



CENTRAL BANK OF KENYA

The 26th East Africa Law Society Annual Conference

That Used To Be Us—The Loss and Recovery of Public Trust

Keynote Address by Dr. Patrick Njoroge

Governor, Central Bank of Kenya

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As Prepared for Delivery

Good morning! I am pleased to join you at the 26th East Africa Law Society Annual Conference, and let me at the outset express my gratitude for the invitation. The theme of the conference—*Building Sustainable Outcomes for the Legal Profession in East Africa*—is timely as you reflect on how to maintain the legal profession’s critical role in the sustainable development of the East African nations. This is against the backdrop of the challenges and opportunities that the coronavirus (COVID-19) pandemic has brought to the fore in our societies, and the regional ambitions that are being revealed. I note the wide range of topics being discussed, which will enrich the outcomes of the Conference.

As an economist speaking to lawyers today, I should be careful not to create any enemies. If one were to choose a group of people to pick a fight with, it would certainly not be a roomful of lawyers. Nevertheless, our professions have a lot in common—it is generally accepted that at least in the not-so-distant past, the three most trusted persons in a community would be *the judge, the banker, and the priest* I suppose this is in part due to the singular commitment of the members of these professions to the community’s manifested ideals or principals, and their close alignment with the aspirations of a better society. I am sure you would agree that the ultimate purpose of a legal system is the betterment of society. While there are different schools of thought about what law is about, you would agree that in establishing the rules of a particular society, and the rights and responsibilities of citizens, the emergence of a better society is made possible.

Laws protect individual rights and liberties. They also provide a framework to help resolve disputes between individuals. As an economist I can affirm that economic development is quickened by a well-functioning legal system. Conversely, economies cannot function effectively without clear rules that are enforced. Recent cross-country and micro-level research has formalized this thesis, and provided a strong anchor for the overwhelming importance of institutions in predicting the level of economic development (Hall and Jones, 1999; Rodrik, 2000b, 2003, 2004b, 2007; Acemoglu, Johnson and Robinson, 2001). These lines of research have shown that institutions are strong determinants of economic growth, with property rights representing one category of economic institutions. More recently, greater importance has been attributed to the role of property rights as a mainstay among institutions for promoting growth (Besley and Ghatak 2009), and the role of the state in formalising and protecting such rights (Acemoglu and Johnson 2000, 2004).

The economic case for secure property rights is that long-term growth is anchored on investment. However, investors will not invest if there is a risk of government or private expropriation (Everest-Phillips 2008; Besley and Ghatak 2009; Acemoglu et al. 2004). On the other hand, markets are less efficient when property rights do not exist or are weak and can lead to adverse consequences such as opportunism to exploit the lack of clarity of ownership (including the common-or-garden variety “grabbing”), and the misuse of scarce resources. At this point I am sure I have dispelled any lingering doubts about the crucial importance of law for economic development, but I wish to include the observations of two renowned central bankers.

Alan Greenspan, former Chair of the United States Federal Reserve—a central banker like myself—saw an inexorable connection between the rule of law and our general prosperity. In his book *The Age of Turbulence*, Greenspan observed:

“Why is this relationship between the rule of law and our material well-being so immutable? In my experience, it is rooted in a key aspect of human nature. In life, unless we take action, we perish. But action risks unforeseen consequences. The extent to which people are willing to take risks depends on the rewards they think they may gain. Effective property and individual rights in general decrease uncertainty and open a wider scope for risk taking and the actions that can produce material well-being.”

Another central banker, Mervyn King, former Governor of the Bank of England, expressed similar sentiments in his brilliant book *The end of Alchemy*. Describing the institutions that support a capitalist system, he singled out the rule of law:

“The rule of law to enforce private contracts and to protect property rights, intellectual freedom to innovate and publish new ideas, anti-trust regulation to promote competition and break up monopolies, and collectively financed services and networks, such as education, water electricity and telecommunications which provide the infrastructure to support a thriving market economy. Those institutions create a balance between freedom and restraint, and between unfettered competition and regulation. It is a subtle balance that has emerged over time. And it has transformed our standard of living.”

Our professions are certainly united for a good cause, and we are in good company. However, despite the robustness of these conclusions, a major conundrum emerges when you probe public perceptions about lawyers, judges, bankers, and indeed other professions. The results are shocking. Things fall apart.

In 2016 the German market research firm GfK Verein conducted a worldwide “**Trust in Professions**” survey to gauge the public’s trust in various professional groups.¹ The survey covered 27 countries—including Kenya, Nigeria, and South Africa—and 32 professions. Some of the results were hardly surprising—politicians consistently had the lowest score, with a global average trust rating of 30 percent.² Tellingly, politicians are solidly the least trusted profession in Kenya, followed by policemen. Firefighters, nurses, teachers, doctors, physicians, and pharmacists were at the top of the global league table in terms of the most trusted professions, with average trust ratings of over 85 percent. Somewhat surprisingly, farmers held their own with an average trust rating of 86 percent, and in Kenya they were the most trusted profession with a trust rating of 90 percent!

Closer home, the survey revealed that judges have a global trust rating of 70 percent and are 15th in the ranking of professionals, just ahead of bankers who come in at 67 percent and 16th in rank. However, lawyers have a trust rating of 58 percent and 28th in rank, a few rungs above politicians. The results for Kenya indicate that judges, priests, and lawyers have relatively low trust ratings compared to most other professions, placing them closer to the bottom of the rankings. These results may appear surprising, and they

¹ A similar survey was done in 2018 with a smaller number of countries—20 instead of 27—but with broadly similar results. The larger set of countries was preferred hence the reporting of the 2016 survey.

² Average of respondents indicating “I completely trust” or “I generally trust” across all countries, in percent.

made me recall another survey a few years ago around the time interest rate caps were introduced in Kenya, which ranked bankers as the least trusted professionals. I believe the context sheds light about the perceptions of the respondents. This is democracy manifest.

I present these survey results to underscore one point—we have taken the high ground on the societal impact of our respective professions, but we may have lost that society and the people in it. Something went wrong along the way—*that used to be us*.

Against this backdrop I want to sketch three broad themes that could explain the surprising results and also highlight what can be done.

First, *the public may have perceived a loss of professionalism*. While technical excellence, taking pride in one's work, and not wanting to be average are important elements of professionalism, public perception may have been driven by other factors. For instance, the legal profession as we know it has resisted technological innovations in its processes and systems, even as the rest of society adopted transformative innovations. It took the impetus of the coronavirus pandemic for the legal profession to embrace and adopt many technologies that have been in use elsewhere for years—electronic filing and case management, virtual court proceedings, etc. Lest we stop here, there is a lot to be done to modernize the processes and support systems for the benefit of the consumers of legal services. Further, there are numerous stories of ordinary citizens being unable to have their matters heard or concluded in a timely manner. The maxim "*justice delayed is justice denied*" rings true in these cases, and it is irrelevant to the citizen that the delay may have been caused by something outside the courtroom.

Several questions arise around this theme. For instance, is the profession committed to catching up and perhaps leapfrog in the use of safe technology? Apart from the merits of those decisions, are the societal consequences of delayed decisions appreciated? Is the impact of court decisions explained to the public? Is the law written in a language that is understood by those that are affected?

The related questions for lawyers are around whether they are playing their part to ensure society has easy access to the law. Is legal advice affordable? Do lawyers help clarify the law? Must a lawyer be needed to buy a house or a car, or to set up a business? What role do lawyers play in the efficient administration of justice? Do lawyers contribute as stakeholders in the making of law?

It is clear that a lot of urgent work is needed to deal with these concerns and inject a good dose of professionalism. The status quo is untenable.

Second, *the public may have found wanting the conduct of some members of the profession.* Members of the legal profession, and particularly judges, are for all intents and purposes public figures who are under public scrutiny at all times. Accordingly, concerns about the behavior of any of them will hurt their own reputation and that of other members of the profession. In this regard, character and integrity are the most important assets, as is the case for all other professions. The renowned American humanist Aldo Leopold said that: *“Ethical behavior is doing the right thing when no one else is watching—even when doing the wrong thing is legal.”* Conversely, compliance without integrity is futile.

Does the profession carry itself as it should, as a noble profession? Does it inspire confidence in the public’s eye? Is it careful about its image?

Third, *in searching for solutions to their daily concerns, the public may have looked to the legal profession for leadership but did not find favorable responses.* General Colin Powell said it best:

“Leadership is solving problems. The day soldiers stop bringing you their problems is the day you have stopped leading them. They have either lost confidence that you can help or concluded you do not care. Either case is a failure of leadership.”

Considering the growing influence of the law, do lawyers consider themselves uniquely placed to offer leadership in influencing the direction that society takes? For instance, why is the inhumane treatment of accused persons and prisoners rampant? In 1895, the Irish wit Oscar Wilde was sentenced to two years of hard labor. While waiting in pouring rain to be taken to prison, he remarked: *“If this is the way Queen Victoria treats her prisoners, she doesn't deserve to have any!”* These and others like them are societal concerns that are close to the legal profession and need strong leadership to resolve.

These are questions which only the legal profession can answer upon deep reflection and introspection. I suspect that the profession knows the answers to them. I suspect that the profession also knows how it can do all these things better. It could do so if only the

correct impulses would assert themselves. The response to the pandemic is the clearest proof of that. The question I was asked was what should lawyers do differently? I think the question really should be, are the lawyers doing what they can towards reversing the public's negative perceptions?

As I close, I want to disclose that the title of this address is taken from a 2012 book by Thomas Friedman and Michael Mandelbaum.³ The authors argue that the United States faces four major challenges, and that it was failing to deal with them even as other nations appeared to be fairing much better. I found the book thought-provoking and the following assessment by the authors quite instructive:

“As we were writing this book we found that when we shared the title with people, they would often nod ruefully and ask: ‘But does it have a happy ending?’ Our answer is that we can write a happy ending, but it is up to the country—to all of us—to determine whether it is fiction or nonfiction. [...] What we need is not novel or foreign, but values, priorities, and practices embedded in our history and culture, applied time and again to propel us forward as a country. That is all part of our past. That used to be us and can be again—if we will it.”

I will finish with a story I have been telling for some time now. At a regional conference a few years ago I struck a friendship with an older participant from another country. At one point he told me a story about how he had travelled somewhere and had seen an old man planting coconut trees. They talked and he remarked to the old man, “I really don't think you will eat the fruit from the coconut trees that you are planting.” To which the older man replied, “Yes, I know that I am planting for another generation. I eat fruit from this coconut tree that I did not plant.” My new friend turned to me and said: “Society is at its best when people plant coconuts that they do not expect to eat from.”

Dear friends, there is work to do. There is only one way to travel. We cannot afford to sit back and watch our professions crumble. The consequences of failure are dire but it is up to each of us how these trends evolve. Let's plant coconut trees.

Thank you for your attention!

³ Thomas L. Friedman and Michael Mandelbaum, *“That Used to Be Us: How America Fell Behind in the World It Invented and How We Can Come Back”* August 2012