A critique of police response to the right to peaceful assembly, demonstration, and picketing in light of the 2024 Finance Bill protests

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Abstract

The events of June 2024 have brought to light a simmering dissent now emerging where it was once almost unheard of, among the 'Gen Z' youth. Kenyan youth have embraced their right to picket and peacefully assemble while seeking to dismantle the status quo. Yet, beneath this facade of a people's sovereignty lies a troubling reality of state repression. This paper aims to critique the inappropriate use of police force especially by using live ammunition during protests and abducting and torturing demonstrators during the 2024 Finance Bill protests, particularly in relation to the implementation of Article 37 of the Constitution of Kenya. It also affirms the role of democracy in strengthening sovereignty and empowering a people in times of dissent.

Keywords: Finance Bill 2024, protests, police brutality, police response, right to peaceful assembly, Constitution of Kenya Article 37, democracy and sovereignty

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* *Contributions to the 'Kianjokoma brothers tribute: The police accountability review' are single blind reviewed.*

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Introduction

The concept of the right to express dissent is fundamental to democratic governance, reflecting the notion that power lies with the people. This principle is embedded in Article 37 of the Constitution of Kenya 2010, which safeguards the right to peaceful assembly, demonstration, and picketing. Protests through demonstrations play a crucial role in safeguarding human rights within a country's democracy. As a state party to the 1966 International Covenant on Civil and Political Rights (ICCPR), Kenya is required to recognise and uphold the right to peaceful assembly.[1] Kenya is also party to the 1981 African Charter on Human and Peoples' Rights that amplifies that every individual has the right to freely assemble with others.[2] However, there have been reports of non-compliance to the stated standards, particularly regarding freedom of expression and assembly.[3]

The exercise of the freedom and right to picket and demonstrate is not absolute as it is subject to certain restrictions that must, among other things, align with the law and be deemed necessary for maintaining public safety.[4] However, these limitations must be carefully enforced to ensure that there is no loophole that undermines the essence of the right itself. This was opined in the *Ferdinand Ndung'u Waititu and 4 others v Attorney General and 12 others*, where the late Justice Joseph Onguto pointed out that public demonstrations and assemblies are regulated by the Public Order Act (Chapter 56 of the Laws of Kenya) adding that it was strictly up to the protestors to ensure peaceful demonstrations. The Court also emphasised that the police had an obligation to maintain peace and order during demonstrations, protecting both participants

1 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Article 21.

2 African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, Article 11.

3 Civic Space, 'Kenya: Harmonise legal framework on free expression with ICCPR recommendations', 28 May 2021.

4 International Covenant on Civil and Political Rights, Article 21.

and non-participants, ensuring security, public safety, and the observance of law during demonstrations. [5]

This commentary starts off with a review of the history on police conduct during public demonstrations arguing that the police misconduct specifically during protests in Kenya has been a prevalent challenge. The second section dwells on the 2024 Finance Bill protests and argues that the actions were an affirmation of the people's sovereignty. Thereafter, I will discuss police responses to the protests showing the specific police responses that are unconstitutional in nature. The fourth section discusses the Kenyan youth's fight for the democracy juxtaposed with the government's continual abnegation of democracy through police brutality.

A historical review of police conduct during protests

The historical context of police responses to public demonstrations in Kenya reveals a troubling pattern of repression and violence that undermines constitutional protections. Mutuma Ruteere observes that Kenya's fledgling democratic experiment has been perpetually challenged by the problem of ineffective and unaccountable policing.[6] He adds that historically, the Kenyan policing paradigm has been characterised by the disproportionate use of force against citizens who are deemed subversive.[7]

This line of thought can be traced to the establishment of the Kenya Police in 1906, which was initially created to enforce British colonial rule. However, its organisation and structure 'mirrored military organisation', rather than that of an institution supposed to actualise peace and

5 *Ferdinand Ndung'u Waititu and 4 others v Attorney General and 12 others*, Petition 169 of 2016, Ruling of the High Court at Nairobi, 6 June 2016 [eKLR] para 38.

6 Mutuma Ruteere and Patrick Mutahi, 'Policing protests in Kenya', Centre for Human Rights and Policy Studies 2019, 1.

7 Ruteere and Mutahi, 'Policing protests in Kenya', 1.

order to its people.[8] Thus, instead of serving public interest as required, the police force often prioritised control and suppression, a legacy that seemed to linger even after independence.

The Kenyan police force also have a history of responding repressively to peaceful protests, which as Mutuma Ruteere asserts is deeply rooted in the fundamental structure of both the police force and the state itself.[9] Police interventions in protests having often been marked by fatalities, the use of indiscriminate force, firearm abuses, and unlawful arrests, all under the guise of maintaining law and order. In 1922, a group of Kenyan workers gathered to demand the release of Harry Thuku, who was then a political leader. By the end of the peaceful demonstrations, 100 people had been shot dead by the police for demonstrating.[10]

This tragic event marked one of the earliest and most brutal examples of police violence against unarmed civilians in Kenya, cementing a deep-seated mistrust in the police force that would resonate through future generations.

Political leaders have also used the police to advance their own interests, further exacerbating the problem of police brutality and impunity.[11] Notably, Kenya's first president, Jomo Kenyatta, was reported to having used police force to silence dissenting voices. A prime example was during the 1969 Kisumu Massacre when police fired into a crowd protesting the president's visit, killing at least 11 people.[12] More of the same brutality was experienced during the start of multi-partyism during the late President Moi's tenure. During protests against electoral injustices following the 2007 presidential elections, police brutality escalated dramatically. Reports indicated that over 1,200 people were

8 Joan Kamere, 'The psychology of misconduct in the Kenyan police', *The Elephant*, 3 July 2024.

9 Ruteere and Mutahi, 'Policing protests in Kenya', 1.

10 Gilbert Mwangi, 'Remembering Muthoni Nyanjiru and the women who helped fight colonialism', *The Standard*, 22 March 2022.

11 Ruteere and Mutahi, 'Policing protests in Kenya', 1.

12 Anokhee Shah, 'Reopening old wounds, the never-ending tale of police brutality', *Lacuna Magazine*, 24 March 2021.

killed during this period, with many fatalities attributed directly to police shootings.[13]

These repressive responses were sharply scrutinised following the violence that erupted after the 2007 presidential election results were announced. The Commission of Inquiry into Post-Election Violence (CIPEV), found that the police's management of the 2007 demonstrations was 'inconsistent with basic legal provisions, jeopardised citizens' lives, and often involved grossly unjustified use of deadly force'.[14] These instances show that there has been a consistent misuse of power by the police officers, often orchestrated by the executive, at the peril of Kenyan citizens.

The Finance Bill, 2024 protests and a search for sovereignty

The June 2024 protests against the Finance Bill, 2024 have exposed a troubling disconnect between Article 37's constitutional guarantee and the reality of state tyranny. Police response to these protests, characterised by excessive force, including the use of live ammunition, torture, and abductions, raises critical questions about the protection of people's liberties and the genuine exercise of sovereignty by the Kenyan people.

Introduced in the National Assembly on 9 May 2024, the Finance Bill of 2024 aimed to tax essential commodities amidst a sluggish economy.[15] This move was widely viewed as unfair and punitive, especially for those already burdened by the high cost of living. Randy Barnett's assertion that resistance signifies a lack of government consent is par-

13 Shah, 'Reopening old wounds, the never-ending tale of police brutality'.

14 Commission of Inquiry into Post-Election Violence, the Waki Report, Part IV, 417; see also Martin Mavenjina, 'Protest in Kenya: Repressive and brutal policing has become normalised', Open Democracy, 3 December 2017.

15 Power Shift Africa, 'Explainer: Finance Bill 2024 chaos. How did Kenya get here?', 28 June 2024. For a detailed view of some of the taxes proposed see, Mercy Jebaibai, 'Highway or high cost? Unpacking the implications of Kenya's motor vehicle tax reform', *Kabarak Law Review Blog*, 14 July 2024.

ticularly relevant when examining the recent protests.[16] The widespread demonstrations were not just a display of dissatisfaction but a profound statement by the Kenyan youth, signalling their rejection of a government policy perceived as unjust and burdensome. Beyond the desire for an end to suffering from heavy taxation, unemployment, and blocked social mobility, most Kenyan youths embraced this unity of purpose, seeing a need to address their needs in a free democratic space.

The forceful police response, characterised by violence and repression, further highlighted the disconnect between the government and the governed, reinforcing Randy Barnett's argument that true consent cannot be coerced but must be freely given and maintained through just governance.

The protests against the Finance Bill of 2024 represented a critical moment in which the youth of Kenya sought to reclaim their sovereignty and assert their rights within a system that has historically marginalised their voices through police brutality during demonstrations. This struggle for genuine sovereignty was not merely about opposing specific policies in the Bill; but it later morphed to also challenging a broader system of governance that perpetuates inequality and alienation.[17] In *The law*, Frederic Bastiat posits that 'men naturally rebel against the injustice of which they are victims'.[18] This encapsulates the essence of the struggle for genuine sovereignty; justifying inherent human response to injustice and the lengths to which individuals and groups will go to reclaim their rights and influence the systems that govern them.

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16 Randy E Barnett, *Restoring the lost constitution: The presumption of liberty*, Princeton University Press, 2004, 21.

17 Wycliffe Muia, 'New faces of protests - Kenya's Gen Z anti-tax revolutionaries', *BBC News Nairobi*, 20 June 2024.

18 Fredrick Bastiat, *The law*, 1850, Translated from French by Dean Russell, Foundation for Economic Education, 1998, 7.

Police responses during the Finance Bill, 2024 protests

Using live ammunition

The Constitution of Kenya 2010 guarantees every person the right to picket and demonstrate and the right to life which remains inherent and can only be deprived lawfully.[19] However, many police officers have become oblivious to this fact, and have taken it upon themselves to shoot protesters.[20] On 20 June 2024, Rex Kanyike was allegedly shot and killed by a police officer during the Finance Bill protests on his way home from work.[21] It was reported that police fired live ammunition at protestors, killing and injuring many despite human rights groups raising concerns on the conduct of police.[22]

In Nairobi alone, Amnesty International reported that more than 200 individuals suffered gun wound injuries while some were referred for specialised treatment in hospital.[23] The Kenya National Commission on Human Rights (KNCHR) indicated to having recorded twenty-two deaths and 300 injured victims.[24] A young boy was also caught up in the fracas, shot eight times and killed instantly by police, as state law enforcers strived to contain the anti-finance bill protesters.[25] Paradoxically, the National Police Service Act decrees that a police officer shall make every effort to avoid the use of firearms, especially against children.[26]

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19 Constitution of Kenya (2010) Article 26(3) and Article 37.

20 Thomas Mukoya and Monicah Mwangi, 'One killed as Kenyan anti-government protests intensify again', *Reuters*, 17 July 2024.

21 Daniel Ogetta and Winnie Onyando, 'Rex Masai: What went wrong? Mystery of night bullet that claimed young life', *Nation*, 21 June 2024.

22 Deutsche Welle (DW), 'Kenya: Police fire live rounds amidst tax protests,' 25 June 2024.

23 Ogetta and Onyando, 'Rex Masai: What went wrong? Mystery of night bullet that claimed young life'.

24 France 24, 'Kenya's Ruto says tax bill to be withdrawn after anti-protest deaths', *France 24*, 26 June 2024.

25 Nyaboga Kiage, 'Anti-tax protests: Kin of boy shot 8 times in Rongai seek justice', *Nation*, 5 July 2024.

26 National Police Service Act (No 11A of 2011) Sixth Schedule, B (3).

The National Police Service Act serves as a cornerstone for policing in Kenya, establishing a comprehensive legal framework aimed at transforming the police from a force into a service that is accountable, community-oriented, and respects human rights.[27] The Kenya police includes, *inter alia*, the Kenya Police Service, the Administration Police Service, and the Directorate of Criminal Investigations.[28] The Internal Affairs Unit also plays a role in police oversight. [29] Separately, the Independent Policing Oversight Authority (IPOA) was established under its own legislation to provide civilian oversight of police conduct, ensuring accountability and transparency in their operations.[30]

Torture and abductions

Torture has been defined as '…any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person…'.[31]As the Finance Bill demonstrations morphed into anti-government protests, one Denzel Omondi's body was found dumped in a quarry, Denzel Omondi was allegedly abducted by police after the finance bill protests.[32] In a similar case, Joshua Okayo, a student leader from the Kenya School of Law, shared a harrowing account of his abduction and torture owing to his role in the Finance Bill demonstrations.[33] The International Commission of Jurists – Kenya (ICJ-K) also demanded

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27 National Police Service Act, Section 3.

28 National Police Service Act, Section 4.

29 This is through their power to investigate police misconduct and recommend action to IPOA. See Release Political Prisoners Trust, 'Your guide to: the National Police Service Act, the National Police Service Commission Act and the Independent Policing Oversight Authority Act', *Release Political Prisoners Trust*, June 2012, 26.

30 Independent Policing Oversight Authority Act (No 35 of 2011) Section 5(b).

31 Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, Article 1.

32 'JKUAT students hold demos over abduction and death of Denzel Omondi,' *Citizen TV* Kenya, 12 July 2024, 0:01 to 0:20.

33 'Rais wa chuo cha Kenya School of Law – Joshua Okayo, asimulia alivyotekwa nyara na polisi kwa kushiriki maandamano,' *NTV Kenya*, 9 July 2024, 9 July 2024, 5:53 to 14:53.

and called for an end to police brutality and torture.[34] Additionally, the chair of the Law Society of Kenya confirmed that there had been incidents of police abducting protesters, torturing them, and holding some incommunicado for several days.[35]

This backdrop of police brutality raised critical questions about the facade of a people's sovereignty. While the Constitution asserts that all sovereign power belongs to the people, the violent suppression of peaceful protests suggested a disconnect between constitutional ideals and the lived experiences of citizens. As the Kenyan populace grapples with the implications of such police actions, it becomes imperative to critically analyse police conduct and the protection of civil liberties, among them being the National Police Service Act, 2011 that governs the behaviour of the police when using a firearm. In Agenda No 4 of the National Dialogue and Reconciliation Agreement, police reforms were among the long-term measures and solutions identified as needed to promote peace and reconciliation in the country.[36]

Kenyan youth exercise of democracy versus the government's continual abnegation of duty through police brutality

For the youth in Kenya, democracy is seen to represent more than just a system of governance; it is a powerful tool for transformation and progress. It provides young people with a platform to voice their ideas, advocate for their rights, and actively participate in shaping the future of their nation. Through democratic processes, the youth can challenge the status quo, drive social and political reforms, and push for policies that address their unique challenges. As agents of change, they play a crucial role in ensuring that democracy continues to evolve, reflecting

[34] Sophie Opondo, 'ICJ [sic] commands release: DCI and Police IG ordered to produce detained Finance Bill protesters', *TV47 digital*, 22 June 2024.

[35] X communication from Faith Odhiambo, 'Law Society of Kenya statement on the state of the nation', 25 June 2024.

[36] Christopher Gitari Ndung'u, 'Failure to reform: A critique of police vetting in Kenya', *International Centre for Transnational Justice*, 21 November 2017.

the aspirations and needs of future generations. Through social media, technology played a dual role in shaping the political discourse among Kenyan youth. While it served as a platform for mobilisation and expression, it was exemplified by movements like #Tribeless #Leaderless and #Partyless.[37]

The introduction of the contentious Finance Bill of 2024 thus provided many Kenyan youths an opportunity to exercise their right to protest from the heavy taxation imposed by the Finance Bill. Unity has been described as one of the most important aspirations of Africans especially unity across contemporary political frontiers.[38] And it so happened that on 18 June 2024, in a powerful display of unity, a number of Kenyan-youth in major cities, marched to the streets, peacefully demonstrating against the bill and exercising their democratic right to demonstrate and picket. [39] What started as anger on social media spaces – TikTok, Facebook and X – morphed into a street revolt with the youth armed with only their cell phones, live-streaming the intense confrontations with the police.[40] This became a defining moment to assert their voices and fight for a free democratic space. Their collective action underscoring the enduring power of peaceful protests in driving change.

The disconnect between the government's obligation to uphold democratic rights and the reality of police brutality is a critical issue that undermines the very foundations of democracy in Kenya. This is because Article 37 explicitly reflects the government's obligation to protect civil liberties. However, the persistent incidents of police violence during protests starkly contrast this constitutional promise, revealing a troubling gap between legal frameworks and their implementation.

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37 Africa Uncensored, 'Kenya protests: Gen Z show the power of digital activism – driving change from screens to the streets', June 2024.

38 Leslie Rubin and Brian Weinstein, *Introduction to African politics: A continental approach*, Praeger Publishers, 1977, 191.

39 Constitution of Kenya (2010) Article 37.

40 Muia, 'New faces of protests'.

This discrepancy manifests in various forms, including the excessive use of force, arbitrary arrests, and even torture. Such actions not only violate individual rights but also instil fear among citizens, discouraging them from exercising their constitutional rights to dissent and assemble. The brutal tactics employed by law enforcement serve to reinforce a culture of repression, where the state prioritises control over the protection of fundamental freedoms.[41]

Moreover, this disconnect raises critical questions about the accountability mechanisms in place for the law enforcement officers. The lack of effective oversight and the absence of stringent consequences for police misconduct contribute to a climate of impunity, where officers may act without fear of repercussions. This situation not only erodes public trust in the police but also undermines the legitimacy of the government, as citizens perceive a failure to uphold their rights.

Conclusion

The recent protests against the Finance Bill, 2024 underscored the critical importance of upholding the right to peaceful assembly enshrined in Article 37 of the Constitution. The violent police response to these demonstrations not only violated fundamental human rights but also highlighted systemic issues within the law enforcement framework that threatened the principles of democracy and the rule of law.

It is imperative that comprehensive reforms are implemented within the police force, emphasising accountability, human rights training, and adherence to constitutional protections. When police use methods that do not mete out brutal force to protestors, Kenyan citizens can be empowered to actively participate in governance, ensuring that sovereignty truly resides with the people.

41 Catherine Wambua-Soi, 'Kenya is not asleep anymore: Why young protesters are not backing down', *Al Jazeera*, 24 July 2024.

In the end, the true measure of Kenya's democracy will be defined not by the absence of dissent, but by the strength of its commitment to justice and the unwavering belief that every voice can ignite the flame of change; while resolutely putting an end to police violence that seeks to silence the very essence of our democratic spirit.

A critique of the High Court's ruling in *FOA v RAO and 2 others* in reinstating Section 12 of the Births and Deaths Registration Act

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Abstract

This case review critically examines the High Court's decision in FOA v RAO and 2 others, which authorised the removal of a father's name from a birth certificate after questioning the petitioner's biological paternity. The case relies on Section 12 of the Births and Deaths Registration Act, a provision the High Court invalidated in LNW v Attorney General and 3 others, marking a troubling judicial departure that revives the application of an unconstitutional provision. Hence, this paper explores the inconsistencies in judicial reasoning regarding the rights of children born out of wedlock, focusing on the implications of the unconstitutionality of Section 12 of the Births and Deaths Registration Act.

Keywords: Birth and Deaths Registration Act, judicial reasoning, unconstitutional provisions, *stare decisis*

* *Contributions to the 'Case commentary section' are single blind reviewed.*

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Introduction

The question of identity – who one is, particularly in familial terms – serves as a fundamental element of human existence.[1] For many, the inquiry into paternity is a simple matter; for others, it can lead to profound emotional and legal dilemma. This case review explores the legal reasoning and consequent implications stemming from the High Court's decision in *FOA v RAO and 2 others*,[2] juxtaposing it against the earlier ruling in *LNW v Attorney General and 3 others*.[3] The central question being; how does the court's recent ruling affect the rights of children born out of wedlock and the constitutional principles designed to protect them?

In *FOA v RAO,* the court grappled with the legitimacy of removing a father's name from a child's birth certificate after doubts surrounding biological paternity emerged. While the court's decision to recognise the need for removing the name of a non-biological father aligns with the best interests of the child, it paradoxically relied on the controversial Section 12 of the Births and Deaths Registration Act[4] – a provision that was previously deemed unconstitutional in *LNW v Attorney General*.[5] This reliance not only revives an invalidated statutory provision but also raises critical concerns regarding the judicial precedent and the doctrine of *stare decisis*.

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1 Martin Woodhead and Liz Booker, 'A sense of belonging', *Early childhood matters,* 2008, 3.

2 *FOA v RAO and 2 others,* Miscellaneous Civil Application E195 of 2023, Ruling of the High Court at Kisumu, 10 June 2024 [eKLR].

3 *LNW v Attorney General and 3 others; Kenya National Commission on Human Rights (KNCHR) (Amicus Curiae); Law Society of Kenya (Interested Party)*, Petition 484 of 2014, Judgement of the High Court at Nairobi, 26 May 2016 [eKLR].

4 Section 12 of the Births and Deaths Registration Act provides that no person shall be entered in the register as the father of any child except either at the joint request of the father and mother or upon the production to the registrar of such evidence as he may require that the father and mother were married according to law or, in accordance with some recognised custom.

5 *LNW v Attorney General and 3 others,* para 111.

This case review is structured to examine the implications of the ruling in *FOA v RAO* on the rights of children born out of wedlock, scrutinising the constitutional and legal inconsistencies that arise from the court's approach. First, it will provide a hypothetical background that provides an example of the lived realities of children in Kenya who undergo this challenge which will form a basis of the discussion. Second, it will analyse how the court's interpretation of Section 12 conflicts with the constitutional protections afforded to children under Articles 27, 28, and 53 of the Constitution of Kenya (2010). Third, the discussion will illuminate the administrative and procedural challenges that render the court's directive impractical. Finally, this critique will address the implications of relying on outdated and unconstitutional legal provisions, ultimately arguing for a consistent application of constitutional protections and the necessity for legislative reform to safeguard the rights of all children. Through this analysis, this case review aims to advocate for a legal system that not only recognises but also actively protects the identity and rights of all children, irrespective of their circumstances of birth.

Hypothetical background of Maina and his mother Wanjiku

Imagine an innocent seven-year-old boy. For purposes of identification let us call him Maina as it is his constitutional right.[6] Maina has just returned from school where, during a show-and-tell session, his friend proudly displayed a family tree project. Maina, eager to replicate the same, asks his mother, 'Mummy, who is my father?'. His mother, startled and saddened, can only glance at the row of continuous X marks on the birth certificate where the father's name should have been. The innocent question hangs in the air, heavy with unspoken truths and societal judgments. Maina's wide, curious eyes gaze up at her mother, Wanjiku, who feels her heart constrict with a mixture of love, pain, and frustration. How can she explain to her son that the law – the very sys-

[6] Constitution of Kenya (2010) Article 53(1)(a).

tem meant to protect and serve its citizens – has deemed Maina's existence less worthy of recognition than his peers?

Wanjiku's mind races back to that fateful day at the registry office. She had gone, full of hope, to register Maina's birth, only to be met with cold bureaucracy and archaic legislation. The registrar's words still echo in her ears, 'I am sorry, madam, but according to the Registration of Births and Deaths Act, Section 12, we cannot enter the father's name without the consent of both parents or proof of marriage'. As Wanjiku looks into her son's eyes, she sees not just curiosity, but the reflection of countless other children born out of wedlock across Kenya – children whose identities have been partially erased by a stroke of the legislative pen, their rights diminished simply because of the circumstances of their birth.

If Maina and Wanjiku had not just existed in my head, that would have been their experience eight years ago. That was before the High Court pronounced Section 12 of the Registration of Births and Deaths Act unconstitutional in *LNW v Attorney General and 3 others*.[7] The finding of the court was founded on the inconsistency of the Section with Articles 27, 28 and 53 of the Constitution of Kenya (2010) because of its discrimination against children born out of wedlock and its failure to respect the inherent dignity of such children by failing to recognise that every child has a constitutional right to a name.

This finding was further reiterated in *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another*.[8] Nevertheless, the High Court in a recent ruling, *FOA v RAO and 2 others* departed from its previous finding and relied on the long-repudiated provision. This ruling reignites the debate over the rights of children born out of wedlock and the role of the judiciary in protecting those rights.

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7 *LNW v Attorney General and 3 others*, para 111.

8 *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and* another, Petition 17 of 2014, Judgement of the High Court at Kakamega, 7 February 2019 [eKLR] para 62.

The return of Section 12 of the Births and Deaths Registration Act in *FOA v RAO and 2 others*

In the case, *FOA v RAO and 2 others*, FOA, a man hailing from Kisumu County, sought to erase his name from the birth certificate of a child, JMO, who he once believed to be his own. Initially convinced by his former lover, RAO, of his paternity, FOA had dutifully inscribed his name on the child's birth certificate. However, doubts gnawed at him, prompting a clandestine DNA test that shattered his assumptions: he was not the father. RAO vehemently disputed this, asserting that their relationship and co-parenting had been harmonious and that the DNA test, performed without her consent on their autistic child, was invalid. Amidst legal skirmishes and missed court dates by RAO, a second DNA test was done which only corroborated the first. The Court, granted FOA's plea to sever his legal ties to the child.

At paragraph 25, the Court noted that the applicant admitted to allowing his name to be used for registering the child during the issuance of the Birth Certificate. However, the Court found no evidence of a joint request for including his name as the child's father in the register of births, as required by Section 12 of the Births and Deaths Registration Act.[9] Further, at paragraph 30, the Court cited the outdated and unconstitutional Section 12 of the Births and Deaths Registration Act and ordered JMO's birth certificate to be recalled. It then directed the second and third respondents to issue a new birth certificate for JMO under the provisions of Section 28(1) and (2) of the Births and Deaths Registration Act, with or without the name of JMO's biological father.[10]

The Court's decision to order the correction of the minor's birth certificate by removing the erroneously listed father's name was ultimately correct. This action aligns with the best interests of the minor, as established by legal precedent. In *FKK and another v Attorney General*

[9] Births and Deaths Registration Act (Chapter 149) Section 12.

[10] *FOA v RAO and 2 others*, para 25-31.

and others,[11] the applicants sought the removal of the second applicant's name from the birth certificate after a DNA test confirmed that the second applicant was not the biological father of AKM, the minor. The child's mother, FKK, had registered the birth and named KLM, the second applicant, as the father, under the belief that he was the biological parent. Following the revelation of the DNA test results, both applicants requested the Court to amend the birth certificate. The court granted this request, affirming that the correction served the child's best interests.[12]

However, in *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another*, the Court rejected the first petitioner's prayer for an order directing the first respondent to reissue the first petitioner's children with new birth certificates bearing the name of their father. The Court held that before such names (names of fathers of children born out of wedlock) are entered into the register there has to be some regulations in place.[13] This was after the Court had found Section 12 of the Births and Deaths Registration Act unconstitutional.

The Court relied on the judgement of Lady Justice Mumbi Ngugi in *LNW v Attorney General and 3 others*, the case that had initially declared Section 12 of the Registration of Births and Deaths Act unconstitutional. When the Lady Justice Mumbi Ngugi invalidated the provision of Section 12 of the Births and Deaths Registration Act, she directed the Registrar of Deaths and Births, the second respondent, to within forty-five (45) days, put into place mechanisms to facilitate the entry into the birth register of names of the fathers of children born outside wedlock.[14]

Regretfully, the same has not been complied with eight years down the line. Bearing this in mind, in line with the provision of Section 28 of the Births and Deaths Registration Act that mandates the Principal

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11 *FKK and another v Attorney General and 2 others*, Civil Suit No 3 of 2014, Ruling of the High Court at Nairobi, 19 November 2014 [eKLR].

12 *FKK and another v Attorney General and 2 others*, 2.

13 *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another*, para 60.

14 *LNW v Attorney General and 3 others*, para 117.

Registrar to correct any errors in any register or index but not erase the original entry, and the orders made in *FOA v RAO and 2 others*, it would be impossible to implement the order directing the second and third respondents to issue a new birth certificate for JMO, with or without the name of JMO's biological father.[15]

Practical implications and administrative challenges of enforcing the court orders

The enforcement of the order to issue JMO a new birth certificate with or without the biological father's name raises significant practical implications and administrative challenges. First, if the second and third respondent were to issue JMO a new birth certificate with the name of his biological father, what procedure would be followed? Section 28 of the Births and Deaths Registration Act allows the Principal Registrar to correct any error or omission in any register or index, provided the Births and Deaths Registration Rules, 1996 are followed and the prescribed fee is paid (which the Principal Registrar may waive at their discretion in specific cases).[16]

These corrections must be made without erasing the original entry and must be authenticated by the Principal Registrar's signature.[17] These rules only lay out the procedure for registering new births,[18] and new deaths,[19] but do not lay out the procedure for the correction of an error.

This observation was also made by Lady Justice Rose Ougo in *FKK and another v Attorney General and 2 others*.[20] Therefore, if the name of the biological father is to be included, the lack of clear regulations and

15 Births and Deaths Registration Act, Section 28(1) and (2).
16 Births and Deaths Registration Act, Section 28(1).
17 Births and Deaths Registration Act, Section 28(1).
18 Births and Deaths Registration Rules (1996) Part III.
19 Births and Deaths Registration Rules (1996) Part IV.
20 *FKK and another v Attorney General and 2 others*, 2.

mechanisms to facilitate this inclusion, means that the implementation of such an order is fraught with uncertainty and potential administrative chaos.[21] This not only burdens the Principal Registrar but also sets a precarious precedent for future cases, where similar orders might be issued without the necessary legislative and administrative frameworks in place.

A quintessential case illustrating the labyrinthine technicalities encountered in rectifying errors on birth certificates is *HBAAA and another v Registrar of Births*.[22] In this matter, the petitioners sought the removal of an incorrect entry of the father's name of their child, HH and substitution with the correct name. The error originated when the minor's mother, the second petitioner, provided an inaccurate name while recuperating from a caesarean operation. Her condition impeded her ability to furnish precise information during the registration process. Despite persistent attempts to amend the error, the registrar steadfastly refused, insisting on a court order. Even after the first petitioner established paternity through a DNA test, upon request by the registrar, the registrar's resistance persisted, necessitating judicial intervention to resolve the matter. Ultimately, it was only through litigation that the applicants found relief.

Conversely, in the case at hand, if the second and third respondents were to issue JMO a new birth certificate without the name of his biological father, then that would open the floodgates of numerous violations of the child's rights enshrined in the Constitution of Kenya (2010) and other instruments.[23]

Every child has the right to a name which assigns the child an iden-

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[21] This was highlighted in *NSA and another v Cabinet Secretary Ministry of Interior and Coordination of National Government and another,* para 60.

[22] *HBAAA and another v Registrar of Births*, Miscellaneous Application E15 of 2021, Judgement of High Court at Nairobi, 2 December 2022 [eKLR].

[23] Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, Articles 7 and 8; African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49 (1990), Article 6; General Comment No: Article 6 on the right to a name, registration at birth, and to acquire a nationality, 16 April 2014, ACERWC/GC/02 (2014), ACERWC.

tity.[24] One might ask, what is a name? As answered elsewhere with regards to children born out of wedlock, it is everything.[25] Erasing the father's name from the child's birth certificate is equivalent to partially erasing the identity of the child.[26] Having a father's name on a child's birth certificate guarantees the child that they shall be cared for by both parents.[27] It also creates a bridge to access and enjoy a host of rights and privileges which cannot be enjoyed by a child who does not know who the father is. For example, the right to inherit property from both parents.

A father's name also creates a foundation for nationality and citizenship for the child in a situation where the mother is not a Kenyan citizen.[28] Furthermore, it is in the best interests of a child to know who their father is. In *Re R (a Child) (Surname: Using Both Parents')*, the court held that a child has the right to know about their parentage.[29] This has now developed to be an internationally recognised right.[30]

Implications of judicial inconsistency from the case

The ruling in *FOA v RAO and 2 others* starkly contrasts with the progressive stance the High Court has taken in *LNW v Attorney General and 3 others* and, *NSA and another v Cabinet Secretary Ministry of Interior and*

24 Constitution of Kenya (2010) Article 53(1)(a).

25 Susan Kimani, '*LNW v Attorney General, Registrar of Births and Deaths and 2 Others (Petition No 484 of 2014)*', *AfricanLii*, 23 August 2016.

26 Brian Machina, 'Promoting the best interests of the child: Kenyan High Court breathes life into the right to a name and an identity', *Oxford Human Rights Hub* (*OHRH) Blog*, 28 September 2016.

27 *LNW v Attorney General and 3 others*, para 110 and 105.

28 Article 14(1) of the Constitution of Kenya 2010 provides that a person is a citizen of Kenya by birth if on the day of the person's birth, either the mother or father of the person is a citizen. In a situation where the birth certificate of the minor does not indicate the father's name, who is Kenyan, then the child will not be recognised as a citizen by birth if the mother is not Kenyan. For a longer discussion, see, Julie Lugulu, 'The child's right to a nationality in Kenya under the Children Act of 2022', 7 *Kabarak Journal of Law and Ethics* (2023) 53-68.

29 *Re R (a Child) (Surname: Using Both Parents')* [2001] EWCA Civ 1344, para 14.

30 See, Convention on the Rights of the Child, Article 7.

Coordination of National Government and another. In the latter cases, the Court upheld the rights of vulnerable individuals and set a precedent to protect the constitutional rights of children. By relying on Section 12 of the Registration of Births and Deaths Act, the Court not only resurrected an unconstitutional provision that should have remained a legislative ghost, but also undermined the earlier jurisprudence that sought to safeguard the fundamental rights of children. This decision is akin to reopening legislative wounds that the High Court has previously sought to heal through a judicious interpretation of the law. It regresses from the path of justice and equality, leaving children vulnerable to the very injustices that the court had previously worked to rectify. Such inconsistency perpetuates a cycle of legal uncertainty and social injustice.

To comprehend the gravity of this judicial regression, we must first revisit the constitutional principles that were upheld in *LNW v Attorney General*. Articles 27, 28, and 53 of the Constitution of Kenya (2010) which enshrine the rights to equality, dignity, and protection of every child. The High Court's declaration of Section 12 as unconstitutional was a beacon of hope, signalling a shift towards a more inclusive and just society. The provisions set out in Section 12 of the Births and Deaths Registrations Act were discriminatory to children born out of wedlock. This judgement recognised that every child, irrespective of the circumstances of their birth, deserves recognition and protection under the law.

Disregarding these constitutional protections, the court in *FOA v RAO and 2 others* puts the children born out of wedlock in harm's way. Moreover, the ruling is troubling as it disregards the doctrine of *stare decisis*, which upholds the consistency and predictability of the law. Judicial decisions are meant to build upon each other, creating a coherent and stable legal framework. When a court departs from an established precedent without a compelling justification, it shows confusion and uncertainty.[31] In this case, the High Court's decision to reference and apply Section 12, despite its prior invalidation, destabilises the legal pro-

[31] *Housen v Nikoaisen* (2002) 2 SCR as cited in *Geoffrey Asanyo and 3 others v Attorney General*, Petition 7 of 2019, Judgement of the Supreme Court at Nairobi, 10 January 2020 [eKLR] para 26.

tections for children born out of wedlock. This inconsistency not only erodes public confidence in the judiciary but also signals to lower courts that adherence to previous precedence is optional.

The legislature should repeal the unconstitutional provision

In legal discourse, it is often assumed that when a court declares a statute unconstitutional, that statute is effectively nullified.[32] Judges and public officials frequently use terms like 'struck down' or 'void' to describe the court's decision, as if the offending law is immediately erased from the statute books.[33] This perception, however, is a misconception. While a court may declare a statute or certain provisions unconstitutional, this judicial declaration does not erase the law from existence. The statute remains on the books until it is formally repealed by the legislative body that enacted it.[34]

The notion that courts possess the power to 'strike down' laws is deeply ingrained in our legal and political culture. Yet, the judiciary does not have the authority to veto, suspend, or physically remove a statute from the statute books. Courts can refuse to enforce a law in a specific case, but the statute continues to exist until the legislature decides otherwise. Consequently, laws deemed unconstitutional by judicial opinion often linger in the legal system, unaddressed and unenforced, but still technically in force.

The responsibility for formally repealing unconstitutional provisions lies with the legislative branch, not the judiciary. Despite courts occasionally directing the Attorney General to take action to rectify unconstitutional statutes, these directives are not always implemented on time. As a result, unconstitutional laws can continue to masquerade as valid, undermining the integrity of our legal system. It is imperative that lawmakers act decisively to eliminate these remnants of unconstitu-

32 Jonathan F Mitchell, 'The writ-of-erasure fallacy', 104(5) *Virginia Law Review* (2018) 3.

33 Mitchell, 'The writ-of-erasure fallacy', 3.

34 Mitchell, 'The writ-of-erasure fallacy', 3.

tional legislation. They must ensure that all legal provisions reflect and uphold the constitutional principles of equality, dignity, and protection for all individuals. This is not just a matter of legal correctness but a moral imperative to safeguard the rights and freedoms of every citizen. Courts must also unequivocally reject reliance on invalidated laws and instead draw upon the progressive principles established by precedent, fostering a just and equitable legal system.

Conclusion

In examining the High Court's ruling in *FOA v RAO and 2 others*, this case review underscores a significant problem in the legal framework governing paternity and the registration of births: the need for clarity and constitutional adherence in protecting the rights of children born out of wedlock. The ruling raises the essential question about the implications of reviving an unconstitutional provision from the Births and Deaths Registration Act, which not only undermines previous judicial decisions but also threatens to erode the legal protection that safeguards the identity and rights of children.

This review has shown that the High Court's reliance on outdated legal provisions is inconsistent with the principles enshrined in the Constitution, particularly concerning the rights of children under Articles 27, 28, and 53. By situating its decision within a problematic legal context, the court risks perpetuating systemic injustices that affect children and their families.

To protect the rights of all children, there is an urgent need for legislative reform that aligns birth registration processes with the constitutional mandate. Such reform should aim to create a clear, fair, and consistent legal framework that acknowledges the diverse realities of modern families. By doing so, the law can foster a more inclusive environment where every child is recognised and protected, ultimately reinforcing the foundational principles of justice and equality in our society.