

## Book Review

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# The Contested Empowerment of Kenya's Judiciary, 2010-2015: A Historical Institutional Analysis by James Thuo Gathii

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There has been an increasing number of written works deconstructing various transformative values underpinned by the Constitution of Kenya.<sup>1</sup> One of these transformative values is the concept of constitutional supremacy which, arguably, has not received nuanced theoretical attention in Kenya's constitutional law scholarship.<sup>2</sup> Gathii theorises the unexplored, yet controversial question of judicial empowerment and its centrality in anchoring constitutional supremacy in the post-2010 politico-constitutional order. He provides a well-researched exploratory analysis of the functional, institutional and normative fledgling nature of the Judiciary of Kenya. He does this through an analytical filter that investigates the prominent role that judicial expansion has played in promoting constitutional supremacy and the principle of legality.

While a vast array of literature has already historicised judicial reforms and dissected the social transformative potential of the newly empowered judiciary, no scholarly piece has offered any concrete theoretical explanation underlying the actuality of these powers. This book makes that contribution. In the first chapter, Gathii investigates the phenomenon of judicial empowerment through a historical institutionalist lens —as the most suitable theory.<sup>3</sup> Historical

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<sup>1</sup> These include Kangu M, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015 (which gives a discursive engagement of the structure and praxis of the concept of devolution). See Mbondenyi K and Osogo J, *The new constitutional law of Kenya: Principles, government and human rights*, Law Africa Publishing, Nairobi, 2014 (discusses the tenets of the Constitution such as the rule of law, human rights and separation of powers). See also Lumumba P and Franceschi L, *The Constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014.

<sup>2</sup> Gathii J, *The contested empowerment of Kenya's judiciary, 2010-2015: A historical institutional analysis*, Sheria Publishing, Nairobi, 2016, 1 posits that judicial empowerment is a new phenomenon for which this book is dedicated.

<sup>3</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 2 and 19.

institutionalism emphasises the significance of a critical juncture marked by extraordinary circumstances that unsettle the status quo. These factors exert pressure on social institutions while conditioning their behaviour to new directions.<sup>4</sup> This is what Gathii calls a ‘moment of crisis’ in the life of a polity.<sup>5</sup> According to this view, the 2007/2008 post-election violence in Kenya presented a climax that rejuvenated politico-constitutional reform, part of which was the dynamic of judicial empowerment.<sup>6</sup>

The book’s central claim is that the 2007/2008 violence was an after-effect of years of ethnic sensitivities in the political organisation of the Kenyan state, displeasure with the congestion of power in the presidency, lack of democratic governance and the rule of law, and distrust of the judiciary, all of which filtered into the constitutional reform process thereby creating a never-ending stalemate.<sup>7</sup> A complex interface of these factors, in their institutional and historical forms; informed the creation of a powerful judiciary. The 2008 ‘moment of crisis’ was therefore a ‘critical juncture’ for Kenya to rewrite a liberal democratic ethos into its constitutive text. Most importantly, the rewriting of Kenya’s constitutional text would be placed in the hands of experts and insulated from feuding political forces that had derailed the reform process for decades.<sup>8</sup> Judicial empowerment was therefore contingent upon these factors.<sup>9</sup>

Gathii makes it clear that in any given jurisdiction, strong judicial review powers may well be accounted for by other theories.<sup>10</sup> On the one hand, rational-strategic scholarship, propounded by Ginsburg,<sup>11</sup> argues that because democracies are characterised by electoral versatility, during constitutional design, politicians consciously elect to vest broader judicial powers in courts. This is done, in anticipation of loss of political power, so as to insure their partisan interests against any likelihood of jeopardy that such a loss may herald.<sup>12</sup> Broad judicial review is thus considered a form of protection against reasonably foreseeable losses.<sup>13</sup> In contrast, the attitudinalist approach holds that judges’ ideological and political persuasions determine their predisposition to make the judiciary an

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<sup>4</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 20.

<sup>5</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 19.

<sup>6</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 21.

<sup>7</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 5.

<sup>8</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 21.

<sup>9</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 21.

<sup>10</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 15 and 18.

<sup>11</sup> Ginsburg T, *Judicial review in new democracies: Constitutional courts in Asian cases*, Cambridge University Press, Cambridge, 2003, 24-25.

<sup>12</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 10.

<sup>13</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 11.

institutional counterbalance to legislative and executive powers.<sup>14</sup> Moral agency and judges' ideological bent are the determinants of judicial boldness.<sup>15</sup> In Gathii's view, these two theories, while not irrelevant, fail to account for Kenya's judicial empowerment. The political insurance theory fails because, contrary to Ginsburg's argument, the constitutional design of an authoritative judiciary was a popular view of the people of Kenya that drowned elite political voices that would have desired a subservient judiciary.<sup>16</sup> The attitudinalist conception fails for its inattention to sovereignty of the people and constitutional embedment of judicial powers.<sup>17</sup>

While the provocative historical institutional analysis may be open to question for assigning an overly significant role to an isolated incident of short-lived violence, such line of scrutiny, if asserted, may miss the whole point of this book. Gathii's central claim seems to be that the start-stop process of constitutional review may have taken too long to yield a constitutional text owing to capture by parochial interests, but that is not to disregard its consequential contribution to the reform process.<sup>18</sup> Certainly, it is the 2008 'moment of crisis' that rejuvenated a reform process long captured by partisanship.<sup>19</sup>

In chapter two, the constitutional underpinnings of the expanded judicial review powers are elaborated. Two factors are identified: supremacy of the Constitution and the principle of legality.<sup>20</sup> First, the supremacy clause has been interpreted to the effect that all public authority is constrained by the Constitution and that any public organ or arm of government must conform its conduct to the dictates of the Constitution.<sup>21</sup> The second aspect is the assertion, by the High Court, of the principle of legality which has been applied to interrogate public actions, especially the authority of parliament and the president. Gathii leans on the celebrated *Matemu*<sup>22</sup> case while rooting for the contested powers of the judiciary.<sup>23</sup> The counter-majoritarian dilemma, a much debated issue in constitutional discourses, seems to be a preoccupation of the Kenyan legal fraternity now more than ever. Its traditional misgivings always interrogate the

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<sup>14</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 16.

<sup>15</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 16-17.

<sup>16</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 12.

<sup>17</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 18.

<sup>18</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 5.

<sup>19</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 19.

<sup>20</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 32-33.

<sup>21</sup> Article 2, *Constitution of Kenya* (2010).

<sup>22</sup> *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR.

<sup>23</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 34.

unprecedented mandate overreach that courts enjoy relative to other branches of government.<sup>24</sup> Counter-majoritarian proponents tend to disclaim judicial review as being undemocratic and are disenchanted with the immense powers of the judiciary over other domains of power.<sup>25</sup> As the book often articulates, concerns of judicial mandate intrusion are invoked whenever courts have overruled executive or parliamentary actions.<sup>26</sup> In particular, the common law jurisprudence of *Ole Njogo*<sup>27</sup> that barred courts from questioning the powers of the Executive seems to have been dismantled by *Matemu's* affirmation of reviewability of executive and parliamentary conduct.<sup>28</sup> Constitutional values that underpin the notion of a constitutionally empowered judiciary, Gathii points out, are entrenched in Article 259(1) which sanctions new canons of interpretation consistent with the transformative ideals of the Constitution.<sup>29</sup>

Citing four reasons, chapter three argues that the Constitution has completely altered the character of judicial review in Kenya. One is the constitutional supremacy, policed by the judiciary under Article 165(3) (d) (ii) that now dethrones archaic claims of parliamentary supremacy.<sup>30</sup> Second, the quality of judgments is improving as more divergent opinions continue to sprout in various tiers of the courts.<sup>31</sup> Third, major jurisprudential milestones have earned the High Court a reputable stature beyond borders.<sup>32</sup> Lastly, judicial resurgence lies in the elimination of technicalities and introduction of generous rules of standing.<sup>33</sup>

Of concern to Gathii is the dual system of judicial review currently in practice in Kenya. There are the received common law judicial review mechanisms drawn from the pre-2010 administrative law practices on the basis of statutory provisions, whereas the principle of judicial review is also engrained in Article 47 of the Constitution.<sup>34</sup> He argues that while the High Court has been exercising proper powers whenever it grants orders of mandamus, certiorari or prohibition,

<sup>24</sup> Waldron J, 'The core of the case against judicial review' 6(115) *Yale Law Journal*, 2006, 1348-1349. Waldron's disapproval of judicial review stems from two premises. First, he argues that courts are by no means alternative protectors of rights than democratic legislatures. Two, his perception considers judicial review as inherently illegitimate.

<sup>25</sup> Bickel A, *The least dangerous branch, the Supreme Court at the bar of politics*, 2ed, Yale University Press, New Haven, 1986, 16-17.

<sup>26</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 34.

<sup>27</sup> *Ole Njogo v AG* (1913) 5 East African Law Reports, 100.

<sup>28</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 33.

<sup>29</sup> Article 259(1) requires a constitutional interpretation 'that promotes its principles, values and purposes, advances the rule of law and human rights and contributes to good governance'.

<sup>30</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 56.

<sup>31</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 56.

<sup>32</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 57.

<sup>33</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 57.

<sup>34</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 57.

such functional competencies are constitutionally mandated and now removed from the province of the common law.<sup>35</sup> Thus, administrative justice must be seen to be a constitutionalised function of the High Court under Article 47. This means that the standard or parameters of review against which courts should evaluate propriety of administrative actions is a constitutional one and not that of common law.<sup>36</sup> However, this is no suggestion for the abandonment of common law administrative principles; such principles are part of our laws, for as long as they do not offend constitutional values and principles.

According to Gathii, the legality principle, founded on the concept of the rule of law, is a value etched in a number of articles of the Constitution which demands 'that all conduct of the government must be constitutionally and legally valid or authorised (on the basis of an understanding that) the Constitution establishes a system of governance by law'.<sup>37</sup> Quoting Mureinik,<sup>38</sup> he calls this reconfiguration of rules-based governance a culture of 'justification' where all conduct must be justified in line with constitutional standards.<sup>39</sup> The rational justification of governmental authority, Gathii contends, should be the 'minimum standard of review Kenyan courts must apply to review legislation and all exercises of public power'.<sup>40</sup> Relying on the dictum of the Constitutional Court of South Africa,<sup>41</sup> he argues that to ascertain rationality of conduct, one ought to look at whether the asserted conduct is rationally connected to the purpose for which the power has been conferred or whether the exercise of such power fulfils the constitutional objective.<sup>42</sup> He calls this test the rational basis review:

'To review a law, rational basis review asks whether the law is rationally connected to a legitimate governmental purpose ... and for governmental [conduct] rational basis review asks whether the conduct is rationally related to the purposes for which it was given'.<sup>43</sup>

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<sup>35</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 58.

<sup>36</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 60. He cites the case of *Moses Kiarie Kariuki & 4 others v Attorney General & 4 others*, Constitutional and Human Rights Division, Petition No. 280 of 2013, para. 11.

<sup>37</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 60.

<sup>38</sup> Mureinik E, 'A bridge to where? Introducing the interim Bill of Rights' 10(1) *South African Journal on Human Rights*, 1994, 31 and 32.

<sup>39</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 61.

<sup>40</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 61.

<sup>41</sup> *Pharmaceutical Manufacturers Association of South Africa & another v In re ex parte President of RSA* (2000), Constitutional Court of South Africa.

<sup>42</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 62.

<sup>43</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 62.

Kenyan constitutional law practitioners and legal scholars now have within their reach a canon for assessing administrative decisions, and this book takes credit for trailblazing the principle of legality and delineating its demarcated contours. But how far can courts go in conducting a rational basis review of a law or the conduct of a government? Gathii argues that a standard of review that insists on constitutional or legal justification of conduct does not substitute the opinion of the court for another government organ or agency; rather it is a decision in consonance with constitutional or legal ‘justification’ as embodied in the principle of constitutional supremacy.<sup>44</sup> Further, he contends that rational basis review standard does not stand in tension with the doctrine of separation of powers given the coextensive nature of powers of the three branches in a coordinate system of government.<sup>45</sup>

Chapter four analyses the feud that has pitted the judiciary against parliament whenever courts have asserted constitutional supremacy. It disapproves of the rejectionist attitude of parliament to the notion of constitutional supremacy.<sup>46</sup> This discomfort with extended judicial powers, Gathii concludes, is ‘a reflection of the political and economic interests opposed to the reforms of the new Judiciary and a Chief Justice who has declined to do the bidding of those who received such favour from the old Judiciary’.<sup>47</sup> In the end, the chapter observes that this manner of disenchantment with a robust judiciary is not unique to Kenya. The Supreme Court of the United States, for example, faced similar threats when Congress tried to undermine its authority through various machinations such as denial of funding, censure and impeachment of one of its sitting members.<sup>48</sup>

Chapter five is a detailed historical insight into lawyers’ struggle for liberal democratic reforms in keeping with the claim that the Kenyan judiciary was subservient. It documents the complicity of the judiciary in the suppression of lawyers who opposed the regime of dictatorship between 1978 and 1992. It forays into the pre- and post-colonial history of legal education and practice of law in Kenya to assess the role lawyers played in championing for democracy. It is observed that the legal education system advanced the agenda of the government while legal practice in the sixties and seventies relegated issues of the rule of law and human rights and never questioned the repression and judicial subordination

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<sup>44</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 64.

<sup>45</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 64.

<sup>46</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 77.

<sup>47</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 82.

<sup>48</sup> Gathii J, *The contested empowerment of Kenya’s judiciary*, 82.

that the Executive was pursuing during that period.<sup>49</sup> This culture was altered when Kenya's first public interest organisation, the Public Law Institute, was founded in 1978 with the aim of providing national legal aid and monitoring the rule of law and human rights. What is remarkable about this chapter is the excursus into the central role played by brave activist lawyers who confronted the intransigence of Moi's dictatorship with little promise of professional reward.<sup>50</sup> It tells the story of unbowed commitment against intimidation, arbitrary arrests and detention by government of the day.<sup>51</sup> The height of judicial capture by the Executive is illustrated by the conservatism of some judges which rid the Bill of Rights of its meaning.<sup>52</sup>

Chapter six details the institutional reforms and other internal and horizontal structures of accountability of the judiciary. Foremost are: the decentralisation of the role of president, the prominence of the Judicial Service Commission in the appointment process and as an institutional anchor of judicial independence and the Judiciary Fund as a foster of financial independence.<sup>53</sup> Innovative aspects of horizontal accountability include the fragmentation of powers of the Chief Justice to various heads of superior courts and the role of the Chief Registrar as the administrative head of the Judiciary.<sup>54</sup> Other mechanisms of accountability include the publishing of an annual State of the Judiciary Report and the involvement of the Court User Committees.

In chapter seven, Gathii puts into historical context the momentum for judicial reform from the 2003 radical surgery to the post-2010 vetting of judges and magistrates. The flaws, biased-nature and unfairness of the 2003 radical surgery of the judiciary are adumbrated and the processes that governed vetting are examined culminating in his call for a rethink of the entire vetting process as a result of the challenges faced by the vetting board.

The last chapter identifies areas such as forced eviction, the death penalty, the right to counsel, women's property rights and diplomatic immunity where the application of Articles 2(5) and 2(6) have been put into practice in co-opting international law principles and treaty norms into the laws of Kenya. This section, however, leaves unresolved the contestation on the tenor and effect of Article 2(5) witnessed in the conflicting decisions emerging from the High Court

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<sup>49</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 86.

<sup>50</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 89.

<sup>51</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 90-91.

<sup>52</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 99.

<sup>53</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 105-106.

<sup>54</sup> Gathii J, *The contested empowerment of Kenya's judiciary*, 122.

and the Court of Appeal. A key example of this is the *Mitu Bell* case, where the Court of Appeal was seen to reject the application of General Comment No. 7 which prescribes guidelines on evictions, terming it a simple rule of international law that does not form part of the laws of Kenya and which falls outside the purview of the Article 2(5) sanction that such law be considered as general rules of international law.<sup>55</sup> The Court made an erroneous distinction between ‘simple rules of international law’ and ‘general rules of international law’, stating that the latter may derive from customary law or *jus cogens* norms.<sup>56</sup> The Court stated further that ‘it is impermissible to use Article 2(5) of the Constitution as a justification for any and all rules and principles of international law as part of the laws of Kenya (and that it) is only the general rules of international law that are part of the laws of Kenya’.<sup>57</sup> This chapter should have grappled with this conceptual conflation. Therefore, future revision is recommended. Clearly, the Court of Appeal misapprehended Article 38 of the International Court of Justice Statute on the sources of international law which is part of the general principles of law recognised by civil nations. General principles of law are a distinct genre of law that cannot be equated to custom or *jus cogens*. In future, interpretive approaches to Article 2(5) need to be re-calibrated so as to give a correct meaning of the provision.

## Conclusion

This work is very topical and in my view the most critically thoughtful constitutional law piece ever written about a reformed Kenyan Judiciary. It draws from numerous judicial decisions and does a good job in applying theories of constitutional law. Its narrative has taken a multi-pronged approach (discursive, conceptual and historical). However, its major contribution is in two areas. The first is that the propounded theory of historical institutionalism has given a solid explanation of Kenya’s expanded judicial authority. The second is the constitutional concept of legality and the corresponding rational standard of review that it bequeaths to Kenya’s legal scholarship and practice. This work is a masterpiece, showcasing rich knowledge for which Professor Gathii is known. I recommend it to keen readers of Kenya’s constitutional history.

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<sup>55</sup> *Kenya Airports Authority v Mitu Bell & 2 others* (2016) eKLR.

<sup>56</sup> *Kenya Airports Authority v Mitu Bell & 2 others* (2016) eKLR, para. 116.

<sup>57</sup> *Kenya Airports Authority v Mitu Bell & 2 others* (2016) eKLR, para. 118.