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# Restructured Citizen–Government Relationship in Kenya's 2010 Constitution and the Right of Hawkers to the City in Nairobi

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## Abstract

This article interrogates how various actors in the Nairobi Central Business District (CBD) space have made sense of the 2010 Constitution's expansive provisions on socio-political and economic rights to advance hawkers' claims to the right to the city. Using Lefebvre's and human rights notions of the 'right to the city', the study finds that the Constitution has immense potential to secure the hawkers' right to the city. However, various challenges impede efforts towards its realisation. Firstly, the 2007 no-hawking-in-the-CBD bylaw exerts inordinate influence, in practice suppressing the Constitution's aspirations. Secondly, the City authorities' efforts to facilitate the hawkers' right to the city remain ambivalent or dependent on the whims of the serving governor. Thirdly, initiatives by other actors remain elitist, top-down and opaque with only the superficial involvement of hawkers. On their part, hawkers' initiatives to claim their right to the city have suffered from fragmented leadership and individualistic self-help micro-strategies. Furthermore, hawkers have underutilised judicial activism as an avenue for challenging the constitutionality of the city bylaws banning hawking in the CBD. This strategy would potentially have provided a discursive platform to make their claim to the city the moral-legal claim envisaged by the Constitution.

**Keywords:** Right to the City, Nairobi, Kenya's 2010 Constitution, hawkers

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## Résumé

Cet article interroge le sens que donnent divers acteurs de l'espace du Central Business District de Nairobi aux dispositions de droits socio-politiques et économiques de la Constitution de 2010 dans la satisfaction des revendications de droit à la ville des colporteurs. Utilisant les notions de Lefebvre et de droits humains (« droit à la ville »), l'étude constate que la Constitution a un immense potentiel de garantie des droits à la ville des colporteurs. Cependant, divers défis entravent les efforts de sa réalisation. Premièrement, la loi de 2007 contre le colportage dans le CDB a une influence démesurée, étouffant, en pratique, les aspirations de la Constitution. Deuxièmement, les efforts des autorités municipales de facilitation du droit à la ville des colporteurs restent ambivalents, ou dépendent des caprices du gouverneur en fonction. Troisièmement, les initiatives des autres acteurs restent élitistes, descendantes et opaques avec, uniquement, une implication superficielle des colporteurs. De leur côté, les colporteurs sous-utilisent l'activisme judiciaire pour contester la constitutionnalité de la disposition, et leurs initiatives de revendication de leur droit à la ville souffrent d'un leadership fragmenté et de micro-stratégies individualistes d'auto-assistance. En outre, les colporteurs sous-emploient l'activisme judiciaire comme moyen de contester la constitutionnalité de l'arrêté municipal interdisant le colportage dans la CDB. Cette stratégie leur aurait, potentiellement, fourni une plate-forme discursive et aurait fait de leur demande de droit à la ville la revendication morale et juridique prévue par la Constitution.

**Mots-clés :** droit à la ville, Nairobi, Constitution du Kenya de 2010, colporteurs

## Introduction

Using the notion of the right to the city, this article seeks to interrogate how hawkers (as ever-present but marginalised inhabitants of the city), the Nairobi City County authorities and other relevant actors have made sense of the 2010 Constitution's enabling governance provisions to advance hawkers' claims of the right to the city. The article adopts the concept of the Right to the City from both Lefebvre's work and human rights perspectives to mean a collective right exercised by hawkers in deciding on the use of the street space. This includes participation in politics, management and administration of Nairobi City, and the right to access and re-organisation of the street space to further their social and economic benefits.

Kenya's 2010 Constitution, which has radically reordered the governance structure was received by citizens with optimism as it provided for expansive rights for citizens. In particular, and regarding the focus of this article, the constitution provides for decentralised governance instruments, such as the

County Governments Act 2012 and the County Integrated Development Plan, that would guarantee greater urban citizenship rights to city actors, including hawkers.

Hawkers' claims to urban citizenship in Nairobi has historically been contested and regulated in a contradictory manner with the '[l]aw enforcement against street vending oscillating between tolerance and brutal eviction' (Racaud, Kago & Owuor 2018:4). Hawkiers have thus always operated from the margins of Nairobi's urban space, enjoying limited urban citizenship. The continuous amendment of the bylaws on hawking shows a consistent ban of hawking in the CBD except for the sale of news and secondhand books. However, these bylaws stand in contrast with postcolonial plans, including the 1973 Nairobi Metropolitan Growth Strategy, the 2008 Nairobi Metro 2030 and the 2014 Nairobi Integrated Urban Development Master Plan (NIUPLAN), all of which sought to integrate hawking in the Nairobi CBD but which have hardly been implemented (GOK 2008:87; Karuga 1993:15; Charton-Bigot & Rodrigues-Torres 2010:27).

Despite their precarious presence, hawkers have always played a significant role in Nairobi CBD's economic system by filling gaps in the formal economic system, Hawkiers have served as a supply chain link between rural agricultural producers and urban consumers, and between manufacturers and urban consumers (Mitullah 1991; Kamunyor 2007). In Nairobi, hawking serves as the main source of livelihood for thousands of those involved in the trade, their families, generating supplement income even to those in formal employment (*ibid*).

More specifically, street hawkers in Kenya form a significant part of the micro, small and medium enterprise (MSME) sector, the majority of whom operate in the informal economy. According to the Kenya National Bureau of Statistics (KNBS 2016), the sector is large and dynamic, constituting around 95 per cent of the country's businesses and entrepreneurs. MSMEs contribute approximately 33.8 per cent of Kenya's GDP and employ about 14.9 million people, with 57.8 per cent being unlicensed enterprises. Further, according to Kenya's Economic Survey 2018, the sector accounts for over 83.4 per cent of job creation. In addition, Nairobi County accounts for the highest concentration of informal sector workers, and, since 2013, Nairobi County has contributed approximately 21.7 per cent to Kenya's GDP (KNBS 2019). The statistics here seem comparable to other studies that have shown that the informal economy remains the mainstay of urban employment in cities across Africa, Asia and Latin America (Brown 2017; Herrera, Kuépié, Nordman, Oudin & Roubaud 2012; ILO 2013).

The division of an economic system into formal and informal sectors is controversial, with various arguments on the practicality of the dualism and preconceived notions about who operates in the informal sector. On the one hand, the informal economy is understood as a kind of marginal, separate economy related to the survival strategies of marginalised social groups who share a common condition manifested in a lack of legal status and protection, extreme vulnerability and dependence on informal engagements that generate their own idiosyncratic political economy (Slavnic 2009). On the other hand, large firms, the state and its institutions are presumptively perceived as the formal economy, always operating in congruence with set rules and regulations, with the state and its institutions partly setting the rules and partly appearing as economic actors (Slavnic 2016). To the contrary, Slavnic (2009) observes that the formal economy and the informal economy should not be taken as mutually exclusive since formal actors are increasingly prone to act informally in ways that conflict with existing 'rules of the game', in order to survive economically.

The notion 'informal economy' was first coined by Keith Hart in the early 1970s, during a time when African countries were facing population growth and migration to rapidly growing cities. Hart described it as the entrepreneurial dynamism of the city migrants, as a way of generating income as the cities' limited industrial capacity failed to accommodate migrants (Hart 1973, 1985; Slavnic 2011, 2016). As such, the informal sector was seen as people taking back into their own hands the economic power that centralised agents had sought to deny them. De Soto (1989) described it as a response to the rigid mercantilist state that survives by granting to a small elite the privilege of legal participation in the economy. In developing countries, the informal economy is closely associated with poverty, minimal education and illegality. In developed economies, informality is associated with immigrants from developing nations as opposed to structural changes within these economies (Slavnic 2011, 2016).

As a consequence of the marginality thesis and the illegality associated with informal economies, Thornton (2000) observes that informal sector workers receive no supportive role from the state, since their activities are perceived to contravene existing laws and regulations. Consequently, informal workers have fewer ties with the government, they feel left out of the political system and are less likely to have high levels of support or protection. On the other hand, the formal sector participants receive government facilitation and protection. This results in a tendency for political, media and academic discourses to lay more emphasis on the formal bureaucratic society while entrenching the exclusion and marginalisation of informal economic actors (Thornton 2000; Slavnic 2011, 2016).

Despite the contribution of hawkers to Nairobi's economic system, the authorities constantly associate them with lawlessness, traffic congestion, crime and insecurity, health concerns, noise and environmental pollution, as well as a threat to tax-paying traders and enterprises (Bocquier, Otieno, Khasakhala & Owuor 2009). Hawkers are thus considered illegal, offered no protection from the state and local authorities and are forced to operate at the peripheries of the CBD. This denies them the right to a livelihood, the right to work and the right to participation and appropriation (Mitchell 2003). This exclusion further expands the disparity between the rich and the poor. Street hawkers' exclusion from the public street space signifies a dispossession of urban citizenship, which is the substantive citizenship that entails access to political, civil, cultural and economic rights that is established at the sub-national level (Purcell 2002; Swider 2015).

The 2010 Kenya Constitution gave previously marginalised communities an increased stake in the political system by enabling local solutions to be found for local problems (Cheeseman, Lynch & Willis 2016). As Bassett (2016) has observed, the 2010 Constitution offers transformative potential for urban governance in Kenya. It is against this backdrop that this article proceeds to interrogate how varied actors in Nairobi CBD have made sense of the 2010 Constitution and its other enabling legal frameworks to advance hawkers' claims to the right to the city.

## **Methodology and Data**

The data for this article was derived from document analysis, interviews, Focus Group Discussions (FGDs) as well as non-participant observation of hawkers and hawking practices within the streets of Nairobi.

The document analysis involved evaluating legal and policy documents relevant to hawking in the Nairobi CBD before and after the promulgation of the 2010 Constitution of Kenya. These documents included the Kenya Constitution 2010, the County Governments Act 2012, the Nairobi City County Persons with Disabilities Act 2015, the Street Vendors (Protection of Livelihood) Bill 2019 and the City of Nairobi by-laws amended in 2007.

With regard to interviews, three sets of actors in Nairobi City were interviewed between September 2018 and January 2019. The first set of actors interviewed were hawkers who sold goods and not services, were mobile and spread their merchandise on the ground or improvised stands on the major streets of the CBD. These are Tom Mboya Street, Moi Avenue, Ronald Ngala Street, River Road, Taveta and Latema roads.

The second group interviewed were county government departmental directors or their representatives who were directly involved in the formulation, implementation and enforcement of policies in the Nairobi City County Government touching on hawkers and hawking. In this respect officers from the following departments were interviewed: Urban Planning; Environment and Natural Resources; Security, Compliance and Disaster Management; and Commerce, Trade and Industrialisation. The third set of interviewees were officers from the Nairobi Regeneration Programme, which is a combined initiative of the National Government and the Nairobi City County that aims at changing the image of Nairobi.

The researchers also conducted FGDs with officials of the following hawkers' associations: Kenya National Alliance of Street Vendors and Informal Traders (KENASVIT); Kenya National Hawkers Association (KENAHA); Nairobi Informal Sectors Confederation (NISCOF); the United Disabled Vendors Group (UDTG); and People with Disabilities Small Traders Organisation (PDSTO). The FGDs were carried out on 18 July 2019 to establish the hawkers' awareness of the legal and policy provisions regarding their social political and economic rights and the efforts they were undertaking as individuals and groups towards claiming the rights provided for in law.

### **Theoretical Framework: The Right to the City**

This section traces the origin of the concept of the right to the city, examines contrasting views of the notion and provides a conceptualisation of the right to the city in the context of street hawkers' claims to urban citizenship, as will be used in this study.

Though the notion of the right to the city can be traced from the works of Henri Lefebvre, which first appeared in his 1968 *Le Droit à la Ville*, the last decade has seen a resurgence of the notion as a central idea in urbanisation discourses. The notion continues to evolve as a unifying call for social inclusion against the exclusionary effects of urbanisation and the commodification of public space typified by the attendant urbanisation of poverty (Brown 2010; Omoegun 2015). According to Lefebvre, a French philosopher, the right to the city is a right to the 'oeuvre', the right to participation and appropriation (Mitchell 2003). While the right to participation necessitates the right of city residents to be involved in all decisions in the production of the urban space, the right to appropriation involves the right of city residents to move in, dwell and utilise by manipulating and modifying that urban space (Purcell 2002). Harvey describes it as a common right rather than an individual one, 'the freedom to make and remake our city and ourselves' (Harvey 2008:1).

Lefebvre envisioned the right to the city as a drastic reorganisation of political and social economic affairs as opposed to being a recommendation for reform or partial resistance. To a large extent, Lefebvre sought the establishment of rights not for all residents but for those whose rights had been denied and were in need (Mayer 2012) and for those whose rights had been deprived of financial and political power (Marcuse 2009). Though Lefebvre's argument was based on urbanisation experiences in France and largely in other Western nations, the rebirth of the concept has universal underpinnings.

Drawing from Lefebvre's original idea, advocacy institutions have fronted a human rights perspective for the right to the city aimed at addressing the exclusionary effects of neoliberalism (Mayer 2012). They conceptualise the notion as the overarching theme in efforts to direct legislation and public policy towards the promotion of equity and justice in urban development. However, the human rights perspective has faced a number of criticisms. First, the perspective has a conformist approach which fails to address the underlying invisible forces that necessitate the call for the establishment of rights in the first case. Second, while the human rights perspective aims at fostering inclusion in the existing global capitalist economic system, it fails to address the issues that surround this model of urban development, which are perceived as a foundational problem. Lastly, although the human rights perspective simply focuses on neoliberal policy, such as poverty alleviation, it fails to address the key economic policies of neoliberal policy that perpetuate exclusion and poverty (Omoegun 2015; Mayer 2012).

Both the Lefebvre and human rights perspectives share a common philosophical origin and envision just, sustainable and democratic cities (Mayer 2012). However, they differ on how the right to the city can be realised. While Lefebvre perceives struggles and confrontation as the means to achieving the right to the city, the latter sees international and legal instruments as the main approach (Omoegun 2015). Further, other scholars adopt a democratic perspective to the right to the city, with McCann (2005) noting that it involves a lack of marginalisation in decision-making and Harvey (2008) seeing it as a call to the democratic management of resources. Attoh (2011), though, generally agreeing with the democratic approach that the right to the city can be thought of as a right to communal decision, says it should also be thought of as a right against unjust communal decisions.

There are various conceptions of what exactly constitutes a right and who has a right to the city. To begin with, Mitchell and Heynen (2009) consider the right to the city as being capacious and open. These authors observe that the value of the right to the city is in its capaciousness, in that it 'allows for solidarity across political struggles while at the same time focusing attention

on the most basic conditions of survivability, the possibility to inhabit, to live' (Mitchell & Heynen 2009:616). Secondly, Lefebvre conceptualises the right to the city as a right to freedom, socialisation, right to habitat (make a life) and a right to inhabit (collectively own, dwell and be in a place unconstrained by demands of exchange value). Thirdly, Mattila (2005) considers that the right to the city encompasses: the right to housing; the right against police callousness and state overreach; rights to public participation; rights against established property laws; and rights to communal good. Fourthly, Mitchell (2003) considers the right as constituting the right to occupy; and fifthly, Gibson (2005) sees it as the right to define public policy. Finally, Marcuse (2009:190) notes, the demand for the right to the city is for the 'material necessities of life, the aspiration is for a broader right to what is necessary beyond the material to lead a satisfying life'. In a nutshell, the right to the city incorporates multiple rights that go beyond a right to public space, to constitute socio-economic, collective, negative and positive rights (Attoh 2011), indeed a 'right to a totality' (Marcuse 2009:193).

On the question of who has the right to the city, scholars accredit it to diverse groups, to those who 'live in the city, who contribute to the body of lived experience and lived space' (Marc Purcell as cited in Attoh 2011:675). Marcuse (2009) ascribes it to the excluded and as a cry for the alienated, to those who are deprived, oppressed, jobless, impoverished and discontent; in other words, those disrespected and given unequal treatment.

The recent revival of interest in the notion of the right to the city as a key theme in urbanisation discourses has been attributed to rapid urbanisation and the emergence of international social movements demanding the right to the city (Harvey 2008; Omoegun 2015). In this regard, this article on the one hand borrows from Lefebvre's work on the right to appropriation and participation—the right to make decisions and the right to access, dwell and utilise the urban space. On the other hand, it borrows from the human rights perspective, which seeks the realisation of the right to the city through the assimilation of universal human rights in national laws.

The subsequent sections present the findings of the study under four headings. First is a discussion of the provisions of the 2010 Constitution and the enabling County Governments Act 2012, and the extent to which the hawkers perceived the possibilities these legal provisions offer in advancing their right to the city. This is followed by a description of the strategies the hawkers have employed to advance these possibilities. The third section interrogates the Nairobi City County's position regarding the hawkers' right to the city after the promulgation of the 2010 Constitution. The fourth section critiques initiatives by other actors seeking to advance hawkers' right to the city in Nairobi, and is followed by the conclusion.

## **Kenya's 2010 Constitution and its Possibilities for Advancing Hawkers' Right to the City in Nairobi**

There are important hallmarks of the 2010 Constitution of Kenya that offer great possibilities in advancing hawkers' right to the city in Nairobi. The first is that the 2010 Constitution acknowledges from the outset that all sovereign power belongs to the people of Kenya. The constitution also provides for citizen participation at all levels of decision-making and governance. The second is that the Constitution has an elaborate bill of rights rendered as an integral part of Kenya's democratic state, which provides the framework for social, economic and cultural rights. The Constitution declares that the purpose of the bill of rights is to protect and preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

Of note in the bill of rights, is Article 43, on economic and social rights, which enshrines the right to be free from hunger and the right to social security. The third key point is that the Constitution provides for a devolved government structure with forty-seven county governments—Nairobi City County being one of them. The objects and principles of the devolved government as captured in Chapter 11 articles 174 and 175 include, among others: promoting the democratic and accountable exercise of power; giving powers of self-governance to the people to enhance their participation in the exercise of the powers of the state and in decisions affecting them; recognising the right of communities to manage their own affairs and to further their development; protecting and promoting the interests and rights of minorities and marginalised communities; promoting social and economic development and the provision of proximate, easily accessible services throughout Kenya; and ensuring equitable sharing of national and local resources throughout Kenya.

As an enabling law of the foregoing, as provided for in the Constitution, the County Governments Act 2012 has many provisions that would have seen the greater entrenchment of urban citizenship for hawkers in Nairobi. The Act provides for inclusivity and people participation in county governments. It also provides for the right to petition a County Assembly to consider any matter within its authority, including enacting, amending or repealing any of its legislation. Likewise, the Act provides for the protection and promotion of the interests and rights of minorities, marginalised groups and communities, and more specifically provides for these groups to seek redress for grievances they may have experienced.

As provided in the County Governments Act 2012, an important function given to County governments is the planning and development of the County guided by, inter alia, the following principles: protect the right to self-fulfillment within the County communities, with responsibility to future generations; protect and integrate the rights and interest of minorities and marginalised groups and communities; engender effective resource mobilisation for sustainable development; and serve as a basis for engagement between the County government and the citizenry, other stakeholders and interest groups. The County planning framework is expected to develop a County Integrated Development Plan, incorporating economic, physical, social, environmental and spatial planning, as well as sectoral plans. The plans would be expected to outline the desired or undesired utilisation of space in a particular area, identify areas where strategic intervention is required and indicate areas where priority spending is required. As is discernable from the foregoing, the Constitution and the enabling County Governments Act 2012 provided for a wide range of possibilities for hawkers to assert their right to the city.

The next section examines how hawkers have both perceived the provisions above and the strategies they have employed to advance their right to the city in Nairobi.

### **Hawkers' Claims to the Right to the City after the Promulgation of the 2010 Constitution**

After the promulgation of the 2010 Kenya Constitution, both the national and County governments have continually taken a hardline stance, declaring street hawking in Nairobi CBD illegal and persistently and forcibly carrying out operations to evict hawkers from the streets. This leaves them excluded from the street space, forcing them to operate at the margins of the city. The exclusion of hawkers has been exacerbated by elitist laws that propagate the colonial ideals of hygienism and gentrification without considering circumstances that have changed over time as well as the power given to citizens to be involved in governance as enshrined in the 2010 Constitution.

We sought to understand from the hawkers, during our FGDs with the hawkers' association officials, whether they understood the wide range of possibilities the Constitution and the enabling County Governments Act 2012 provided for them to assert their right to the city. The officials expressed a clear idea of various avenues afforded them in the two instruments of governance, even though they said their understanding was not comprehensive, and was even less so among most other hawkers. One of the officials said '*katiba hatujaielwa kabisa*' (We have not understood

the Constitution comprehensively). However, they expressed their dismay at the Nairobi City 2007 bylaws banning hawking in the Nairobi CBD, which seemed to override the Constitution. One official said '*katika hawking Nairobi kuna katiba na bylaws ... bylaws ambazo ndio mbaya kabisa hazitambui katiba, hazifanyi nini ... hizi ndizo zinaendelea kutumika*' (For hawking in Nairobi there are bylaws and the Constitution ... the bylaws, which are terrible, do not recognise the Constitution; they seem to be law unto themselves ... they continue to be used to regulate hawking).

The Nairobi City (hawkers) bylaw, 2007 No. 11, states, 'any person who engages in hawking with or without a permit within the CBD area as defined by the Council from time to time shall be guilty of an offence under these bylaws'. In addition, bylaw No. 12 renders guilty of an offence any person who buys from hawkers. These bylaws remain in force to date despite successive master plans that have recommended the integration of hawking into urban policies and planning (GOK 2008; Nairobi City County [NCC] 2014), nine years after the promulgation of the 2010 Constitution. The continued existence of the bylaws, contrary to the spirit of the Constitution, infringes on the hawkers' right to appropriation, subsequently denying them the right to trade and earn a livelihood.

The FGDs revealed that hawkers seemed helpless in the face of existing bylaws that contravene the Constitution. Another official commented that:

*wengi wetu, percentage kubwa wanaelewa kipengele una haki ya biashara—economic right—uko na haki ya kukula chakula—protection by the government, wanajua ziko lakini sio kwa kina. Swali ni aje haki nitapigania? Yaani nimepatiwa haki nitapigania aje?* (Most of us, a large percentage, are aware of economic rights and social rights though not in much detail. However, the question is, how do I fight for these rights? So, I have been given these rights; how do I fight for them?)

The researchers thus sought to find out what initiatives the hawkers had taken, as had been done by other sectors of Kenyan society aggrieved by existing legislation that ran afoul of the new Constitution, to challenge the Nairobi City bylaws that banned hawking in the CBD. The association officials clarified that they were aware of this possible line of action but rued the fact that it had remained unviable for a number of reasons. One handicap was that they perceived the justice system in Kenya as expensive. For instance, one of the officials said:

*ndio upate justice in Kenya hata kama ni kortini tunajua hizo sheria ziko zinafanywa lakini hata kama ni kortini, kama huna pesa hakuna kitu ambao utafanya kitu ya kwanza kuna zile lugha za kisheria ambao zinatajikana zijulikane zitumike ... inabidi nitafute wakili, kwenda kwa wakili utapata*

*kufungua file inaweza kuwa ukiambiwa kidogo sana ni kama 20k. Sasa ndio uanze procedure ya kumweleza ndio sasa apeleke kortini so in the first place, utapata huyo wakili kama pengine hauna 50k zikiwa kidogo sana ndio hiyo kesi ainze, hauwezi fanya.* (Securing justice in Kenya is very expensive—even if you know that laws supporting your cause exist. For instance, because of the legal jargon in which the law is written, you will need to hire a lawyer, open a file, which will cost you at least 20,000 Kenya Shillings. For the lawyer to commence the case in court, you will need at least 50,000 Kenya Shillings. Without this you cannot do much).

For the hawkers to effectively lay claim to their right to the CBD street space and secure a livelihood, they need legal aid and empowerment to defend the gains made under the bill of rights and to fight the seemingly hard-to-win legal battles that pit the hawkers against the City authorities. This approach apparently worked in the case of Durban street vendors in South Africa, and, as Skinner (2017) notes, having access to free and high-grade legal aid is vital for informal sector workers in the face of dominant formal sector interest.

In addition, the Nairobi hawkers' association officials observed that the different hawkers' associations had for a long time been fragmented and beset with rivalry, such that they were unable to form a united front to speak with one voice about their plight. One official, for instance, said, '*Shida ni kwetu, kwa mfano NISCOF wakisema hivi, KENAHA wanaamka wanasema hiyo hatujui ingawa tulikuwa mkutano pamoja tukikubaliana hivyo.*' (The problem is on our part [as leaders]. For instance, if a NISCOF official makes a pronouncement that had been agreed in a collective meeting of all hawkers' associations, KENAHA will protest, claiming that what was said is NISCOF's stand, yet that is what was collectively agreed).

Likewise, the FGD revealed that City authorities had perfected the art of manipulating the hawkers' leadership so that they were unable to unite. Furthermore, interviews with hawkers registered a cynicism about association leadership because experience had taught them that the leaders of such groups would normally use their positions to extract personal benefits from the authorities and City politicians to the detriment of the hawkers' claims to the right to the city.

By and large it would seem that, in the recent past, hawkers have underutilised macro-level strategies in their claims to the right to the city. Macro-strategies involve negotiations between organised groups of vendors and the state authorities (Forkuor, Akuoko & Yeboah 2017). Hawkers' associations are often marred by fragmentation, mistrust and opportunism, as well as a lack of pursuit of long-term policy and legal initiatives. This is

in contrast with the situation in the first decade of the twenty-first century, when, with the help of NGOs, hawkers' associations seemed to project a more united and visionary approach (Morange 2015). The status of hawkers' associations is by and large reflective of the national political party organisation landscape in the country, which is beset with the same issues (Gachigua 2016; Wanyama 2010).

In place of macro-strategies, hawkers have largely resorted to micro-level survival strategies. These take place between individual street vendors and City authorities (Forkuor et al 2017). These strategies include forming informally organised social security networks that alert hawkers of impending swoops, and operating lightly on the streets to ensure that they can quickly scoop up their wares and run when a sudden swoop occurs and, in the event of confiscation or loss of wares, minimise their loss.

Hawkers also offer bribes as individuals, and in some cases as groups, to appease City inspectorate officials to avoid disruptions and arrests. They engage in passive resistance, too, through pleading guilty to all charges preferred against them in court regardless of the truthfulness of the charges, in order to shorten the court process and secure their freedom to return to the streets. Furthermore, hawkers foster symbiotic relations with other seemingly antagonistic actors in the Nairobi CBD, such as public service vehicle operators and licensed traders, in order to help them negotiate their precarious presence in the city.

The discussions here suggest that the hawkers had a sufficient understanding of the provisions of the Constitution and the County Governments Act 2012. However, their overreliance on micro-level strategies in their claim to the right to the city at the expense of the macro-strategies may prolong their realisation of their right to the city in Nairobi, since. As Scott (1985) has commented, the micro-level strategies may work in the long run by nibbling away at the oppressive structures of society, but they take a long time to bear fruit.

It would seem that the hawkers in Nairobi might benefit from the experience of hawkers in India. Organising at the macro-level under the umbrella of the National Association of Street Vendors of India (NASVI), the hawkers in India mobilised public support for the legal recognition of hawkers' right to the cities in India (Joshi 2018). The hawkers in Nairobi may also benefit from the counsel of Brown (2017), who notes that in the absence of collective empowerment and actions, whether formally constituted or informal, the marginalised, the poor and the excluded may not gather numbers large enough to effect the desired change. To strengthen a collective struggle, it is imperative for hawkers and other marginalised

groups to build forums and networks that provide social, political and economic space to resist, dialogue and organise proposals towards building more inclusive public policies.

The section that follows interrogates the Nairobi City County authorities' position on the hawkers' right to the city after the promulgation of the 2010 Constitution.

### **Nairobi City County Authorities' Position on the Hawkers' Right to the City**

As earlier stated, the County Governments Act 2012 stipulated that counties are required to develop a County Integrated Development Plan. In this regard, the Nairobi City County Government developed and inaugurated the Nairobi Integrated Urban Development Master Plan (NIUPLAN) in 2014. The plan envisaged a compact and inclusive city that ensured spatial and social equity with multiple core centres and a revitalised CBD. This plan recognised hawking as an integral activity in the city. It also acknowledged that the population of market traders was mostly low-income earners who ventured into micro-enterprise activities. These economic activities play an important role in the city's economy in terms of employment generation and the delivery of urban services. In addition, the plan acknowledged that the number of traders and buyers had increased considerably, putting pressure on the infrastructure and capacity of existing market facilities, thus encouraging street trading (NCC 2014:2–34). The plan therefore proposed ways of accommodating hawking into the urban planning policies. While the NIUPLAN acknowledged hawkers and the right to the city, it is yet to be implemented, more than five years after its launch.

In our interview with the Nairobi City County Director of Planning, he expressed frustration, saying that the department had painstakingly generated master plans informed by extensive research, yet for political reasons the plans had been ignored or not implemented as envisaged. He wearily commented: 'Politics is a problem to planning in Nairobi.'

There has also been an initiative by the County Executive to amend the 2007 bylaws in order to align them to the 2010 Constitution. This presumably included the amendment of the hawkers' bylaws that would have an impact on the hawkers' claim to the right to the city. However, this remains a proposal and has not reached the County Assembly for debate, several years after the inauguration of the County governments. The existence of conflicting legal and institutional domains on hawking in Nairobi CBD streets disadvantage the hawkers and leave them prone to exploitation and extortion. The continued existence of the repressive bylaws

represents efforts to redefine what is considered acceptable in the public space and recreate the public sphere as intentionally exclusive (Mitchell 2009). In this case, legal reforms and a collective push to implement an all-inclusive city plan are a prerequisite to extend the right to produce, occupy and utilise the CBD street space, as well as the right to work and earn a decent livelihood on the streets, not just for hawkers but also for other marginalised groups.

Even in the face of the contradictory approaches to handling hawkers' right to the city, as shown above, there seem to be some subtle differences in the manner in which hawkers have been handled by the two successive Nairobi City County regimes. Though the hawkers we interviewed generally were not satisfied with the benefits the new Constitution had brought to their right to the city, they felt that the first Nairobi County government, under Governor Evans Kidero (2013–2017), was less hostile to hawkers compared to the succeeding one under Governor Mike Sonko, who took charge in 2017. They observed that, though street hawking was illegal, Kidero's government was sympathetic to hawkers living with disabilities, who would be given temporary permits to hawk in the CBD streets in the spirit of the Disability Act 2015. In addition, the County government would generally issue seasonal permits to hawkers to sell seasonal goods, like examination success cards during the national examinations period, Valentine's cards, etc. The majority of the hawkers also held the opinion that during Kidero's government, the City courts were less punitive and the City *askaris* (officers) less brutal when evicting hawkers from the CBD streets.

In contrast, hawkers expressed disappointment with Mike Sonko's government, whose pre-election populist promises had made them believe that they would be allowed to trade in the CBD streets. Furthermore, they claimed that the enforcement officers have become more aggressive, with standby *askaris* manning the city streets day and night to prevent the hawkers from carrying out their business. Both hawkers with disabilities and those without decried the confiscation of their merchandise, exorbitant charging of impounding fees and even loss of their merchandise to the *askaris*. During the devolution era, hawkers claim that the County courts have become more punitive, because upon arrest and arraignment in the City courts, one is charged with a minimum of four counts, each attracting a fine of 2,000 Kenya shillings.

It is evident from the foregoing that the position of Nairobi City County to facilitate hawkers' right to the city after the promulgation of the 2010 Constitution remains at best ambivalent or half-hearted, and at worst, keen

on maintaining the status quo in which the hawkers are denied the right to the city. It is from this understanding that the article now turns to a review and critiques initiatives by other actors seeking to advance hawkers' right to the city in Nairobi.

### **Other Actors' Initiatives in Advancing Hawkers' Right to the City in Nairobi**

The Nairobi Regeneration programme, proposed in 2017, but has not been implemented yet might help entrench the hawkers' right to the city of Nairobi. The Regeneration programme was a combined national government and Nairobi City County government initiative that aimed at changing the image of Nairobi. It was co-chaired by the President of Kenya or, in his absence, the Cabinet Secretary for Tourism, on the one hand, and the Nairobi City County Governor on the other. It comprised selected sectors in the Nairobi City County government as well as selected cabinet secretaries in the national government. Among its proposals under the theme of 'wealth and job creation' was to ensure that there were specified car-free days in some streets which would also be the days when hawkers would be allowed to trade in the CBD without restriction, on the empty parking slots. Consequently, decent, foldable stalls were designed in consultation with some hawkers in readiness for this. As much as these recommendations were to accommodate the hawkers and recognise them as belonging to the CBD streets, this programme has yet to bear fruit as hawkers remain barred from trading in the CBD streets.

Three issues militate against the success of this programme. Firstly, the programme seems an elitist initiative with only minimal or superficial involvement of hawkers and other interested parties. Secondly it is shrouded in opaqueness. For instance, in our FGD with the association officials, a NISCOF official observed '*Hii mambo tunasikia tu kwa magazeti*' (We only get to read about this programme in the news). He further lamented that he had tried to find out about the programme and how his organisation could be involved '*nimeandika email mara mbili lakini hakuna reply*' (I have written two emails and both have not been replied to). However, a KENASVIT official acknowledged that the organisation and KENAHA had been invited to one of the programme's meetings where a sample of the foldable stalls for hawkers was unveiled. During the meeting, the KENASVIT official told us that it was agreed that a pilot roll-out of the programme would first be undertaken, and a list of the participants in the pilot roll-out would be made. However, the programme officials went mum for some time, and to the consternation of those who were to participate

in the pilot roll-out, they heard and read from the media that the entire roll-out of the programme was about to be undertaken. It also emerged that the roll-out of car-free days and hawking on the car-free streets was not supported by licensed businesses within the streets. It would seem that the programme to have car-free days and hawking in the car-free streets was a knee-jerk reaction by the Nairobi City County government and its national counterpart to resolve the hawker issue through rushed declarations that were unlikely to succeed. As the KENASVIT official, who is also a member of UDTG and PDSTO observed, '*wamechukuwa mambo mingi ambayo haiwezi kutimilika*' ([The initiative] took up a complex matter in a rushed manner that would never succeed). Another NISCOF official observed that this process was true to form, that when authorities deal with hawkers, they rush through initiatives in support of hawking to hoodwink them that their plight is being resolved, knowing that they will fail—in essence it is just a gimmick used time and again. Thirdly, it seems this programme was based on the goodwill of the president and the then governor—Mike Sonko. It is not necessarily anchored in law; thus its sustainability may not be guaranteed in the long run.

Another more ambitious proposition to have hawkers secure the claim to the right to the city in Nairobi CBD street space (as well as all other urban centres in Kenya) is the Hawkers and Street Vendors (Protection of Livelihood) Bill, 2018, formulated by Governor Mwangi wa Iria of Murang'a County. In March 2018, he presented the Bill to the Senate Committee on Tourism, Trade and Industrialisation, which embraced it. The Bill has similarities both in name and content to the Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act 2014 of India. The objective of this Bill is stated as: to provide a legal framework for the recognition, protection and regulation of street vending in Kenya as well as the identification of minimum standards for street vending in Kenya. The Bill in essence seems to codify the moral and abstract aspiration of the Constitution—the 'programmatically rights' into 'enforceable legal rights' with specificities about actionable courses of action regarding obligations and entitlements between the City authorities and hawkers (Watts & Fitzpatrick 2017:45).

The key provisions of the Bill include, first, the establishment of the Hawkers and Street Vendors Registration Authority, which would be tasked with registration and overseeing policy on all activities of hawkers in the country. Second, it provides for the survey, identification and designation of vending zones according to no-vending, restricted vending and restriction-free zones as well as amenities that hawkers should be provided with. Third, it provides for the establishment of County Vending Committees that would

register and license street hawkers. Fourth, it stipulates licensed hawkers' rights in Kenya, which safeguard them from unwarranted harassment and persecution, as well as stating their obligations, such as maintaining public hygiene and the right of way for other urban citizens. Fifthly, it provides penal provisions for offences committed under the Bill, including illegal vending and bribery. It also provides mechanisms for dispute resolution. More importantly, the Bill provides for County governments to review any bylaw and other legislation that would be in contravention with the proposed law within six months of its enactment.

About one year after it was presented to the Senate Committee on Trade and Industrialisation, the Bill was published, on 24 May 2019. It was subsequently renamed the Hawkers and Street Vendors (Protection of Livelihood) Bill, 2019 and was subjected to the First Reading on 19 June 2019 and subsequently referred to the Senate Committee on Trade and Industrialisation to facilitate public participation, which was slated for 30 July 2019. All the hawkers' associations (KENASVIT, NISCOF, KENAHA, UDTG and PDSTO) represented during our FGD held on 18 July 2019 told us that they had not in any way been represented in the formulation of the Bill. The constant comment about the Bill was '*sisi tunasikianga tu hatujaiona*' (We just hear about it, but we have not seen it). This is an indicator that, unlike the formulation of the Vendors' Act in India on which this Bill is modelled, which adopted a bottom-up approach in which the Act organically grew from the lead activities of the National Association of Street Vendors of India (NASVI), the formulation of the Kenyan Bill was elitist, adopting a top-down model.

As Joshi (2018:7) explains, the Indian Act was 'a campaign unprecedented in its scale as well as its scope'. It was spearheaded in 1998 by the NGO, the Self-Employed Women's Association, that would later become NASVI, in 2003. It involved a wide collaboration of vendors' associations, NGOs, academics and international organisations. It employed multiple strategies, such as publishing studies on hawking, providing education and insurance services to hawkers, and public relations campaigns to improve the perception of hawkers among the public, such as street food festivals to counter the fear that street food was unhygienic. It communicated its activities and goals through various platforms, such as Twitter and Facebook, and maintained a website. The ultimate strategy by NASVI was to initiate legal reform and policy on street vending. Here, the organisation drafted a bill, monitored its progress, presented amendments and organised demonstrations and campaigns to nudge the politicians to pass the bill. All these concerted efforts resulted in the 2014 Act.

With regard to the formulation of the Kenyan law, an official of NISCOF told us that the only contact he had had with the Bill was during the launch of its popular version at the Sarova PanAfric Hotel in Nairobi, which he attended through self-invitation after hearing about the launch from a friend. The officials of PDSTO and UDTG on their part told us that they had made three attempts at getting the Bill without success. It is actually the researchers of this article who gave the hawkers' association leaders the comprehensive draft bill. On informing the officials of the hawkers' associations during the FGD that the Bill was due for public participation on 30 July 2019, they all expressed surprise that nobody had taken the initiative to tell them this beforehand. In essence, though the Bill is laudable, it is an initiative that is almost completely shorn of the participation of the very people it is meant to benefit. It is also an initiative by and large driven by a member of the political elite.

## **Conclusion**

In this article, we have shown how the 2010 Kenya Constitution guarantees a basis for formulating better bylaws to safeguard hawkers' rights to the city. In turn, the County Governments Act 2012 guarantees substantive citizenship at the local level, which is meant to bring inclusivity to the management of county resources and enable local solutions to be found for local problems. However, the 2007 bylaw banning hawking in the CBD still exert considerable influence on how hawking is treated in Nairobi and in practice seems to supersede the provisions of the 2010 Constitution, creating what Brown (2017:28) calls 'fuzzy city governance', in which the national Constitution and the City bylaws operate on divergent trajectories. Though their existence is as old as the city, hawkers have persistently been deprived of the right to participate through involvement in decision-making and the right to appropriate, move in and utilise urban street spaces. They are therefore denied the right to work and earn a livelihood there.

Overall, the discussion in this article has shown that the Nairobi City County efforts to facilitate hawkers' right to the city after the promulgation of the 2010 Constitution remain at best ambivalent or half-hearted, or largely dependent on the whims of the serving governor, and at worst, keen on maintaining the status quo. Further, the discussion has shown that efforts by the hawkers to claim their right to the city have over-relied on micro-level strategies, which have involved individual or small groups of hawkers negotiating their survival in the city with the City authorities, at the expense of macro-strategies that would involve a collective organisation and fight for the right to the city. It is also notable that the hawkers have completely

underutilised judicial activism as an avenue, unlike many other sectors of society in Kenya after the promulgation of the 2010 Constitution, to challenge the constitutionality of the City bylaw banning hawking in the CBD.

In this respect, it would seem that the hawkers in Nairobi are in the foreseeable future ‘condemned to perpetually negotiate their survival with the law, while necessarily remaining outside it’ (Joshi 2018:2, citing Bhowmik, Zérah & Chaudhuri 2011). This is largely because the hawkers’ association leadership is fragmented, distrustful of each other and distrusted by potential members, and has a leadership that is opportunistic and lacks the long-term collective vision to be able to somewhat replicate the successful NASVI of India. Further, the resort to primarily individualistic survivalist strategies by hawkers seems to be reflective of a widespread cynicism towards general civil and socio-political leadership as well as collective civil endeavours in Kenya today. A common response to collective civil endeavours is: ‘*kila mtu apambane na hali yake ya maisha.*’ This is Swahili for ‘In this life, everyone is on their own.’ Generally adopting this strategy, hawkers have thus not effectively utilised the platform provided by the 2010 Constitution to raise their claims to the right to the city from a survivalist strategy into the moral-legal claim envisaged by the Constitution. As Watts and Fitzpatrick (2017) have noted, a platform that would challenge the constitutionality of unjust laws—such as the one offered by Kenya’s 2010 Constitution—has the potential to provide a discursive platform. This would, firstly, raise consciousness about the marginalisation of the hawkers’ right to the city; secondly, challenge the contradictions between the provisions of the Constitution and the City bylaws on hawkers and hawking; and finally help the hawkers construct their claims to the city as legitimate in the eyes of other urban citizens. Cumulatively, this would be very useful in asserting their right to urban citizenship.

In addition, the discussion in this article has shown that other recent initiatives to advance the hawkers’ right to the city, namely, the Nairobi Regeneration Programme and the Hawkers and Street Vendors (Protection of Livelihood) Bill, 2019, show promise but are also problematic in their own right. The former is an elitist top-down initiative with minimal or superficial involvement of hawkers and other interested parties, as well as being largely shrouded in opaqueness, besides being too dependant on the political goodwill. The latter is so far the most comprehensive and far-reaching initiative. However, it is also an elitist and top-down initiative with minimal participation so far from the hawkers who stand to benefit the most from it. It was not clear at the time of this study the extent to which County and national government involvement has

been sought during the formulation of the law by the initiators of the bill. Therefore, it remains to be seen how the bill will be embraced by the hawkers, the public and urban authorities, and whether the hawkers and other actors in the city would be able to reap the full benefits of the prospective law. Furthermore, it is not clear how the hawkers' failure to use the opportunity afforded by the Constitution to raise their claims to the right to the city as a moral-legal issue for debate will impact on the implementation of the new bill when it becomes law. Even when the bill is eventually passed, it is not clear how it would tackle the creation of space for vending, given the extensive reallocation of designated hawkers' markets, as has been documented by, for instance, Klopp (2000). Nairobi City County will also have to grapple with how to balance the interests of the hawkers vis-à-vis those of other entrenched city residents, such as licensed business owners, motorists and pedestrians.

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