

**CHALLENGES OF PROTECTING LABOUR RIGHTS IN THE
INFORMAL ECONOMY IN KENYA**

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**The views expressed in this paper are those of the author and do not
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EXECUTIVE SUMMARY

This paper reviews labour rights of the working poor in Kenya, by first providing an overview of informal economy and contextualising labour rights and decent work. This is followed by an examination of the institutional, policy and regulatory framework; discussion on protecting rights of the poor for economic growth, which include: organisation of workers, infrastructure and services, improving business opportunities for women and youth, and ensuring workers rights through efficient local governance. The paper ends with concluding remarks.

The paper notes that the concept informal economy remains controversial, and should be applied taking into consideration, the fact that, majority of workers are transitory operating across the formal and informal economy. In Kenya, the so called informal economy generates over 90 per cent of employment but the quality of jobs generated is comparatively poor, compared to the few created within the formal sector. The jobs lack the pillars of decent work which include workers rights, proper working conditions, legal and social protection, representation and voice.

The Kenya Government has put in place a policy framework for MSEs, but legal provisions are still to be enacted. The use of outdated and retrogressive legal provisions is cumbersome and hostile to the growth of the MSE sector. The related bureaucratic processes of transacting business is lengthy and adversely impacts on the operations of MSEs by diverting scarce resources from production to sheer 'housekeeping'. Further, enforcing policies and Acts of Parliament relevant to employment in the informal economy is challenging, and the local governments are still to begin addressing the issue. All not withstanding, there is a role for government in the labour market, at the minimum ensuring the right to collective action and enforcing minimum standards.

In the absence of a conducive legal framework, businesses operate under the Local Government Act which is restrictive and non responsive to the emerging new roles of Local Authorities. The provisions of the Act stand in conflict with the Government policy of encouraging the growth and development of MSEs and supporting informal workers. The reforms in the area of business licensing have began improving the situation of small enterprises, while the micro enterprises still face a number of

challenges. They operate without licenses due to lack of business premises, and are subjected to harassment by Local Authorities.

Turning the economy of Kenya, like other African countries will depend on how the government handles the informal economy and its workers. Most of these workers are own account workers without employers and what they require is an enabling environment and protection of their rights. This should begin with workers getting organised beyond welfare groupings. Other elements of enabling environment include; appropriate infrastructure and services; business development services, expanding business opportunities and ensuring workers rights through efficient local governance.

1. Introduction

Poor countries in Africa are dominated by rapid informal economic development, which most governments have failed to integrate into the overall planning of national economies. Equally, these countries face a serious challenge in protecting labour rights in their informal economies; in spite of being signatories to the International Labour Organisation (ILO) provisions, the Labour rights, are enshrined in ILO Declaration on Fundamental Principles and Rights to Work. The Declaration constitutes a mutual obligation between member states and the ILO. It applies to all workers, regardless of employment relationship or formality status. These rights include: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced labour; the effective abolition of child labour; and the elimination of discrimination in respect to employment and occupation (ILO 1998).

A mention of Labour Rights conjures the idea of formal employment and a relationship of an employer and an employee. This is the conventional thinking, which has prevailed over the decades, irrespective of the prevalence of a large category of workers who are self employed, and others, who are employed by those who do not follow the rules and regulations of employment. The conventional premise of employer/employee owes its origin to the industrial revolution era, and the immediate subsequent periods when employment meant being a factory worker, `civil servant, or an employee in registered service industry. These categories of employment had distinct employer and employee relationships with rules and regulations griding the relations.

The employer/employee relationship has been a fading phenomenon in most countries; in particular, the developing countries, where the majority of the population are either self employed and have to cater for their own labour rights or are employed by unregistered employers who do not subscribe to their respective country's, or the ILO's labour rules and regulations of employment. In Kenya, as in many other countries within Africa, this category of employees constitutes the majority of workers. These workers, largely operate within the informal economy which, in spite of having linkages to the formal economy, is still to be fully integrated into the national economic development.

The concept informal sector, alias informal economy remains controversial this paper however will not review and survey the controversies. Instead, the paper notes that the concept needs a re-examination, taking into consideration the fact that, the majority of the populations in Kenya and many other African countries, survives on the informal

sector. Thus, there is therefore nothing informal about the sector; what is lacking, is an enabling environment, required for facilitating those operating within the sector. Most attempts at addressing the sector have tended to 'push' the sector towards the formal sector, and thereby failing to recognize the fact that those operating within the sector have their own dynamics that require policy, legal, infrastructure and service support. The 1991, ILO Director General's report (1991) on the 'Dilemma of the Informal Sector' captures this situation by noting that:

The dilemma, put simply, is whether to promote the informal sector as a provider of employment and incomes; or to seek to extend regulation and social protection to it and thereby possibly reduce its capacity to provide jobs and incomes for an ever-expanding labour force (ILO 1991)

Analysts, largely agree that, informal activities and employment relations take place outside the formal regulatory framework. A study conducted in Kenya on Informal Labour in the Construction Industry revealed that 88 per cent of employees had no contracts but verbal agreements. Only 11 per cent were working on some form of written agreement, albeit not standard (Mitullah and Wachira 2003). Chen et al (2002), observes that there are marked differences in the diagnosis of informality, including: who or what remains to be regulated and why. To the neo-liberalists, informal entrepreneurs deliberately avoid compliance with the law and regulatory environment. Stiglitz (2002) has exposed the contradictions in neo-liberal thinking, in the context of globalisation. He notes that 'anyone who is concerned with employment and decent work must be concerned about features of the global economic architecture which contribute to volatility. Conversely, it seems perverse to argue simultaneously for measures that enhance global volatility, and against measures that enhance worker security'. In the perspective of the legalists, popularised by Hernando de Soto, the informal sector entrepreneurs find it impossible to comply with the unreasonable bureaucratic procedures associated with registration. To the structuralists, there are structural barriers, and this is not just the bureaucratic barriers to formalisation, and the vested interests in the informal economy which promote formal arrangements.

The dynamics of the informal economy cannot be explained using a linear approach. An alternative perspective, advanced by Tokman (1992), and Thomas (1995), which views informal activities and relationships as outside the 'criminal' economy but within a continuum between illegal or underground activities, and legal or formal activities gives a more informative approach. Those operating within the sector, occupy a vast grey, semi-legal middle between legality and illegality. In some cases,

such businesses, for example, street vendors, pay taxes even when they are not registered by the Local Authorities, who in turn collect daily fees, fines and bribes from the traders. The latter are viewed as indirect taxes, and are often higher than the actual legal taxes.

The informal economy in Kenya is dominated by the Micro and Small Enterprises (MSE). Enterprises in this sector include: agri-processing, building, electrical, woodwork, metal work, leatherwork, textile, chemical, handicraft, service industry, trade and motor vehicles. The 1999, National Baseline Survey on MSEs revealed that, there is a high degree of informality within the MSE sector, with more than 88 per cent and about 61 per cent of the firms operating without registration or any license respectively (GOK et al 1999). These enterprises, face a number of challenges namely: unfavorable policy environment; inhibitive legal and regulatory framework; limited access to markets; financial services, information, infrastructure and linkages with larger enterprises; inadequate access to business skills and technology, gender inequality; unfavourable taxation regime, entry barriers and health and safety among others.

The 2004, Kenya Economic Survey noted that, the MSE's, which are part of the informal sector, created 458,800 new jobs constituting 94.3 per cent of all new jobs created outside small scale agriculture. On the other hand, the formal sector created only 27.9 thousand new jobs and grew by 1.6 per cent, (GOK 2004). The National Baseline Survey found out that, there were 1.3 million MSEs in Kenya, employing an estimated 2.4 million people. Over 99 per cent of the firms employed only 1 person and the MSE share of contribution to GDP was 18.4 per cent.

Arnold et al (1994), and Mead (1994 and 1998), have noted that, these kinds of businesses are the least remunerative of small enterprises. However, the average income of the enterprises surveyed was 25 times higher than the minimum legal wage for general wage labourers. Mead notes that, the health of the economy as a whole has a strong relationship with the health and nature of MSE sector, `for in good times, a relatively high share of the new SME jobs are closer to the growth end of the spectrum (Mead 1998). While it is acknowledged that these enterprises are creating many jobs in Kenya, the quality of jobs is comparatively poor, compared to the few created within the formal sector. It is therefore necessary to reflect on the concept of decent work in the context of labour rights.

Apart from this introduction, this paper begins with a reflection on labour rights in the context of decent work. This is followed by an overview of the institutional and

policy framework, legal and regulatory framework, protecting rights of the poor for economic growth, and concluding remarks.

2. Contextualising Labour Rights and Decent Work

In Kenya, the majority of workers operate within the unprotected informal sector. These workers are not restricted to this sector. A significant percentage of them operate across the formal and informal sector, depending on the availability of opportunities, while a few others are permanently employed within the formal sector. This signifies the symbiotic relations between the formal and the informal economy and the need to ensure a good working environment in both sectors. Many informal workers, work in formal and informal firms that do not pay minimum wages nor provide standard worker benefits or payroll taxes

The informal economy generates a significant percentage of the Gross Domestic Product (GDP). However, in spite of its significant contribution to the economy, majority of the workers operating within the sector are poor, and lack both legal and social protection. Most of them, can hardly sustain their livelihoods, and the households they support. The rapid growth of the informal economy and the rights deficit has influenced the ILO's emphasis on Labour Standards and Decent Work. The ILO (2002) notes that: 'the informal economy is where most jobs have been created in recent years, but it is also where the greatest problems with regard to workers rights are found'.

The ILO further observes that jobs, in the informal economy are seriously deficient in terms of workers rights, proper working conditions, legal and social protection, representation and voice, and are not comparable to protected and decent work jobs in the formal economy. The World Employment Report 2004/2005 notes that, while it is clearly the case that employment is central to poverty reduction, it is 'decent and productive' employment that matters, and not employment alone. Labour Rights, which is the focus of this paper, should be embedded in the decent work pillars.

Understanding labour rights has to begin by an acknowledgement of who the workers are. Since our concern is on the poor, and the decent work deficit, which they experience, this section focuses on employment within the informal economy. Chen et al (2002) argues that despite the heterogeneity of the informal economy, it can be classified in two ways: by those who work in it (the workforce) or by the activities which take place in it (economic units). Our concern is the workforce which can be classified according to non wage workers and wage workers (Box 1) employment status categories.

Box 1: Employment Status Categories

1. Non wage-workers

- (a) Employers, including:
 - owners of informal enterprises
 - Owner operators of informal enterprises
- (b) Self Employed, including:
 - Heads of family businesses
 - Own account workers
 - Unpaid family workers

2. Wage-workers:

- Employees of informal enterprises
- Domestic workers
- Casual workers without a fixed employer
- Home workers (also called industrial workers)
- Temporary and part time workers
- Unregistered workers

Note: Some workers belong to more than one category while others change jobs or activities across any given unit of time (day, month, and year). The multiple statuses complicates classification

Source: Chen, Martha Alter, Jhabvala Renana and Lund, Francie. 2002.

Most of the above categories of workers work under harsh conditions, and the decent work philosophy, pursued by the ILO, and partially supported by governments, hardly apply. Although the ILO 1993, enterprise based definition of the informal sector only included employees of the informal enterprises, leaving out all other categories; it should be acknowledged that the informal economy includes all types of 'non standard' wage employment – including 'sweat' shop production, home work, temporary and part-time work, unregistered workers, which all have direct and indirect links with the formal sector (Chen et al 2002).

The High Commission on Legal Empowerment of the Poor, is concerned with how entrepreneurial innovation and creativity, found within the informal economy, can be channelled into the creation of decent jobs within the informal economy. The ILO pillars of decent work include employment opportunities, workers rights, social protection, and representation as outlined in Box 2.

Box 2: ILO Pillars of decent work

Protection of worker rights include: freedom of association and right to collective bargaining, elimination of discrimination in respect of employment and occupation, and effective abolition of child labour. Other basic rights include safe and healthy

working conditions, reasonable working hours, severance notice and pay, paid sick leave, vacations, and retirement compensation

Social Protection: upholds the right of workers in the informal economy, particularly women workers, to adequate social security, including maternity benefits, health insurance, and old age pensions

Education: promote and develop education programmes for workers in the informal economy, particularly women workers;

Economic Support: enact and implement laws on fair wages and incomes, and provide mechanisms by which workers in the informal economy, particularly women workers, can be provided access to and control over production assets and resources, such as land, credit, capital, marketing and technological assistance;

Voice and Representation: establish tri-partite bodies which deal with the problems of the informal economy, where workers and employers in the informal economy are represented in a workers' group through workers organizations, and in an employers group, through business associations

Source: ILO, 2002

The ILO policy on decent work is not hinged on formalizing the informal sector, as the Commission contends. Charlotta (2002), contends that, formalising the informal sector is not within reach. The study further notes that, for the ILO, the task is to assist countries to extend, to the extent possible, the aspect of 'formality' which aims at protecting the informal sector. The decent work policy has a major focus on the informal economy workers, who have decent work deficits. Statistics show that the number of the poor working in the informal economy is higher than in the formal economy. ILO has acknowledged that workers in the informal economy are unprotected, unregistered, and unrepresented and therefore exhibit features of poverty that include: powerlessness, exclusion, and vulnerability (ILO 2002).

Decent work policy focuses on the informal economy as an entity, with decent work deficits. The informal workers are exposed to inadequate and unsafe working conditions, high illiteracy levels, low skill levels and productivity, inadequate training opportunities, uncertain, irregular and low income, ambiguous or disguised employment status, long working hours, exclusion from social security and protection schemes, work related incidents and injuries (ILO 2004). Policies and interventions have to address these issues if the situation of informal workers has to improve.

The Kenya MSE policy aims at addressing the problem of the missing middle by putting in place a mechanism to enable the growth oriented MSEs to graduate to medium enterprises, and for others to thrive. The MSEs fall in both formal and informal economy and operate in a fluid manner across and in between the two sectors. In this respect, there is no neat progression from informal to formal as insinuated by the Commission. In terms of labour rights, workers should be respected irrespective of whether they belong to the formal or informal economy.

3. Institutional and Policy Framework

The Kenya policy paper on Development of Micro and Small Enterprises for Wealth and Employment Creation for Poverty Reduction (2005), has isolated a number of challenges, which include: unfavourable policy environment, inhibitive legal and regulatory framework; limited access to markets, financial services, information, infrastructure, linkages with larger enterprises; inadequate access to skills and technology, business skills; gender inequality; unfavourable taxation regime, entry barriers and health and safety. These challenges do not include labour laws, and occupational health and safety which negatively affect MSE workers.

The informal economy in Kenya has been performing better in employment generation over the years, and the Government is making attempts to improve the environment of the MSEs. This contradiction has to be addressed if the Millennium Development Goal (MDG) number 1 on eradicating extreme poverty and hunger by 2015 is to be achieved. Most of the poor are engaged in informal economic activities and in particular, MSE, and any improvement in the sector may have a positive effect on them. The 2005, World Development Report on a Better Investment Climate for Everyone, observes that, although governments are recognizing that their policies and behaviours play a critical role in shaping the investment climate of societies, and that they are making changes, efforts to improve the investment climate need to go beyond just reducing business costs (World Bank 2004).

The World Bank report (2004), points out that, conducting business in most developing countries is costly and most governments saddle firms and entrepreneurs with unnecessary costs, create substantial uncertainty and risk, and erect unjustified barriers to competition. In Kenya, business operations have been noted to be very costly for MSEs, and the government has been addressing the poor business environment situation since the mid 1990s. This has meant examining infrastructure, and services, including business services; business registration, licensing and the cost of non-compliance (bribes) to business regulations. The practice in Kenya, prior to 1999, when the government began reforming business licensing was for businesses to

pay for 'public relations' – money to the enforcement officers for non compliance. A study conducted in 1999, examined three broad costs of non compliance (Box 3)

Box 3: Cost of Non Compliance

The first cost of non compliance is the money paid for preventing the authorities from taking punitive action as a result of the enterprise's failure to comply. The most common item in this category is payment of 'public relations' money to enforcement officers. The second group includes the financial consequences of punitive action actually taken by local authorities. The authorities are known to close businesses, evict firms from their premises, demolish premises and confiscate goods. Such actions have direct costs. Finally, both preventive measures and dealing with the consequences of the punitive action take time, a costly commodity in the business world.

K'Obonyo et al 1999.

Sessional Paper No. 1 of 1986, on 'Economic Growth Management for Renewed Growth' laid the foundation for the founding of entrepreneurship in Kenya. The paper highlighted the potential of the MSE sector, and helped to change its image from employer of the last resort, to that, of a vibrant wellspring of technological capacity and aggressive entrepreneurship. The paper, introduced radical changes, and outlined a development strategy that put greater emphasis on the rural economy and the development of the informal sector. The policy paper proposed the establishment of a special task force to review local authority by-laws and other regulations governing informal activities, and thereby, to create a healthy legal and regulatory environment for informal sector activities. The policy paper further noted that, direct assistance was to be provided to individuals and small scale businesses. Consequently, the 'Center Project' was born within the Ministry of Planning and National Development to address key issues relating to the informal sector.

The Sessional Paper was followed by the publication of a 'Strategy for Small Enterprises Development in Kenya: Towards the Year 2000' in 1989. The strategy focused on the constraints the sector was experiencing, which included: enabling environment, investment and finance and promotional programmes and enterprise culture. These, subsequently, formed the basis for designing fairly focused policies on the sector. By 1992, therefore the policy was refined, and was published as Sessional Paper No. 2 of 1992 on 'Small Enterprises and 'Jua Kali' Development in Kenya'.

In 1994, a comprehensive analysis of policies, strategies and programmes under the Agenda for Early Action was carried out, and obstacles inhibiting growth in the sector identified and analysed as highlighted in Box 4.

Box 4: Obstacles to Development of MSE

- There was a multitude of actors involved at various levels of implementation of the policy and strategy framework. However, due to weak or non-existent coordination mechanisms, much of the effort had been misspent, resulting in minimum impact. Further, the capacity in government to play its facilitative and coordination role effectively was weak and required strengthening,
- Although the policy environment of the MSE sector was considered positive, the regulatory environment remained largely hostile to many small business operators. Most of the disabling laws and regulations that inhibit the operations of the sector had been reviewed in 1988, but the outcome was not adequately disseminated to appropriate users for action. Consequently, other task forces were set up later to review some of the laws and regulations.

GOK 1994

In order to address the above two issues, the MSE unit in the Ministry of Planning and National Development was upgraded to a division with two distinct sections, namely; Policy, and Regulatory, Sections. The Policy Section was given the mandate to develop policy, monitor implementation, coordinate and disseminate information to target users, and assess their impact on the beneficiaries. The De-regulation Section was mandated to facilitate the creation of an enabling environment for promoting MSE by addressing the existing constraints, specifically those laws and regulations that prove punitive to MSE development.

The government effort was backed up by a number of multi-lateral and bilateral agencies, including the United Nations Development Programme (UNDP), the British Department for International Development (DFID), and the United States Agency for International Development (USAID), German Technical Development Agency (GTZ) and the European Union (EU). These agencies, simultaneously, designed a series of support programmes with the goal of promoting the growth and development of MSEs in Kenya.

USAID, in an effort to make further progress, signed a collaborative agreement with the International Center for Economic Growth (ICEG) in July 1996, under which, the ICEG was to implement a Micro Enterprise Policy Support Programme – MICROPED consisting of a series of research projects, stakeholder policy forums, brainstorming workshops and strategic planning seminars. These activities were specifically intended to promote dialogue and yield policy and regulatory reforms aimed at easing constraints to the development of MSE activities in Kenya, thereby increasing opportunities for employment and income.

The Sessional Paper of 1992, served as the basis of the development of the sector, until 2005 when a new Sessional Paper, No. 2, on Development of Micro and Small Enterprises for Wealth and Employment Creation for Poverty Reduction was developed (GOK 2005). The paper states that, MSEs `provide one of the most prolific sources of employment, not to mention the breeding ground for medium and large industries, which are critical for industrialization. The policy framework provides a more balanced policy focus in line with national goals of fostering economic growth, employment creation, income generation, poverty reduction and industrialisation as stipulated in the Poverty Reduction Strategy Paper (PRSP) and, the Economic Recovery Strategy for Wealth and Employment Creation, 2003 – 2007 paper (GOK 2003).

The 2005, policy paper, also covers issues relating to health and safety in the work places, noting that the MSE sector is adversely affected by the limited access and adherence to the health and safety regulations. The paper further notes that, the Factories and Other Places of Work Act Cap 514 does not cover the MSE sector, yet it is the sector where workers are exposed to all sorts of occupational hazards and other forms of work related accidents. The policy paper points out that, the Employment Act Cap 266, and the Regulations of Wages and Conditions of Employment Act, Cap 299, will be reviewed to make the minimum statutory standards prescribed in the legislation, take cognisance of the constraints of MSEs. Further, the Factories and Other Places of Work Act, Cap 514, will be reviewed to make them sensitive and accommodative to the operations of MSEs.

Enforcing policies and Acts of Parliament relevant to employment in the informal economy remains challenging. The ILO has observed that there are clear difficulties in verifying and enforcing standards as regards conditions of work in the formal sector. The ILO Conventions and recommendations are not tailored to apply in the informal sector (Charlotta 2002). Stiglitz, on the other hand, argues that, there is a role

for government in the labour market; at the minimum, ensuring that the right to collective action and enforcing minimum standards.

Policy without laws is meaningless, and it is necessary to reflect on laws and regulations which sustain the informal economy and the development of entrepreneurship. The section below discusses some of the challenges that face entrepreneurs in their innovation efforts.

4.1 Legal and Regulatory Framework

The Sessional Paper No 2 of 2005, states that, an MSE Act, will be legislated to provide an appropriate legal framework to support the growth and development of the sector. It further provides for partnership building and working, in an enabling legal and regulatory framework. However, the policy points out that the regulatory framework is still problematic as reflected in Box 5.

Box 5: Legal and Regulatory Framework

A number of existing laws and regulations still remain cumbersome, and out of step with current realities and are hostile to the growth of the MSE sector. Specifically, the by-laws applied by many Local Authorities are not standardized and appear, in most cases, punitive instead of facilitative. At the same time, the role of the Provincial Administration in the enforcement of regulations and in jurisdiction over land and utilities tends to overlap and conflict with those of local authorities. Finally, the bureaucratic and lengthy process of transacting business with Government agencies adversely impacts on the operations of MSEs by diverting the scarce resources away from production into sheer housekeeping (*Republic of Kenya, 2005*)

The laws and regulations have been a problem to business development in Kenya. The labour regulations, which include recruitment and dismissal regulations, restrictions on employment of part time and temporary workers and restrictions on pay rates, have a major impact on the ability of a business to operate with flexibility. However, the MSEs, which are our focus in this paper, generally do not comply with the existing labour laws, and the intended plan to legislate an MSE Act is expected to change the operations of the MSE. Legal statutes existing in Kenya such as, the Employment Act; Factories and Other Places of Work Act; Workman's Compensation Act; Copy Right and Trade Marks Act; and Safety and Security Act are largely designed for large formal enterprises, and not MSEs, which are largely own account enterprises.

The Employment Act, does not include entering into contract for tasks or piece work for an agreed remuneration. This leaves most MSE workers working without contracts and subject to abuse by employers. Section 7, of the Draft Employment Bill of 2004, indicates that, all employment shall be in accordance with the provisions of the Act, whether it is express or oral. While this is a good provision, it will be difficult to implement without contracts, as is the case in the informal sector.

Under Duties of Self Employed Persons, section 9, gives the self employed persons, the responsibility of ensuring their own safety and that of other persons in their work place or within the surrounding area. Section 24, on registration of workplaces, requires workplaces to be registered, a requirement which majority of the MSEs do not fulfil. It is necessary to look at this provision from a policy and planning perspective. There is need to adequately plan for MSEs in order to accommodate them in the overall planning of urban and county councils.

The Kenyan labour statutes do not make any distinction on how they apply to different types of enterprises. Often, the MSEs find it virtually impossible to meet the requirements, making them open to official harassment (GOK 1997). Further, MSEs are often not conversant with the provisions of labour laws. Although there is need for sensitisation and protection of informal workers rights, effective enforcement is likely to result in reduction of the employment opportunities available to the poor. This is the dilemma which governments with a huge sector of informal economy, have to deal with.

In the absence of an MSE Act, the businesses are largely operating under the Local Government Act, which has not been revised since 1977. A Discussion Paper on Local Government Management Reform notes that, the Local Government Act Cap 265 is restrictive and not adequately responsive to the emerging roles of local government (GOK 2004). The review of the Act was suspended to give way for the review and development of the Kenya Constitution, which backfired after the national referendum of November 2005. In respect to businesses, the Local Government Act gives Local Authorities the powers to:

- Control public sales and places of any sales and to license people to conduct such sales (Section 145)
- Charge fees, without resolution on the amount, for any business license issued (Section 148)
- Prohibit and control shops in rural areas (Section 159)

- Control all establishments where actual food or drink are manufactured, prepared for sale or use, stored, or sold (Section 161D)
- Prohibit and control peddling, hawking, street trading, barbers, second hand goods dealers, and traders and industry deemed to be noxious or offensive
- Refuse to grant and to cancel a business licenses (Section 165)
- Make adoption by-laws under the Local Government Act and other laws of Kenya, including the Building Code and Public Health Act (Section 210)

These legal provisions, stand in conflict with the government's policy of encouraging the growth and development of MSEs, and have been recommended for review. A document, prepared by the Ministry of Local Authorities (LAs), for the International Center for Economic Growth, noted that, the approach of initiating policy reforms and backing them with legal amendments as adopted, in regard to licensing and deregulation are pragmatic in dealing with the changes to the legal framework (GOK 1998).

Business licensing and registration has been one of the most challenging regulations for MSEs. Business licensing in Kenya dates back to the colonial period, and was aimed at regulation although revenue raising is also part of the goal. Licensing of particular trades has been concerned with public health and public order, licensing in food and alcohol being the major ones. Devas, argues that, `regulating businesses can be justified where there are market failures of one sort or another. He further notes that, licensing is often a crude form of regulation, which may be less effective than other instruments such as codes of practice, producer insurance and liability assignment, or targeted taxes and subsidies (Devas 2001).

In discussing the reform of business licensing in Kenya, Devas notes that, prior to the reforms, to obtain a licenses for businesses one was required to meet a number of pre-conditions, such as obtaining health clearance certificates, and providing evidence that they had paid taxes. These requirements could involve lengthy delays, and in many cases were beyond the capacity of the applicant to achieve. Devas provides a summary of the defects of business licensing in Kenya prior to the reforms as follows:

- High compliance costs to businesses due to multiple licensing and complex procedures;
- Tariff structures which were illogical and did not reflect ability to pay;

- A process loaded with ineffective regulatory requirements which provided opportunities for rent seeking without actually protecting citizens from health and safety risks;
- Poor administration and evasion which reduced the tax base and generated inequities; and
- A revenue source which generated relatively little income for local government, and little scope to increase the yield.

The Single Business Permit (SBP) replaced the complex and cumbersome local business licensing system, and enhanced revenue for LAs. The reform of business licensing took five steps beginning with the removal of the regulatory requirement. The reform process acknowledged that, the requirements were ineffective and created opportunities for corruption. The process untied public health and safety from licensing, and the inspection of premises could be carried out any time. Secondly, the law was amended to broaden the base to include all businesses and trades, including professions and occupations. Thirdly, businesses were only required to have one Business Permit per premise, regardless of the range of activities carried out in the premises – hence the title Single Business Permit (SBP). Fourthly, LAs were required to establish ‘one-stop-shops’, at which permits could be issued on the spot in exchange of the appropriate fee. Fifthly, a standard tariff structure was established. The tariff uses a generic classification of businesses into eight sectors, sub divided into broad categories reflecting the scale or profitability of the business. One year from implementation, the reform had enabled LAs to collect more revenue while at the same time reduced compliance costs on businesses and the opportunities for rent seeking and corruption (Devas 2001).

It is not only the regulations that have a negative impact on the conduct of business, but there is also the manner in which they are implemented and enforced. The licensing provisions give the responsible officers wide discretionary powers to grant, revoke, cancel or renew licenses. It has been noted that these powers are often implemented inappropriately, with the cost to business being uncertainty, wasted time and additional expenditure in form of bribes. (Mullei and Bokea (1999), observe that, the manner in which licensing provisions are enforced in Kenya, creates a major disincentive to investment. This is reflected in the violation of property rights of entrepreneurs by trade licensing enforcement officers, and the harassment and bribery of street traders by police and Local Authority officers.

This paper acknowledges that there are many entrepreneurs in Kenya who operate without licenses. These are mostly own account workers who have either failed to get licenses or do not bother to apply for any.

4.1 Reforms in the Legal and Regulatory Framework

In the 2005, Policy Paper on MSEs, the Government committed itself to continue with legislative reforms. These reforms encompass review and updating of existing pieces of legislation and enactment of new laws which are responsive to the needs of MSE, and are supportive to the growth and development of the sector. The policy paper provides for the establishment of a National Council for Small Enterprises (NCSE) to advise and follow up the implementation of MSE policies. Other reforms will focus on: licensing regulation; business registration; local government reforms; land laws; labour laws; arbitration and dispute resolution, and MSE Act. While the reform of licensing regulation is on-going, business registration is in the process of being decentralised to the Provinces and eventually to the Districts. Over the years, business registration has been centralized at the headquarters in Nairobi. The decentralisation will avail services closer to the workers and is likely to attract more people venture into businesses.

The local government reforms, mainly include the review of the Local Government, Act which had began and was suspended to allow the review of the Constitution of Kenya to take place. The review is expected to reflect limited and essential regulatory powers by LAs to ensure compliance to standards relating to security, public healthy, safety and environmental preservation. The review will further include the development of clear guidelines for enforcement of regulations and the review of by-laws.

Land and premises for trade has been a major problem to MSEs. The policy states that LAs will earmark land for MSE development. As opposed to the current situation such land will be registered and titles issued. In addition, written warrants duly authorized by full councils, with appropriate press notices, will be issued before demolition of MSE structures by LAs. In addition, MSE courts will be established to dispense justice and deal with small but non trivial claims emanating from the sector. Associations will also be assisted through targeted capacity building to become strong legal entities capable of effectively managing their affairs.

5. Protecting Rights of the Poor for Economic Growth

Turning round the economies of African countries, depends on how respective countries handle the informal economy and its workers. Most of these workers, work

as own account workers, without employers, and what they require is an enabling environment which includes; efficient organisation; appropriate infrastructure and services; business development service; innovative and creative business opportunities and improving local governance for economic growth.

5.1 Organisation of Workers

Most poor workers operate as individuals and only join small groups for welfare purposes, and in isolated cases, for business development. They are organised around small associations' with weak organisational capacity. Associations have the potential to make important contributions to the development of MSEs and the condition of poor workers within the informal economy through collective services. Associations can be used to achieve member's common needs, which would be difficult to achieve individually, including advocacy for access to infrastructure, improved policies and regulations, increased resource allocations and overall integration into the national economy.

Kenya has over a million small welfare associations, with few umbrella associations such as the Federation of Kenya National Jua Kali Associations (FKNJKA), and the Kenya National Alliance of Street Vendors and Informal Traders (KENASVIT). There are also sub-sector based associations such as the National Jua Kali Exhibition and Marketing Association (NJEMA), National Association for Technology Transfer and Entrepreneurial Training (NATTET) Kenya Curios Jua Kali association (KCJKA), Association of Makers and Exporters of Gift Articles (AMEGA).

The FKNJKA, which, has been assumed, by the government, for many years, as the representative of those operating within the informal economy, owe its origin to the then Presidential stop over at an MSE cluster en-route to Nairobi City Stadium. The President at the time advised the entrepreneurs to organise themselves into associations in order to have legal recognition, which is necessary for any formal support, including that of government. This became the origin of most Jua Kali associations affiliated to the Federation.

The membership of the Jua Kali associations, are largely drawn from the small scale manufacturing sub-sector, including carpentry and metal work. These associations, including the federation, have been weak, and exposed to leadership wrangles, and have not efficiently served the entrepreneurs and their workers. At the same time many MSE operators do not belong to these associations. A Task Force on Micro and Small Enterprises, commissioned by the Ministry of Labour, in 2003, to assess the extent to which MSE associations are able to execute their mandate and roles in

support of the members revealed that, effective membership of associations are significantly low due to poor service delivery by associations and inefficient management of associations (GOK 2003).

The FKNJKA in theory has democratic and participatory structures, but in practice, these hardly work. The findings of the Task Force further revealed that, although the constitution of the federation is adequate, the Federation and its member associations hardly adhere to their constitutions, especially with regard to holding meetings, carrying out elections, expenditure controls and membership participation in decision making. Secondly, the Federation and its membership associations have experienced leadership problems manifested in leadership wrangles. Thirdly, the general members of most associations are not fully exposed to their respective constitutions. In some cases, some officials of the associations regard respective constitutions as confidential documents and do not easily avail to them membership.

The membership of the FKNJKA leaves out the trade and service MSEs, which are the dominant employment sources for the poor in Kenya. So far, a national alliance of street vendors and informal traders – KENASVIT has been established, with the facilitation of the Institute for Development Studies, of the University of Nairobi (Mitullah 2005). The alliance has a vision of transforming street traders and informal businesses into corporate establishments. Their mission is: to organise and empower the vendors and informal traders ;in order to improve their businesses through training, access to credit, dialogue with local authorities and other relevant organisations on appropriate by-laws and policies that give recognition to, and bring to an end harassment and discrimination against the traders.

Experience of the IDS, in working with KENASVIT, has revealed the challenges the poor face in organising. The major problem is availing time for efficient management of associations. Most members of the association are own account subsistence workers, who have to work on a daily basis to sustain their livelihoods. They therefore have little time for the associational life, and are largely suspicious of the management of the alliance. The suspicion arises out of their experience with the general management of associations and self help groups in Kenya. Secondly, most of the membership, including, the office holders do not have adequate capacity for managing the association and leveraging required resources. Thirdly, they expect immediate benefits, and have difficulty in grasping issues and efforts geared towards improving their environment such as representation and lobbying.

Strong associations with voice and representation capacity are important for ensuring

Workers' rights, and there is need for continuous capacity building, including awareness creation and facilitation of such associations. Strong associations are able to lobby for enabling policy; legal and regulatory frameworks; infrastructure and services; and protection of the rights of the membership.

5.2 Infrastructure and Services

Most MSEs, and in particular, the micro enterprises operate on premises not set aside for trade and which are not provided with infrastructure and services. Provision of access roads, adequate power, water, sewerage, telecommunications, land, and related work sites are the most critical infrastructure for MSE, and by extension the poor entrepreneurs working in the industry. The majority of MSEs Entrepreneurs do not have access to working sites and have to operate in areas such road reserves, on private land without authorisation, pavements, and peripheral locations or merely hawk the wares in their hands. These areas have poor infrastructure, poor supply of water, sanitation, and waste disposal, inadequate energy and poor roads (GOK 2005).

Availability of an acceptable site of operation is a pre-condition for compliance with various statutes relating to business operation. The authorities have been reluctant to plan and set aside sites for MSE operations, including allocation of vending sites within the CBD. The micro enterprises, in particular street and roadside vendors have been the most disadvantaged among the MSE. They have no authorized sites for their activities, which results in incidences of confrontation and brutality with urban authorities. The authorities are reluctant to plan and allocate vending sites within the Central Business District (CBD). In most major cities in Kenya, vendors have severally been allocated sites out of the CBD, that they have rejected, arguing that they are not accessible to customers.

The insistence by urban authorities that street vendors should not operate within the CBD is misplaced. The campaign for good governance advocates for an inclusive city where all have space to engage in their activities. The perception of street vendors by urban authorities is totally different from that of traders; while the authorities view vending sites as temporary; the vendors view them as permanent. It is the perception of the authorities that have prevented them from planning and allocating space for vending. Most street vendors have no tenure for the spaces they occupy and hence the temporary nature of the structures and display facilities they use. The number that have tenure are negligible compared to the total number that are engaged in street trading activities. This gap is captured when one looks at the numbers licensed to trader, compared to the number that trade. In Nairobi, there are 100,000 thousand vendors trading within the CBD, but at no time have more than 10,000 been licensed .

It has been argued that the Local Authorities in Africa are a major obstacle to the development of MSEs. Most of them use outdated restrictive policies, by-laws and regulations originally intended to control and regulate the growth of indigenous enterprises. These provisions make vending illegal, and view vendors as a problem and responsible for making cities dirty, obstructing traffic and therefore as a nuisance. The neglect of the sub sector is further reflected in the placement of the management of vending activities in wrong departments, in particular, Enforcement Department. The Department views vending as a problem that has to be controlled rather than as a production unit that contributes to the urban economy.

These operational policies and the legal provisions currently being applied were intended for managing cities planned for colonial governors and ought to have changed in line with urban dynamics. While the legal provisions are still to be overhauled, the Kenya government has begun making concessions for micro enterprises as reflected in the development of Jua Kali sheds (sites for manufacturing MSEs and related services) and the setting aside of some parking lots for trade on particular days. However, in the case of the latter, relevant services, including water and sanitation are not provided to traders operating within such areas. The urban authorities use lack of licensing as a justification for not providing services

In 1997, a circular from the Office of the President, to all Provincial Commissioners, urged Local Authorities wishing to benefit from a World Bank infrastructure facility, to set aside suitable plots, which must be a minimum size of 5 hectares, easily accessible, near essential utilities and secure from encroachment. This programme faced a number of problems. In almost all cases, land allocated was not well secured and registered. In some cases, land was allocated in unsuitable sites and the MSE did not move to the sites, while in others, the ownership of land allocated was disputed and the matter taken to court.

The report of the Task Force on MSE (2003), notes that, in cases where land is available, there have been problems with land allocation procedures and the unresolved ownership status of land designated for MSE activities. The allocation of public land to individuals has been problematic, resulting in conflict between MSEs who occupy the sites and the allottees and their agents. This has exposed MSEs to harassment by urban authorities and individual landowners. Most of these issues remain unresolved in spite of the many letters from associations to the Ministry charged with MSE operations (ROK 2003). Overall, efficient operations of MSEs

require secure property right, infrastructure development and provision of related services, and an efficient management system.

Apart from the planned Jua Kali shades, MSE entrepreneurs operate without services such as water, sanitation, energy supply and storage facilities. This has been a major challenge for women who operate with their children and have to do without basic services such as water and sanitation. They have to carry both their babies and goods to and from their operation sites. The situation is even more challenging when traders engage in running battles across the city with city enforcement officers. In this process, traders lose their goods, while other fragile goods are destroyed. This often results in loss of jobs, and property and is a disincentive to MSE. Harassment puts traders out of business for a while as they look for capital to re-start their businesses. Research conducted on street trade reveals that, the greatest challenge facing the vendors is harassment by urban authorities (Alila and Mitullah 1999). Planning and providing space for vending operations remains the option if the efforts of street traders are to be tapped and mainstreamed into urban development.

5.2.1 Reforms on Infrastructure and Services

The 2005 MSE policy notes that, the government, with relevant stakeholders will encourage more private sector participation in the development and management of market stalls and worksites for MSEs. This will be achieved by leasing land to developers on a concessionary rate and granting tax incentives to such developers. Simultaneously, the government will introduce measures to privatize existing sheds, in order to, facilitate their efficient management and utilisation.

On overcoming the insecurity of tenure, the MSE policy points out that the government, in collaboration with local authorities, will promote the issuance of Temporary Occupancy License (TOL) for a longer and specified period of term. This will be followed by short time leases to individual MSE entrepreneurs. As a long term measure, the MSE associations will be encouraged to adopt a Community Land Trust (CLT) arrangement for the benefit of members. This is expected to promote investment and infrastructure development within MSE sites.

Securing land has the potential of providing collateral which the MSEs require for accessing credit. The registration of business requires a land reference number, which the MSEs often do not have. Further, in order to connect electricity, water and other amenities, including telephones, the MSEs must indicate their land location. All these requirements keep the MSEs away from registering their businesses.

5.3 Business Development Services

Apart from an enabling policy and legal framework, infrastructure and services, the MSEs also require financial and business services. Majority of the MSEs, especially micro enterprises have limited capital and hardly have any savings. At the same time, they have no access to business services and any minor upset pulls them out of business. Evidence from MSE surveys in Kenya indicate that enterprises that accessed credit and other inputs have survived longer and in addition have been able to expand their businesses more than those that did not access credit. The studies further show that self finance enterprises generally start smaller than those that start up with external financing; and both medium and fast growth enterprises are characterised by high incidence of commercial bank start up financing.

The MSE 2005 policy, has grouped issues and problems limiting MSE acquisition of financial services into two broad categories: lack of tangible security, coupled with inappropriate legal and regulatory framework that does not recognize innovative strategies for lending to MSEs; and the limited access to formal finance due to poor and insufficient capacity to deliver financial services to MSEs.

Micro Finance Institutions (MFIs) have been operating in Kenya for a long time and there is still no Act of Parliament to guide their operations. They operate group lending schemes, which a number of entrepreneurs, find problematic. On the other hand, Commercial banks, which have a strong resource base, and wider outreach, are still to acquire the expertise required for operating schemes for MSEs. The MSE 2005 policy indicates that the government will establish a Micro Finance Trust Fund from which the MSEs can borrow at affordable interest rates. The policy indicates that more resources will be provided to the newly established Micro Enterprise Support Programme (MESPT) to be able to lend to the MFIs. Further, the Government will encourage commercial banks to develop an appropriate risk classification system governing loan collateral, documentation and inspection risks for the MSE sector. This will enable banks to open up lending to MSEs. Further, the Government will strengthen the Central Bank of Kenya's Micro Finance Unit through the Micro-Finance Act. The Act is expected to make MFIs sustainable and more responsive to the commercial operations of savings and credit. Laws that prohibit those organizations that mobilize savings in the country to offer credit will be amended.

MSEs lack requisite business management skills. The MSE 2005 policy contends that in order to improve and promote entrepreneurial skills, the Government will encourage universities, polytechnics, technical institutions and other MSE support organizations to develop certified demand-driven courses for entrepreneurship and

business management. The policy goes further to state that the Government will introduce entrepreneurial development programmes in schools and other training institutions.

5.2.1 Improving Business Opportunities for Women and Youth

The global employment trends indicate that women and youth represent a group with serious vulnerabilities in the world of work. The challenges women face in the world of work become manifest when women's roles are examined. In most societies women are bunched with children, the sick, physically challenged and with household management. This triple roles (production, reproduction and community welfare) contributes to the bunching of women with other categories. This limits employment opportunities available to women, with many opting to work within and around the household. This allows them to also take care of the household, including the sick and the physically challenged.

Downing (1991), notes that, the goal of women is mainly to feed and educate their children, while men generally undertake business risks in pursuit of profits. Besides the socio-cultural bottlenecks that hinder women's enterprises from efficient performance, the multiple roles that women play is a major drawback. In relation to their enterprises, these roles make them not operate on a full time basis. In many occasions, they operate intermittently, which allows them to take care of the household, including the sick. Kinyanjui and Munguti (2000), have observed that, conflicts arising from different roles women have to play in households, including the 'long' time spent at enterprise site have been cited as constituting a major obstacle to the stability and growth of women owned enterprises and their development in Kenya.

The Kenya Policy on SMEs in discussing gender equality notes that 'promotion of equality of opportunity and elimination of all forms of discrimination based on sex is a fundamental step that provides a necessary and important condition for effective development'. The policy further notes that, women are more vulnerable to chronic poverty, due to gender inequalities in the distribution of income, access to productive inputs such as credit, access to and control of property and earned income, multiple roles, inadequate access to education and training as well as gender biases in the labour market.

In spite of the many bottlenecks, women continue to use the only resource, which is hardly interfered with – their labour. However, the movement of this labour is limited, due to the household chores that women have to plan and manage. The limitation of the movement of their labour, reduces their employment opportunities to the

household and surrounding areas. This raises a planning question, which most governments have failed to handle due to the assumption that employment means being located outside the household and its surrounding. In cases where employment has been planned around the household, it is often a low notch type of employment, which does not elevate women beyond the subsistence level. In isolated cases, elsewhere, women are subcontracted by large businesses for piece work at home, but are paid minimal wages, without any employment benefits. It is therefore necessary to plan for decent employment opportunities within and around the household in order to expand the economic activities available for women.

In cases where women are working as traders, away from their households, they often work with children in an environment lacking infrastructure and services. It has been noted that small enterprises are a hazard, given that over 60 per cent do not have water in their premises and use open spaces, rivers, and streams to dispose their waste and effluent (Ronge and Nyagito 2002). In addition, such sites are not licensed for trade and women are exposed to running battles with urban authorities. Although men are also exposed to the same situation, the case of women is worse since they have to face these challenges with children strapped to their backs sometimes as young as a few weeks strapped to their backs. In addition, women operating away from their households have to either close their businesses intermittently to allow them to deal with household chores or must plan for an alternative, which they often can ill afford. This pushes women to use their children as workers, thereby exposing themselves to be violators of their own children's rights.

On the youth, the Global Employment Trends for Youth of 2006 (internet 2006) notes that, there is growing evidence of a trend in which young people are facing increasing difficulties in entering the labour force. This is largely due to the reduction of formal employment opportunities, and the requirement of experience which almost all young school leavers cannot fulfil. The report further indicates that, a global deficit of decent work opportunities has resulted in a situation in which, one out of three youth in the world is seeking but is unable to find work (the unemployed), has given up on the job search entirely (the discouraged) or is working but still living below the US\$ 2 a day poverty line (the working poor)

5.2.3 Ensuring Workers Rights through efficient local governance

Local governance has been a major threat to businesses of the poor. Indeed LAs have failed to plan for MSEs and their employees. In many cases they do not perceive the businesses as engines of growth, but rather as nuisance to local governance. This perception has to change if the poor workers have to be integrated in local economic

development. This has to begin by local governors ensuring that the policy, legal and regulatory framework is in place. This should be followed by facilitation of the development and management of sub-sectoral workers organisations in cases where they do not exist, and capacity building, where there they exist. This approach should be adopted since it is not possible to deal with the millions of associations and self help workers groups operating at the local levels.

While most countries including Kenya have revised their licensing and registration regulations, many workers are still left out of the system and are not protected by policies and administrative regulations.

6. Concluding Remarks

This conclusion attempts to respond to some of the specific issues raised by the Commission on Legal Empowerment of the poor in the thematic area of labour rights. An overview of the Kenyan situation shows that a deliberate attempt to move the workers out of the informal sector is a futile attempt. The informal economy has its own dynamics with some workers straddling in between formal and informal sectors of the economy. In this respect, focus should be limited to reviewing and facilitating policies, laws and regulations negatively affecting workers in the informal economy, in particular the MSE operations. So far, the Government has experimented with putting a policy in place without the vision of pushing the MSEs who operate within the informal economy to formal economy. In any case, the operations of the MSEs are fluid and conceptualizing them as being in one part of the economy and not the other is problematic.

Decent work can be assured in MSE operations if the appropriate policy and regulatory framework is put in place. So far the policy is in place but enactment of relevant laws and regulations is still to be done. Policy and laws without efficient framework of implementation and management is not useful. MSE entrepreneurs are quite active, but their organisations are weak and their working environment remains insecure due to a poor investment environment. The most affected are the Micro Enterprises which operate own accounts and have to close business whenever they are sick or have to engage in other activities, including attending to the sick or managing the households. This case is more applicable to female than male workers who do not operate on full time basis due to their triple roles.

The poor workers operating MSE have specific needs which include enabling policy and legal framework, infrastructure and services, financial and business development services. The latter largely uses a group approach which in many cases does not reach

the very poor. Most of the very poor do not join groups, and are difficult to reach. Through groups MSEs get information and knowledge for improving their livelihoods. The MSE 2005 policy points out that necessary support will be provided to associations of MSE. However, so far active associations are those of the Small Enterprises engaged in manufacturing. Trade and services which are the dominant MSE activities are still to form effective associations which can lobby and advocate for their membership.

The poor know what they want but they hardly have opportunities for airing their views. Targeting the poor should include bringing services closer to them and/or facilitating their access to employment opportunities. The poor find it more convenient to operate enterprises either within their households or close to their households, but planning hardly integrates these two activities. Working away from the household and its surrounding implies an extra cost on transport, food and upkeep of the household while away.

Facilitating associational life of the workers is critical if labour rights are to be ensured. The poor who operate within the informal economy have weak organisational capacity and require facilitation. Most of their associations are organised around welfare issues, totally ignoring the labour rights issues. There is therefore need to ensure that information regarding the right to organise is made known to the informal sector workers. In cases where workers are already organised, it is necessary to assist them in finding ways of improving their working conditions.

Availing infrastructure and services is critical if the MSEs are to develop. Most entrepreneurs face a challenge in locating business premises. Many of them operate on open public and private land, with a threat of eviction. While it is acknowledged that it may not be possible to provide business premises and related services for all entrepreneurs, the LA should integrate MSEs in their planning. Most LAs view MSEs, in particular the Micro Enterprises, as a problem, as opposed to engines of growth. This is unfortunate since statistics show that the MSE are indeed engines of growth for countries such as Kenya. The perception that views MSE as transitory phase to formal sector has to change if these enterprises are to be tapped for economic growth.

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