA was marred by breaches of the National Assembly Standing Orders (the internal rules that govern custom, debate and the conduct of proceedings), since the proceedings and voting were chaotic. The Court did not find a breach of the Standing Orders and went on to caution that, while the Court has jurisdiction to intervene where Parliament has failed to abide by its Standing Orders, such intervention should be restrained and only exercised in clear cases which disclose a flagrant breach of the Standing Orders.

Courts have also been called upon to determine questions on matters that are pending debate in Parliament. In *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* [2017] eKLR, the Supreme Court stated, inter alia, that each arm of Government must recognise the independence of the other arms of Government and refrain from directing another organ on how to exercise its mandate, and that the courts should be guided by restraint, limiting themselves to intervention in requisite instances, considering the prevailing circumstances, the objective needs and the public interest attending each case.

The above notwithstanding, one cannot help but wonder how far the doctrine of judicial restraint can be applied in the face of a clear threat of infringement of the Bill of Rights or of a constitutional violation. Suppose Parliament were to introduce and debate a Bill allowing for torture in the interrogation of suspects. One can argue that it would be premature for the Court to intervene at this point, since the Bill may or may not make it through Parliament. However, as soon as such a Bill is passed and assented to, the Constitution provides for the right of every person to institute court

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proceedings where a right or fundamental freedom, or the Constitution itself, has been threatened (Articles 22(1), 70(1), 165(3)(b) and 258(1)). One can see that some threats have a real chance of becoming actual infringements, which is why the Constitution gives courts jurisdiction to issue conservatory orders stopping constitutional violations in their tracks.

UPHOLDING THE ROLE OF THE LEGISLATURE IN OVERSIGHT

The relationship between the Judiciary and the Legislature is not always acrimonious. The courts have on a number of occasions supported and upheld the role of the Legislature in legislation and oversight. In *Re Speaker of the Senate & another v Attorney-General & another* (Advisory Opinion Reference 2 of 2013), the Supreme Court upheld the Senate's role in considering the annual Division of Revenue Bill, while in *Senate v Council of County Governors & 6 others* (Petition 24 & 27 of 2019 (Consolidated)), the Court upheld the Senate's oversight role over revenue in counties, as well as its power to summon Governors to appear before it or any of its committees for purposes of answering questions and providing requisite information.

CONCLUSION

Separation of powers is a constitutional creation in Kenya. From the examples given above, the Judiciary's role in interpreting the Constitution is not a creation of the Judiciary but of the Constitution. In an adversarial system, the Judiciary's involvement is never *suo motu*; it must be triggered by a suit filed by a person seeking a determination or an interpretation of the constitutionality, or lack thereof, of a law or an action taken by the Legislature or other organs of government. However, I began by describing the nature of human beings and the problem of power. It appears as if the findings of the Judiciary are often diametrically opposed to the actions of the Legislature.

So the answer to the question of whether the Judiciary is messing with the role of the Legislature depends on whom you ask. Those in the Legislature might say that the courts are unduly interfering, while a bystander may disagree. It is the classic depiction of the Swahili proverb *kila mwamba ngoma, ngozi huivuta kwake* (everyone who stretches a skin over a drum pulls the skin to his or her own side). ■



The clock tower of Parliament Buildings, Nairobi.

> ***Kila mwamba ngoma, ngozi huivuta kwake.***
>
> Everyone who stretches a skin over a drum pulls the skin to his or her own side.
>
> — SWAHILI PROVERB



ARTIFICIAL INTELLIGENCE

Will AI Eliminate the Need for Lawyers?

Generative AI and the future of legislative drafting

"AI will not eliminate the need for lawyers, but it does portend the end of lawyering as we know it."

— Andrew Perlman

Submitted by:
Ms. Patricia Gichane

1.0 INTRODUCTION

Artificial Intelligence (AI) is the simulation of human intelligence by computer systems to perform specific tasks. AI has evolved from basic prediction and classification models to machine learning and deep learning. This progression has led to the recent emergence of Generative AI, a derivative of deep learning.

Generative AI is artificial intelligence that can create new content, such as text, images and music, by learning patterns from large data sets. Large language models are commonly used for text generation, while other generative AI techniques, such as generative adversarial networks (GANs), are used for image creation. Unlike traditional AI, which might analyse data or perform specific tasks, generative AI can produce original content that was not programmed into it. The system examines syntax, language style and patterns, and creates new ideas from historical data.

2.0 INTERFACE BETWEEN AI AND LEGISLATIVE DRAFTING

The application of Artificial Intelligence has been lauded for its capability to revolutionise industries such as healthcare and finance. AI can significantly impact legislative drafting through drafting assistance, the use of templates based on existing legal frameworks, and the adaptation of jurisdiction-specific language and formatting style. In error detection and correction, AI tools can highlight inconsistencies, ambiguities or potential conflicts in proposed legislation.

In research, AI can analyse large volumes of legal texts, case law and academic literature that inform legislative drafting, synthesising relevant information from data sets that would be time-consuming for human drafters. Further, it can improve efficiency in workflow by automating repetitive tasks and providing drafting suggestions, thereby streamlining the legislative process and making it more accessible and responsive to timely updates of legislation. Lastly, it may assist in the analysis and processing of public views and sentiments on laws, widening the scope of public participation.

The role of the legal counsel is to facilitate Members of Parliament in executing their legislative mandate by rendering legal advice and drafting clear and concise laws. Generative AI, as a tool, can enhance the legislative process by promoting efficiency in the workflow.

However, AI cannot replace human drafters, because generative AI models are known to suffer from "artificial hallucinations" and to reach wrong conclusions. This was demonstrated in the 2023 case of *Mata v. Avianca*, in which lawyers submitted to a New York court a brief containing fake extracts and case citations generated by ChatGPT, a predictive-text AI chatbot. The lawyers, unaware that ChatGPT can hallucinate, failed to check that the cases existed, and the court dismissed their case and sanctioned them for acting in bad faith.[1]

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Further, generative AI models are only as good as the repository of data against which they are modelled; their output is therefore subject to the biases contained in that data.

In Africa, the Association of Legislative Drafting and Advocacy Practitioners has developed LEGISCRIPTA, a legislative drafting software. The software helps legislators to produce and submit Bills and motions based on a template, and enables them to input and track their progress. However, there is no record of its application or effectiveness in any jurisdiction.[2] The United Kingdom is currently developing a prototype AI-assisted drafting tool with the capacity to quickly identify context-relevant legislative materials and generate explanatory notes on government Bills.[3]

3.0 LEGAL AND ETHICAL CONSIDERATIONS IN THE USE OF AI

Generative AI marks a significant advancement in the field of Artificial Intelligence, with the potential to transform several industries. However, it is necessary to consider the legal, ethical and social impact of its application and development.[4]

Some of the ethical and social concerns about the use of generative AI include its susceptibility to perpetuating bias based on the data model. It also raises concerns about workforce disruption and job displacement. However, the most significant concern is its ability to propagate misinformation through errors or "deep fakes", thereby shaping belief systems, human interaction and how people think and behave. It therefore poses the risk of manipulation, misuse and the spread of misinformation.[5]

The legal concerns include its use as a tool for the unauthorised practice of law by non-professionals. There also exist ethical and legal dilemmas, such as AI reaching conclusions based on majority views that may sideline minority perspectives or uphold outdated norms. Generative AI may also give rise to intellectual property claims and create dilemmas in identifying authentic original work, as its predictive nature in content creation based on historical data can mimic existing works. There is also the concern of data security, noting that most AI software offers limited protection for users, creating the possibility of the monetisation of data.[6]

4.0 CONCLUSION

AI legislative drafting tools will soon be the norm in various jurisdictions. However, human judgement is an indispensable input in the drafting of laws and policies.

Legislatures in Africa need to embrace AI tools to enhance and promote efficiency in legislative drafting and advisory services. The developers of these tools need to ensure transparency and accountability in the development of AI models, especially with regard to algorithmic bias.

The legislative drafter needs to embrace their future role as an intervenor in the effective prompt engineering of AI tools modelled on jurisdiction-specific data. Additionally, the legal counsel has a pivotal role in the governance of these tools by setting ethical and legal guidelines and by assessing risk management and compliance. ■

AI legislative drafting tools will soon be the norm in various jurisdictions. However, human judgement is an indispensable input in the drafting of laws and policies.

— PATRICIA GICHANE

NOTES

1. https://theconversation.com/ai-is-creating-fake-legal-cases-and-making-its-way-into-real-courtrooms-with-disastrous-results-225080
2. Estelle Matilda Appiah, "Globalization and Rule of Law Challenges for African Commonwealth Legislative Drafting", p. 18 — presented at the CALC Annual Conference, Mombasa, Kenya, 23rd–25th October 2023.
3. "i.AI develops Lex tool for legislative drafting", UKAuthority.
4. Ethics and Governance of AI, Berkman Klein Center for Internet & Society, Harvard University.
5. Ibid.
6. https://legal.thomsonreuters.com/blog/the-key-legal-issues-with-gen-ai/#significant-risks

THEME PAPER · LEGAL OFFICES

Law-making, Oversight and Innovation

The Centrality of Legal Offices in Legislative Bodies

Submitted by:

Mr. Fares Rizq Hamad

Northern Region Representative (Libya)



Mr. Fares Rizq Hamad

THE CONTRIBUTION OF LEGAL OFFICES

1. How do legal offices contribute to the process of drafting and enacting legislation?
2. What mechanisms and procedures do these offices follow to ensure the quality and effectiveness of legislation?
3. How do these offices affect the process of legislative oversight and the verification of the executive's compliance with the law?

CENTRALISATION OF LEGAL OFFICES

1. What are the advantages and disadvantages of centralising legal offices in legislative bodies?
2. How can a balance be achieved between the centralisation of these offices and the need of various legislative bodies for legal advice?
3. What are the best international practices in this regard?

THE ROLE OF LEGAL OFFICES IN LEGISLATIVE INNOVATION

1. How can legal offices contribute to the development and proposal of innovative legislation that keeps pace with rapid developments?
2. What mechanisms enable these offices to anticipate the future and provide innovative legislative solutions?

Examples of successful legislative innovation with the contribution of legal offices may also be examined. In addition to these main topics, the role of the legal adviser in these offices, and how to enhance their efficiency and effectiveness, can be addressed. Case studies and practical models can further clarify the topic in more detail.

WHAT ARE THE MAIN CHALLENGES FACING LEGAL OFFICES IN LEGISLATIVE BODIES?

There are several challenges facing legal offices in legislative bodies, the most important of which are:

- **Balancing centralisation and independence** – achieving a balance between the centralisation of legal offices and the need of different legislative bodies for independence in legal consultations.
- **Coordination** between central legal offices and legal experts in parliamentary committees and departments.
- **Resources and funding** – the limited financial and human resources available to legal offices.
- **Specialised expertise** – providing specialised legal expertise and keeping pace with legislative developments.
- **Technical and technological challenges** – using modern technologies in legislative drafting and oversight processes, and effectively managing and organising legal information and data.
- **Maintaining neutrality and objectivity** – ensuring the independence of legal offices from political or partisan influences, and maintaining objectivity in providing legal advice and consultations.

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- **Communication and coordination** – enhancing communication and coordination between legal offices and executive and judicial bodies, and ensuring the smooth flow of legal information and data between different bodies.

PROFESSIONAL DEVELOPMENT AND CONTINUOUS TRAINING

Legal offices must ensure the continuous development of the skills and competencies of their staff, follow up on legislative and legal changes, and update their knowledge and expertise periodically.

IMPROVING COMMUNICATION BETWEEN LEGAL OFFICES AND OTHER ENTITIES

- **Enhancing coordination and cooperation** – establishing formal mechanisms for coordination and communication between legal offices and executive and judicial bodies, and holding periodic joint meetings to discuss legal and legislative issues of common interest.
- **Developing effective communication channels** – using modern information and communication technologies to facilitate the exchange of information and legal documents, and establishing joint electronic platforms for the exchange of legal information and inquiries.
- **Enhancing transparency and accountability** – publishing reports and statistics on the activities of legal offices on a regular basis, and developing mechanisms to respond to inquiries from other entities in a regular and clear manner.
- **Organising joint workshops and seminars** – holding joint workshops and training seminars to exchange experiences and good practices, and inviting other entities to participate in these interactive activities.
- **Developing joint databases** – establishing unified databases for legislation, judicial rulings and legal opinions, and allowing relevant entities limited access to them.
- **Enhancing trust and mutual understanding** – organising periodic meetings between the leaders of legal offices and other entities, and exchanging field visits to understand the work and procedures of each entity.

HOW TO BE A DISTINGUISHED LEGAL ADVISER

1. Have a strong personality, be respected, and maintain a decent and respectful appearance.
2. Hold firm principles that do not waver.
3. Do not flatter one party or person at the expense of another.
4. Be confident and take responsibility for your opinions.
5. Say no to the employer if their position is not right, regardless of the consequences.
6. Abide by the laws and regulations and work in accordance with them.
7. Do not hesitate to seek advice and counsel from others when something is unclear.
8. Avoid indecisive responses that offer only partial solutions to the matter presented.
9. Express a clear opinion that reflects vision, philosophy and a sound legal, Sharia and regulatory understanding of the issue presented.
10. Ensure privacy and confidentiality in the matters referred to you, including the confidentiality of communications and consultations.
11. If the employer asks you to perform a task that you are not convinced of, do not flatter them and do not do it.
12. Have deep experience and competence, and be among those who constantly research, learn and develop their capabilities, with a keen commitment to training and learning. ■



Colloquium members with their hosts in Benghazi, Libya.

THE DISTINGUISHED LEGAL ADVISER

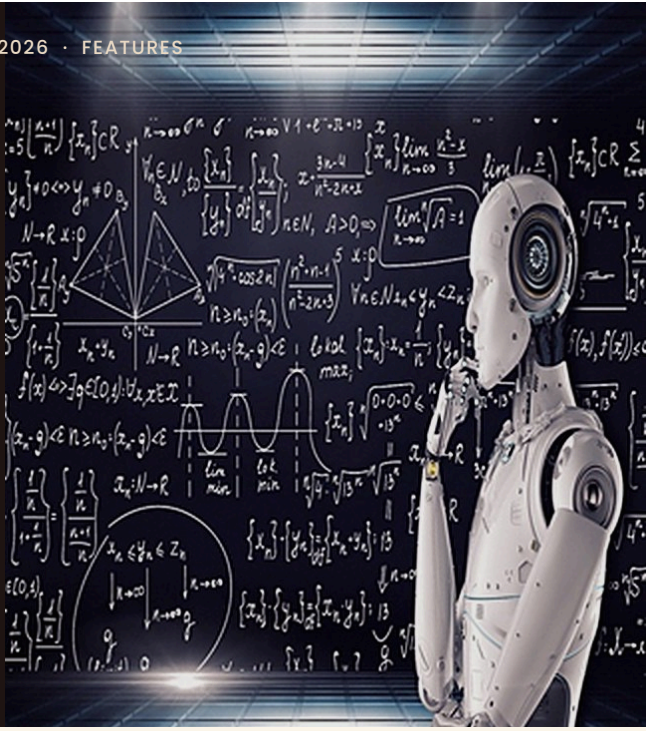
"Say no to the employer if their position is not right, regardless of the consequences."

— FARES RIZQ HAMAD

TECHNOLOGY & THE LAW

Legal and Ethical Considerations in the Use of Artificial Intelligence

Submitted by: Ms. Faith Wangui Kamau



INTRODUCTION

In 2014, director Alex Garland released the science fiction film *Ex Machina*. The film follows a computer programmer who wins a contest to take part in a test in which he is expected, under surveillance, to judge whether a humanoid robot is capable of thought and consciousness. During the film, the programmer grows close to the robot, which expresses a desire to experience the outside world and develops romantic feelings for him. As the film progresses, it becomes clear that the humanoid robot was all along capable of independent thought and action, such as shutting down the power system in order to carry out unsurveilled conversations with the programmer, manipulating him and, finally, orchestrating its escape.

Science fiction films allow us to imagine, albeit temporarily, what would happen if certain things came to pass. The release of *Ex Machina* and other films of the same genre brings to the fore the question of the legal and ethical considerations in the use of AI.

AI has been defined as the ability of computers to perform complex tasks that, historically, only human beings could perform, through automated decision-making, learning and recognition. AI carries a lot of promise that, if properly leveraged, can significantly improve the conditions of life. Kenya, and indeed other developing countries, are uniquely placed to leverage such emerging opportunities to transform healthcare (more accurate diagnoses, early disease identification and better treatment plans that improve patient outcomes); agriculture (AI can help farmers collect data on weather conditions, rain prediction, water usage and temperature and analyse the data in real time to make better decisions on their produce, detect crop and animal diseases and pests, and market farm produce); education (AI has the potential to improve learning outcomes by providing personalised learning for students, tracking and analysing student performance, and developing, administering and assessing national examinations); and even government services (AI can be used to automate government services, increase transparency, address public expenditure and possible fraud, keep track of projects and their progress, and improve citizen engagement with the leadership).

Companies utilising AI in Kenya include M-Shule, a company creating personalised tuition tools that use text messaging to support primary school students in revising English, Kiswahili and Mathematics, conducting formal assessments, collecting learner data and providing automated text reports to parents; and Ujuzi Kilimo, a company providing smart farming solutions for small-scale farmers, using sensors to collect and analyse soil and weather data and giving farmers real-time advice via text messages and phone calls. AI has also revolutionised lending in Kenya. Fintech products such as Tala and M-Shwari utilise AI to build credit histories using data to determine creditworthiness, optimise debt recovery by sending regular reminders, and streamline loan processing by automating document verification.

LEGAL AND ETHICAL CONSIDERATIONS IN AI

Every major evolution in human history has proven to be a double-edged sword. The Agrarian Revolution brought with it increased and stable food production

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and population growth, but also societal inequality as a result of humans' increased dependence on the land and fears of scarcity, a decline in nutrition and a rise in infectious diseases contracted from domesticated animals. The Industrial Revolution increased the production of goods, leading to lower prices, new goods, more goods and the growth of urban areas. These positives were offset by the depletion of natural resources, air and water pollution, climate change, low wages and child labour, among others. Somehow, the world has managed, with regulation geared towards addressing the negative outcomes.

As with the other two examples, the technological revolution brings new problems. The legal and ethical issues in AI are bigger, more complex and riskier to humanity in its current form. Whenever the discussion of AI and human beings comes up, one might be tempted to think that the danger is that a malicious robot will obliterate humanity, a situation that is unlikely to happen. The legal and ethical issues surrounding AI relate to overreliance on AI, bias, the use of AI to fuel oppression, and the destabilisation of society.

OVERRELIANCE ON AI

AI systems have revolutionised efficiency in many industries by presenting faster ways of automating repetitive tasks, automating decision-making, analysing huge volumes of data, predicting and preventing future problems, and learning continuously, which allows such systems to keep improving in performance. This has led to improved systems which work better and more accurately, save on costs and avoid wastage. As such, many businesses that are keen on cutting costs have benefited from AI systems that remove human intervention. This is not always desirable, and an argument can be made for the retention of human intervention.

In 1983, during the height of the Cold War, the Soviet Union's early-warning missile system reported that the United States had launched five nuclear missiles heading for the USSR. The officer in charge, Stanislav Petrov, was expected to report the warning as per Soviet protocol but decided to wait instead. He suspected that there was an error in the system but wasn't certain of it. The Soviet protocol was that if such messages were received, the person in charge would report to his superiors and the USSR would then respond with a retaliatory attack. His decision to wait prevented an erroneous retaliatory nuclear attack on the United States, which would have resulted in a large-scale nuclear war with devastating consequences. A question is often posed: what if the USSR had relied on an automated system? Would it have been able to make the best judgement in such a critical situation?

Overreliance on AI could erode essential human skills and capacities over time. As AI takes on more and more tasks, human beings may become less proficient in critical thinking, emotional and social skills, creativity and innovation, with reduced human resilience and adaptability and impaired judgement and decision-making in nuanced situations. If human beings lose these skills, will they remain employable? How quickly can people reinvent themselves for a new career in their 40s? (Perhaps this is why Yuval Noah Harari, in his book *21 Lessons for the 21st Century*, states that creating new jobs might prove easier than retraining human beings to fill them.) Will we have a huge group of unemployable people? How does that bode for our current economic system of production and consumption if production is automated and consumers cannot afford to purchase the products?

It might seem like a far-off possibility, but it is foreseeable that AI is, and will continue, disrupting the labour market. The concern is that if human beings are unable to find other sources of income, inequality will widen. A case has been argued for States to provide a Universal Basic Income to blunt the economic disparity.

BIAS

An AI system is trained on real human data. As such, some AI systems have mirrored the existing biases and prejudices in society. An AI system could be biased if the training data is not inclusive or a fair representation of society, if there is an error in the algorithm, or because of unconscious bias during the creation of the AI system. This could increase social inequality in communities that are already marginalised.

For example, in 2014, Amazon's experimental AI tool for sifting and rating résumés was discovered to discriminate against women. From the historical data fed to the system, in which male applicants were over-represented, the tool assumed that male applicants were preferred and hence rated them higher than female applicants. Amazon discontinued the tool in 2017.

Perhaps the most insidious cases of bias have been observed in law enforcement. PredPol, a tool employed by the Los Angeles Police Department, used historical data to identify high-risk crime areas to guide the

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allocation of resources. The system was found to perpetuate existing racial biases, where already over-policed communities continued to be surveilled by the police, reinforcing the perception of elevated crime in such areas. PredPol was discontinued in 2020.

Facial recognition software used to compare faces against criminal databases has been found to be less reliable when used on people of colour. The United States judicial system employed a risk assessment tool, COMPAS, which was designed to predict the likelihood of an offender re-offending and to inform bail, sentencing and parole. It was found that the tool labelled black offenders as higher risk than white offenders.

USE OF AI TO FUEL OPPRESSION

Closely related to bias is the risk that oppressive governments can use AI to further oppress their citizens. This could be through the use of AI tools that enable facial recognition, predictive policing, information suppression, disinformation, micromanagement of the biometric and personal data of citizens, excessive surveillance capabilities and censorship.

As States experience increased threats to their internal security, the use of AI in surveillance has been justified as essential to the maintenance of stability and the combating of terrorism. China has employed facial recognition technology, social media surveillance and internet censorship in the Xinjiang Autonomous Region, targeting Uyghur and other Muslim minorities in that region. The cameras installed reportedly identify Uyghur people for placement in "re-education" camps against their will, where they are forcefully assimilated, among other allegations. Still in China, the government enforces a social credit system, which amalgamates social and behavioural digital data (online presence, habits, finances, purchases, hobbies and opinions) with AI to rank citizens as well as corporations, rewarding and punishing them based on the rating. Higher credit scores allow a citizen to access priority healthcare and treatment, undertake higher education, access property at fair rates and work certain jobs. The danger is that the ratings are ascribed by the government and may be lowered based on how the State views certain actions; for instance, political dissent, speeding, or failing to pay taxes or paying them late will result in a reduction of credits.

In 2016, Russia passed amendments to its Law on Counteracting Terrorism and Certain Legislative Acts of the Russian Federation in Terms of Establishing Additional Measures to Counter Terrorism and Ensure Public Safety (known as the Yarovaya Law, after its author Irina Yarovaya). This law requires telecom operators and Internet Service Providers to store voice communications, data, images and text messages for six months. The law also requires service providers to store metadata (information about data, such as the time, location and recipients of a communication) for three years. This creates specificity about the original set of data, making the tracking of senders and recipients easier.

Aside from the storage of data, the law also requires communication service providers to assist security agencies in decrypting messages sent through their networks. This provision, which undermines encryption and privacy protection by giving security agencies the ability to access private communication, was central to the judgment in *Podchasov v. Russia*. This landmark decision of the European Court of Human Rights arose from a challenge to the Russian Government's decision to direct Telegram to decrypt the messages of suspects of terrorism-related activities. In upholding the right to privacy and encryption, the Court stated that:

> *"in order to enable decryption of communications protected by end-to-end encryption, such as communications through Telegram's 'secret chats', it would be necessary to weaken encryption for all users. These measures allegedly cannot be limited to specific individuals and would affect everyone indiscriminately, including individuals who pose no threat to a legitimate government interest. Weakening encryption by creating backdoors would apparently make it technically possible to perform routine, general and indiscriminate surveillance of personal electronic communications. Backdoors may also be exploited by criminal networks and would seriously compromise the security of all users' electronic communications."*

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Internet provision in Africa has been largely liberalised. However, with the emergence of Deep Packet Inspection (DPI), authorities are able to filter internet traffic in real time, gain insight into online content and censor at will. DPI can be used to filter and block specific types of content, such as political dissent before it gains traction, or information that would cause social unrest. DPI combined with AI can analyse internet usage patterns and profile individuals to target political dissidents, activists and minority groups.

DESTABILISATION OF SOCIETY

AI can undermine collective decision-making through the generation of false public participation comments on a large scale. Malicious actors using AI can flood lawmakers with limitless unique comments advancing an agenda and dwarfing genuine public comments.

AI can be used to interfere with free and fair elections through targeted advertisements, intentionally falsified news articles and social media tools used to deceive voters. AI-generated propaganda is just as believable as human propaganda. Misinformation and micro-targeted content may change what people believe or put doubts in their minds, thereby undermining social trust. The sphere of propaganda has witnessed insidious applications of AI: the personalised and realistic use of social media bots to promote official narratives, and the potential to create deep-fake videos or audio to wrongly implicate those who oppose the government.

In the aftermath of the 2017 Kenyan presidential election, the role of the data analytics firm Cambridge Analytica was questioned. It appeared that the firm worked on the former President's campaign and used data obtained from Facebook to target voters with specific political content without the voters' knowledge or consent. In August 2024, Meta CEO Mark Zuckerberg, responding to an enquiry from the US House Judiciary Committee, admitted to censoring COVID-19 content in 2021 across the Meta platforms Facebook and Instagram. Meta flagged content, attached fact-checks and removed posts on claims around the safety of coronavirus vaccines and speculation on the origin of the virus.

REGULATORY APPROACHES TOWARDS AI

The European Union Artificial Intelligence Act

This Act, hailed as the world's first comprehensive AI law, was adopted by the European Parliament on 13th March, 2024, signed on 13th June, 2024, and is intended to apply generally in the EU from 2nd August, 2026. Article 2 of the Act states that it applies to providers and deployers of AI systems in the EU and their representatives, importers and distributors of AI systems, and affected persons in the EU. Article 6(2), as read with Annex III of the Act, identifies high-risk AI systems, including:

- remote biometric identification systems;
- AI systems intended for emotion recognition;
- AI systems used as safety components in the management and operation of critical digital infrastructure, road traffic, or the supply of water, gas, heating or electricity;
- AI systems intended to be used in education to determine access or admission, evaluate learning outcomes, determine the appropriate level of education one will receive, and monitor and detect the behaviour of students during tests;
- AI systems used in the recruitment or selection of natural persons in response to targeted job advertisements, to analyse and filter job applications, evaluate candidates, make decisions affecting terms of work and the promotion of work-related contracts, and evaluate performance;
- AI intended to determine access to and enjoyment of essential public and private services and benefits, including evaluating the eligibility of persons for public services and benefits, creditworthiness, risk assessment in the pricing of life and health insurance, and the evaluation of emergency calls and response priorities;
- AI systems used in law enforcement to assess the risk of a person becoming a victim of crime, as polygraphs, to evaluate the reliability of evidence in the course of the investigation or prosecution of criminal offences, to assess the risk of re-offending, and for profiling in the detection and investigation of crime;
- AI used in migration and border control;
- AI to be used in research, to interpret facts and the law and apply it to a specific set of facts; and
- AI systems to be used to influence the outcome of an election or referendum or the voting behaviour of persons.

High-risk AI systems must comply with certain conditions, including:

- maintaining a risk management system that is reviewed, tested in real-world conditions and updated (Article 9);
- training data sets shall be relevant, sufficiently representative and free of errors to the extent possible, shall consider the intended purpose and the elements of the specific geographical, contextual, behavioural or functional setting, and shall have privacy controls and bias detection and correction (Article 10);

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- the AI system shall have up-to-date technical documentation before it is put into service, containing a description of its intended purpose, interactions with hardware, software and other AI systems, forms of the AI, user interface, instructions for use, design specifications, human oversight measures, and testing and validation procedures (Article 11);
- the AI system shall keep records over its lifetime (Article 12) and shall ensure that its operation is transparent to deployers through the provision of instructions for use and human oversight measures (Article 13);
- high-risk AI systems should be designed in a way that allows humans to oversee them. The goal of human oversight is to prevent or minimise risks to health, safety or fundamental rights that may arise from the use of these systems. The system should allow the overseer to understand its capabilities and limitations, detect and address issues, avoid overreliance on the system, and decide to override it or stop its application altogether (Article 14); and
- high-risk AI systems should be designed in a way that ensures accuracy, robustness and cybersecurity (as much resilience as possible regarding errors, inaccuracies, back-ups, fail-safe mechanisms and exposure to vulnerabilities).

The Act also contains detailed obligations for providers of high-risk AI systems, importers, distributors and deployers (Articles 17, 23, 24 and 26), as well as requirements to keep documents and automatically generated logs and to cooperate with competent authorities.

High-risk AI systems providing a public service must assess how the system could impact human rights through a fundamental rights impact assessment (Article 27). This includes describing how and when a system will be used, who will be affected and what risks are posed, and outlining how humans will oversee the system and what steps will be taken if the risk materialises.

Article 5 contains a list of prohibited AI practices, which include using an AI system that:

- deploys subliminal techniques beyond a person's consciousness, or purposely manipulative or deceptive techniques, to distort the behaviour of a person or a group of persons by impairing their ability to make an informed choice;
- exploits the vulnerabilities of a natural person or a group of persons due to their age, disability or economic situation to distort their behaviour;
- evaluates natural persons or groups of persons, leading to detrimental or unfavourable treatment in social contexts;
- makes risk assessments of natural persons to predict the risk of their committing a crime based solely on their personality traits;
- creates or expands facial recognition databases through the untargeted scraping of facial images from the internet or CCTV footage;
- infers the emotions of a natural person in workplaces or educational institutions;
- uses biometric categorisation systems to categorise persons based on their biometric data to deduce or infer their race, political opinions, trade union membership, philosophical or religious beliefs, sex or sexual orientation; and
- uses real-time remote biometric identification in public spaces for the purposes of law enforcement, with the exception of where the AI is used to search for victims of abduction, sex or human trafficking and missing persons, to prevent a serious or imminent terrorist attack, or to identify a suspect of a serious crime punishable by a custodial sentence of at least four years.

Aside from the prohibitions in Article 5, Article 73 requires providers of high-risk AI systems to report any serious incident (death or serious harm to a person's health, serious and irreversible disruption of critical infrastructure, infringement of obligations, or serious harm to property or the environment).

CONCLUSION

In 2019, the OECD adopted value-based principles to guide AI actors in developing AI that is trustworthy. In November 2021, the 193 member states of UNESCO adopted the UNESCO Recommendation on the Ethics of Artificial Intelligence, which enjoins member states to make all reasonable efforts to minimise and avoid perpetuating AI systems that produce discriminatory or biased outcomes. Though the OECD principles and the UNESCO recommendations are not binding on member states, they provide a political and moral imperative for member states to implement them. They also form a guideline for States, or groups of States, which may wish to enact their own AI law. Indeed, the OECD principles and the UNESCO recommendations appear to have largely influenced the EU AI Act.

I stated that the legal and ethical issues in AI are bigger, more complex and riskier to humanity in its current form than other challenges that humanity has faced. This is because AI keeps taking on more and more human roles and, in the process, learns our biases. Research has shown that despite all our brilliance as human beings, we make predictable decisions and are, on many occasions, driven by unconscious bias.

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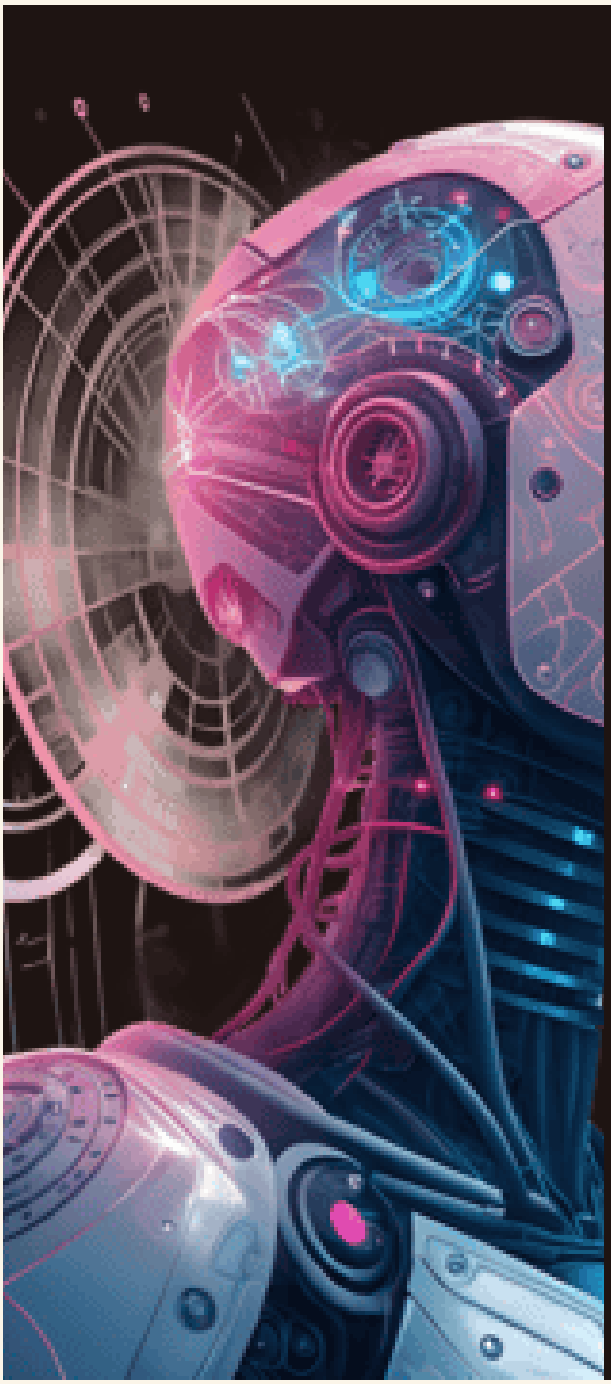
There are many other novel legal challenges posed by AI, including questions such as: Can one contest an automated decision? If an AI system is able to do all that a human can, does it acquire legal personality? Who owns the intellectual property created by generative AI? If automation creates a huge class of unemployable people, will States provide a universal basic income? Who is liable for damage caused by an AI system? These matters require robust conversations around AI regulation to ensure that our inventions do not mean our collective end – not in the sense of a sinister robot, but in the enlargement of current inequalities, the suppression of human rights, or the creation of authoritarian States with unchecked power. ■



> *These matters require robust conversations around AI regulation to ensure that our inventions do not mean our collective end.*
>
> — FAITH WANGUI KAMAU



About the author. Ms. Faith Wangui Kamau is an Advocate of the High Court of Kenya and legal counsel in the Senate of Kenya, where she drafts Members' Bills and advises the Standing Committee on Delegated Legislation. She also wrote "Judicial Overreach" on page 13.

GOVERNANCE · PROFESSIONAL STANDARDS

The Nairobi Principles

Advancing Good Governance in African Parliaments

Submitted by: Ms. Mercy Gathoni Kinyua



Ms. Kinyua is an Advocate of the High Court of Kenya and a Legislative Drafter in the Parliament of Kenya. She is an expert in law and governance, which underpins her keen interest in legislative affairs, corporate governance and public sector governance.

Prior to joining Parliament, she was a Principal Litigation Counsel at the Office of the Attorney-General, Kenya. She is a member of the Law Society of Kenya and the East African Law Society.

The Africa Colloquium of Legal Counsel to Parliaments operates on the premise that effective law-making is inseparable from effective legal advice. At the heart of this mission lie the Nairobi Principles, a crucial framework that not only defines the role of the parliamentary Legal Counsel but is also instrumental in safeguarding the integrity of parliamentary governance across Africa.

The Nairobi Principles are more than just a code; they are a constitution for professional conduct, ensuring that the legal arm of the Legislature remains a pillar of constitutionalism, good governance and the public interest.

SAFEGUARDING PARLIAMENTARY GOOD GOVERNANCE: INDEPENDENCE AND THE RULE OF LAW

Good governance in any Parliament relies heavily on impartial legal advice that is untainted by political considerations. The Nairobi Principles provide Legal Counsel with the professional backbone to withstand external pressures, thereby directly advancing democratic quality.

The core mandate derived from the Nairobi Principles is to "at all times uphold constitutionalism and the rule of law and serve in public interest." This non-negotiable directive ensures that all legislative and oversight actions advised by the legal office comply with the supreme law of the land, protecting the Legislature from ensuing legal challenges and reinforcing public trust.

Legal Counsel are further directed to "maintain their independence and impartiality at all times" and to "steer clear of political interference and patronage." This separation is vital. By founding advice "entirely on the law," as the Principles mandate, the legal office acts as a neutral arbiter, thus ensuring fairness in processes such as the passage of Bills and the handling of petitions and motions. This institutional independence is the single most critical factor in guaranteeing the quality of parliamentary decision-making.

ENHANCING GOOD CORPORATE GOVERNANCE WITHIN LEGAL OFFICES

The influence of the Nairobi Principles is not limited to the legislative floor; the Principles dictate the standards for professional practice and management within the offices of Legal Counsel themselves, promoting internal good corporate governance.

The Nairobi Principles explicitly require Legal Counsel to "uphold high standards of ethics in the workplace and act professionally." This ensures that the internal operations of legal departments, from managing confidential committee reports to drafting legislation, are executed with integrity, transparency and accountability.

CONTINUED ON PAGE 27

With regard to competence and continuous development, the Nairobi Principles demand that Legal Counsel be "competent, knowledgeable in their work and continuously develop themselves through studying courses and keeping abreast with local and foreign jurisdictions." This commitment to professional growth ensures that legal offices are always equipped to handle increasingly complex legislation and emerging issues, such as the use of Artificial Intelligence in legislative drafting and post-legislative scrutiny.

By defining clear ethical and professional boundaries, the Nairobi Principles establish a framework for performance evaluation and internal discipline, mirroring best practices in corporate governance and setting the legal office apart as a model of professionalism within the parliamentary service.

ADVANCING THE LEGISLATIVE ROLE

The practical application of the Nairobi Principles solidifies the central role of Legal Counsel in advancing the core functions of Parliament, to wit, law-making, oversight and representation.

The guidance derived from the Principles enables Legal Counsel to strengthen legislative output. By grounding all advice in law and maintaining impartiality, Legal Counsel ensure that Bills are technically sound, constitutionally and legally compliant, and address the public interest effectively.

With regard to supporting effective parliamentary oversight, when Legal Counsel advise parliamentary committees, the Principles guarantee that their legal guidance is objective, thus facilitating Parliament's constitutional role of holding the executive accountable.

Additionally, the Principles facilitate greater cooperation and consultation among Legal Counsel in African Parliaments by establishing a common continental standard of practice, hence fulfilling the Colloquium's mandate to share best practices and collectively strengthen legislative capacity across the region.

In conclusion, the Nairobi Principles serve as the foundational professional contract for every parliamentary Legal Counsel in Africa. By championing independence, enforcing ethical competence and demanding adherence to the rule of law, they are the most powerful instrument the Colloquium possesses in safeguarding and advancing good governance in African Parliaments. ■

> *"At all times uphold constitutionalism and the rule of law and serve in public interest."*
>
> — THE NAIROBI PRINCIPLES



The 4th meeting of the Council of the Africa Colloquium, held at the Libyan House of Representatives in Benghazi, 29th–31st January, 2024.

Know Your **Council Members**



Mr. J. M. Nyegenye, CBS
Patron of the Colloquium (Kenya)



Ms. Sena Atsu
President of the Colloquium (Ghana)



Mr. Asaph Arinaitwe
Vice-President & Eastern Region Representative (Uganda)



Mr. Fares Rizq Hamad
ممثل المنطقة الشمالية
Northern Region Representative (Libya)



Ms. Tangella Sam
Western Region Representative (Sierra Leone)



Ms. Connie Mantahli Sefo
Southern Region Representative (South Africa)



Ms. Thoko Gumedze
Regional Parliaments Representative (Eswatini)



Mrs. Elizabeth Hove
Immediate Former President & Co-opted Member (Zimbabwe)



Mr. Clement Mavungu
Pan-African Parliament Representative (DR Congo)



Ms. Elizabeth Muhia
Secretary-General (Kenya)

Memories

Benghazi and Zanzibar





Legal Counsel from the Parliament of Tanzania at the 6th Colloquium in Zanzibar.

Dr. Okello, then Secretary-General, meets Legal Counsel of the Libyan House of Representatives in Benghazi.





Colloquium members in Benghazi, Libya.



A dance group entertains members of the Colloquium during the 6th Colloquium in Zanzibar.

Memories

The Council in Nairobi, February 2025



Seated, left to right:
Ms. Thoko Gumedze; Ms. Sena Atsu (President); Mr. Jeremiah Nyegenye, CBS (Patron and Clerk of the Senate); Mr. Asaph Arinaitwe (Vice-President); and Mrs. Elizabeth Hove.

Standing, from right:
Mr. Fares Hamad, Ms. Tangella Sam and Hon. Justice (Dr.) Johnson Okello.





Council Members during their physical meeting at the Parliament of Kenya, Nairobi, February 2025.



Ms. Vane Akama, Director, Legal Services, National Assembly of Kenya, makes a presentation to the Council, February 2025.



Ms. Tangella Sam, Western Region Representative (Sierra Leone), during the Council meeting in Nairobi.

2025

First physical meeting of the new Council, hosted by the Parliament of Kenya.

Memories

The 6th Colloquium, Zanzibar



The President of Zanzibar, Dr. Hussein Ali Mwinyi (left), holds up the Certificate of Incorporation of the Africa Colloquium of Legal Counsel to Parliaments during the 6th Colloquium in Zanzibar.



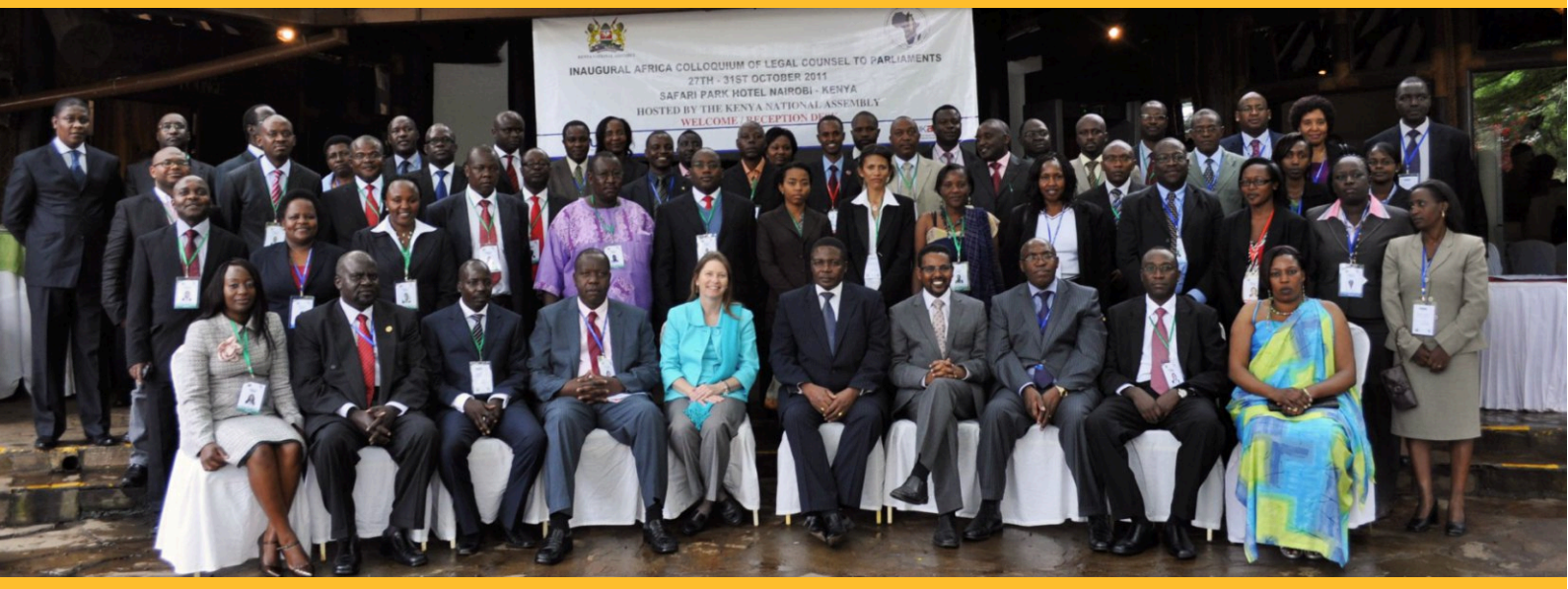
Dr. Hussein Ali Mwinyi (left) receives a gift after gracing the 6th Colloquium of Legal Counsel in Zanzibar.



Participants during the anthem at the start of the 6th Colloquium of Legal Counsel in Zanzibar, November 2022.

Africa Colloquium of Legal Counsel to Parliaments

Sharing modern trends and best practices in the provision of legal services to Parliaments across Africa.



Delegates at the Inaugural Africa Colloquium of Legal Counsel to Parliaments, Safari Park Hotel, Nairobi, 27th–31st October, 2011.

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