

Informal Employment and Competition: Street Food Vending

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This paper is an initial and exploratory exercise on the ways in which analysis of competition and regulation to assure effective competition, are affected by the presence of substantial informality, using street vending as an example. Competition may be viewed as an instrument for increasing welfare through static and dynamic efficiency, or to specifically increase welfare through the prevention of exploitation of market participants (especially consumers) by firms with market power. This paper suggests that a perspective of constitutional economics is useful in realigning economic development models with the empirical realities of the entrepreneurs in our midst, our constitutional order, and the real demands of our customers as citizens. The goals of such law and policy realignments could be based on broad constitutional-economic goals such as: ensuring equitable access to public space for street vending; promoting economic activity and employment through street vending, and using street vending as a tool to advance related citywide planning goals.

This paper is an initial and exploratory exercise on the ways in which analysis of competition and regulation to assure effective competition, are affected by the presence of substantial informality. The first section argues that given the high levels of informality in the Indian economy, policy discourse around competition needs to explicitly engage with this aspect. The legal nature of street vending, prevalent negative attitudes towards street vending, and the promise of constitutionally-informed competition law and policy are discussed in section two. Focusing on a particular micro-segment of the informal economy – street food vending - the concluding section suggests that street foods add immense value to the global city and its inhabitants, and regulatory frameworks require a reassessment in light of forward looking approaches to constitutional economics, competition and market regulation.

I. The economy, informality and competition:

In practically every sector of the Indian economy, there is a 'formal' and 'informal' segment. The definition of informality and the informal segment varies with the context and method of analysis – in general, informal economic activities are characterized by small scale and few workers, limited capital, reduced or no taxation and reporting requirements, and limited access to normal credit, social security, and legal services and benefits.ⁱ This informal segment ranges from almost 100 per cent in agriculture (with the exception of plantations and contract farming in the case of some vegetables like tomatoes, other cultivation is informal) to significant shares in sectors like construction, education, health and finance.ⁱⁱ The overall contribution to the GDP of the informal segment is available from the National Accounts and is roughly 40 per cent.ⁱⁱⁱ

Informal workers in agriculture, manufacturing and services constitute about 90 per cent of India's working population.^{iv} Moreover, this informal segment has neither disappeared nor been displaced despite economic growth. On the contrary, new employment in the organised sector is increasingly informal.^v There is no reason to expect that the size of the informal sector will reduce substantially in the foreseeable future.^{vi} It cannot be over-emphasized that no single typology defines the relationship between the formal and informal segments of the economy.^{vii} Some activities in the informal segment are sub-contracted from formal enterprises (for example embellishment of garments; stitching buttons, shoe soles; assembling parts); some are own account production directly sold to consumers (including both manufacturing and services, eg products like kites, rakhis, malas...or services like tailoring, construction, street vending); some activities include both sub-contracting from the formal sector and own account production – eg *bidi* making has a substantial home-based share and also a factory share; *agarbathis* (incense sticks) are likewise largely made at home with the perfume generally added at a factory.^{viii} There are other activities which shift from formal to informal or vice versa depending on the status of the economy – failure of the growth of jobs involving formal work is accompanied by an expansion of informal work. It is well recognized that data for a comprehensive study of the informal sector is currently very poor in India – by way of exception, two rounds of the NSSO survey reports provide some information on home based work and its share in overall employment for men and women; as well as other aspects.^{ix}

While domestic markets are more significant on the whole than export markets for informal work, some export production-linked activities are outsourced to or made available to informal/ home based workers. In many such cases, the formal segment adds the capital content (including branding) only. In other cases small industries that produce certain kinds of products (including garments, leather goods, small tools, etc.) export directly without formal regulations and procedures.^x Finally, in all developing countries including India, agriculture, nomadic meat-sellers, and fisheries are largely outside the formal net and agricultural output and consumer non-durables including fish and meat/meat-products are significantly exported.^{xi}

Workers in the informal economy lack written contracts/assurance of work, access to social protection, suffer from seasonality in demand, etc.^{xii} Estimates suggest that women constitute one third of those engaged in the informal segment and one seventh of those engaged in the formal segment in India.^{xiii} Fluctuations in market demand and prices are immediately translated into fluctuations in work and income. It needs emphasis that informal work as described above is not illegal. It is simply small scale, falling below the size beyond which registration and returns become mandatory.^{xiv}

The norms of behavior within the informal economy therefore permeate the larger economy. The success of attempts at economic regulation will depend on the extent to which there is recognition of, and compliance within, the informal economy; a discourse on competition that limits itself to the formal organized sector (as with Competition law in the Indian context at

present) ignores the complex interactions between formal and informal segments of the economy. In a country where the informal economy accounts for a large part of the overall economy it becomes necessary to examine the competitive impact of, and upon, informal, but legal, market players. One notable recent study (the Report of the OECD Global Forum on Competition, Competition Policy and the Informal Economy - 2009) acknowledges that there are difficulties in applying competition law with regard to informal firms (particularly in defining the relevant market and in computation of market shares). The Report notes that competition from informal firms (that don't comply with regulatory obligations) hurts formal firms in a variety of ways, and urges competition authorities to attack the underlying causes of (low-productivity) informality. However, the study fails to adequately differentiate and explain the competitive effects of informal but legally-compliant individual street vendors, for example.^{xv}

The English case of *Gloucester Grammar School* (1410) is one of the oldest recorded authorities for the proposition that '*fair competition is itself no ground of action whatever damage it may cause.*'^{xvi} Lord Lindley's dictum in *Quinn v. Leathem* is worth noting in this regard: "*Competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed.*"^{xvii} Further, it is well settled in English law that under-selling by itself is not a wrong, where the seller may sell some article at un-remunerative prices to attract customers, nor is it a wrong to offer advantages to customers who will deal with a trading company to the exclusion of its rival.^{xviii}

Economic theory and approaches to competition law

While economic theory has always been the basis of competition law, the fairly recent impetus in Europe to adopt a 'more economic approach' to competition (a policy decision taken under former Competition Commissioner Mario Monti) has led to resurgence in the analysis of the relationship between economic theory and competition law.^{xix} The 'more economic approach' abandons the form-based approach and advocates an assessment of the legality of actions in light of the impact of these actions on the relevant market.^{xx} While this approach necessarily suggests a change in the way competition law applies, it also highlights the need for clearly (re)assessing the goals of competition law. The 'more economic approach' therefore enables (and requires) clear appreciation of the informal segment and its relationship to the aims and goals of competition law and policy. For example, the EU competition rules have a specific goal of market integration and additionally are intended to protect 'effective competition' which 'brings benefits to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation.'^{xxi} Clearly, the role of the informal segment in bringing about effective competition resulting in benefits to customers would need to be explicitly recognized by any analysis of such competition rules.

Overviews of the goals of competition policy written from an economic perspective primarily emphasize allocative (and productive) efficiency based on welfare economics (connected with general equilibrium theory at the theoretical level and with the Pareto criterion at the normative level).^{xxii} Efficient allocation would imply that the resources of an economy should be allocated to the production of products in such a way that the Pareto criterion is fulfilled for the whole economy.^{xxiii} The Pareto criterion is satisfied when there is no possibility of increasing the well-being of any person in the economy without reducing that of any other person. It is important to reiterate that the concept of allocative efficiency is closely linked to general equilibrium theory and the model of perfect competition.^{xxiv}

The link between efficient allocation and competition is represented by the first theorem of welfare economics that asserts that market equilibria are Pareto efficient. In other words, if the assumptions of the model of perfect competition are fulfilled by all markets (product and factor markets), the decentralized optimizing behaviour of all agents (persons, firms) will lead to an efficient allocation throughout the entire economy, that is, the Pareto criterion will be automatically fulfilled without the necessity for state intervention.^{xxv} Consequently, welfare-theoretical market failure theory is based upon the notion that any deviation from the assumptions of perfect competition leads to allocative inefficiency of one kind or the other, and therefore requires some correction of the allocation through economic policy.^{xxvi} The assumptions of the model of perfect competition are usually represented as: there are many buyers and sellers of the product, the quantity of products bought by any buyer or sold by any seller is so small relative to the total quantity traded that changes in these quantities leave market prices unchanged, the product is homogeneous, all buyers and sellers have perfect information and there is both free entry into and exit out of the market.^{xxvii}

Competition policy, from this welfare-theoretical perspective, represents just one of a number of economic policies that helps solve market-failure problems – competition, therefore, is viewed as an instrument that has the sole task of effectuating allocative efficiency. In a scenario where a conflict emerges between competitive markets and efficiency, this perspective would advocate that a trade-off must always be made in favour of efficiency.^{xxviii}

The operation of the informal segment appears to correspond to the above-mentioned assumptions of perfect competition to a far greater extent than the formal segment. For example, an Asian street food market represents one of the few real-world cases where the assumptions of a perfectly competitive market are more or less achieved. Additionally, given the supply linkages between the informal and formal segment of the economy as highlighted earlier in the section, the informal segment clearly contributes to achievement of the assumptions of a model of perfect competition even when the markets in question are clearly non-segmented (for example, the product market for fresh fruits or fresh vegetables in a particular geographic area).

The qualitative homogeneity of the product in question, of course, deserves a particularly careful case-by-case analysis when considering markets that are constituted by both the formal and informal segment. The informal segment and its relationship to allocative (and productive) efficiency therefore ought to form a significant part of any analysis of competition policy and the law from the welfare-theoretical market-failure perspective.

Other approaches focusing on dynamic efficiency (and not static allocative efficiency) suggest that innovation and diffusion of new products and technologies are among the important results that effective competition should bring about.^{xxxix} In this tradition, theories of allocative efficiency cannot satisfactorily analyse innovation given that innovative processes cannot simply be treated as production processes with pre-defined inputs and outputs. This requires the development of an economic theory that recognizes competition as a dynamic process (involving innovation, imitation, experimentation, variation-selection, discovery, etc.) that cannot be adequately analysed or explained by the static assumptions of the perfect competition model that mainstream general equilibrium theory is built around.^{xxx} For example, Hayek's well-known critique argues that the model of perfect competition and its knowledge assumptions erroneously presupposes the very knowledge that is generated through the competition process.^{xxxi} Clearly then, the question of the effect and extent of trade-offs between static and dynamic efficiency must feature prominently in discussions on competition policy.^{xxxii} The nature of the informal segment as characterized earlier suggests a high degree of innovation, imitation, experimentation, etc. – the *dabbawallahs* of Mumbai (who deliver lunch boxes to office goers) being a case in point - therefore any analysis of dynamic efficiency in a competitive economy would be incomplete without recognition of the role and potential of the informal segment.

Yet other approaches argue that apart from increasing welfare with regard to static and dynamic efficiency, the goal of competition policy is to specifically increase welfare through the prevention of exploitation of market participants (especially consumers) by firms with market power. The logic underlying this approach is that redistributions that are caused not by better performance of market players but only through restraints of competition and through market power should be prevented through the operation of competition law and policy.

Despite the stated position of the European Commission and the US Federal Trade Commission in upholding the welfare of consumer when faced with firms having market power, there is an ongoing unresolved debate on whether total-welfare standards or consumer-welfare standards should be used as the appropriate normative criterion when evaluating competition law.^{xxxiii} The use of a total-welfare standard as a normative criterion for competition law would imply that it is not necessary to consider the distributional effects that turn a part of the former consumer surplus into market-power profits since the only relevant consideration in a particular market is that the sum of producer and consumer surplus (total surplus) should be maximized.^{xxxiv} In contrast, the use of a consumer-welfare standard as a normative criterion for evaluating competition law

would focus on whether the consumer surplus is larger or smaller as a result of the operation of the competition regulation irrespective of its impact on the surplus of the producers.^{xxxv}

The informal segment's effect on both total welfare and consumer welfare therefore requires careful analysis in any approach that identifies the goal of competition law as preventing the exploitation of market participants by firms with market power. In the context of India, the informal segment caters, inter alia, to a vast population of desperately poor consumers who simply would not be able to afford a qualitatively substitutable product sourced from the formal segment production process. The question of consumer-welfare versus total-welfare takes on a new dimension in the context of such demographic socio-economic realities.

We have discussed above three distinctive economic approaches to competition law and policy – each of these emphasizes the importance of efficiency, of one kind or another, to the overall goal of effective competition. In sharp contrast, one researcher suggests that the choice being between two (usually) conflicting legal goals – a) ensuring freedom to compete, or b) promoting economic and social welfare – ‘the creation and protection of the freedom to compete should remain the purpose of competition law’.^{xxxvi} Acceptance of this argument (and in light of the formal-informal linkages described earlier) would suggest that competition law and policy would need to create and protect the economic freedom to compete within both the informal segment and the formal segment. This argument however is premised on the contestable assumption that competition lawyers cannot predict or foresee future economic outcomes and therefore lacks a sufficient normative basis of its own that would help justify its broader acceptability.

The problem with the efficiency-based approaches outlined above remains that the economic theory involved has not yet adequately developed normative concepts that integrate the idea of protected rights for individual people or firms into the normative welfare-theoretical efficiency perspectives (static and/or dynamic efficiency, consumer-welfare or total-welfare concepts). The traditional welfare-theoretical perspectives simply do not attribute any (or adequate) value to freedom of contract, entrepreneurial freedom, fairness and justice, or specific policies promoting gender equality, poverty alleviation, dignity of labour, etc unless they help achieve efficient allocation, total welfare or consumer welfare.^{xxxvii}

A Constitutional Economics Perspective on Market Competition

Economic freedom, fairness and justice, gender-sensitivity, protection of small, medium-sized, and family-run firms, international competitiveness of domestic firms, and economic integration could well represent legitimate goals of competition law from a constitutional economics perspective that takes as its ultimate normative criterion (for the rules of the market) the preferences of citizens.^{xxxviii} Such a constitutional economics approach would also imply that different societies can come to different conclusions about the appropriate goals of competition laws.^{xxxix} In the context of India, the salient features of a constitutional economics perspective to market competition could be ascertained through a careful examination of statutes, delegated

legislation, executive and judicial decisions relating to competition and the informal economy when mediated through the relevant legal meanings flowing from the Preamble, Part III (the fundamental rights chapter), Part IV (directive principles of state policy), and other provisions of the Constitution of India. While a detailed analysis is not possible here, constitutional guidance on citizen preferences relevant to competition and informality in varying governance contexts may be sourced in provisions including the Preamble, and various articles of the Constitution especially Articles 14, 19, 21, 38, 39, 39-A, 41, 42, 43, 43-A, 47, 48-A, 243-P to 243-ZG

The underlying objectives of the Competition Act, 2002 (as amended by the Competition (Amendment) Act, 2007) are: “*keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.*”^{xli} Therefore, the goals of the Indian competition legislation may be clearly identified as: 1) protecting the interests of consumers; 2) ensuring economic freedom to trade and compete; and 3) promoting and sustaining competition in markets including through the prevention of practices having an adverse effect on competition.^{xlii} Clearly, these objectives are not based purely on efficiency considerations (static efficiency and/or dynamic efficiency) given that the interests of customers and economic freedom of market participants are also explicitly identified as objectives of the competition legislation. The realization of these goals would naturally require a careful examination of whether and to what extent the informal sector promotes the interests of the customers; the extent to which the legal system promotes or stifles the informal segment’s freedom to trade; and the nature of the relationship between the informal segment and effective competition in relevant markets.

Given the large numbers of persons who work in the informal segment and the large volume of trade generated through or involving informality, any inclusive, democratic and sustainable competition policy would need to carefully analyze and accommodate the informal segment’s overall effect on effective competition within the relevant market, the satisfaction or non-satisfaction of consumer interests by both the formal and informal segments in the economy, and the realization (or non-realization) of the constitutionally mandated freedom to trade in the market (including formal and informal segments) in terms of the Competition Act, 2002.^{xliii} In particular, any articulation of effective competition in the Indian context would necessitate an active engagement with the informal segment’s relationship to static allocative efficiency, dynamic innovation efficiency, and constitutional citizen preferences as discussed earlier in this section.

The Competition Act, 2002 seeks to achieve the afore-mentioned objectives through 4 distinct strategies. Firstly, the prohibition and voiding of “any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which

causes or is likely to cause an appreciable adverse effect on competition within India.”^{xliii} Second, a prohibition on the abuse of dominant position by any enterprise or group of enterprises.^{xliv} Third, the regulation and voiding of combinations (satisfying certain threshold conditions) that cause or are likely to cause “an appreciable adverse effect on competition within the relevant market in India.”^{xlv}

Finally, Section 49 of the Competition Act provides that the Competition Commission shall (on receiving a reference from the Central Government or the State Government) provide its opinion on possible effect of governmental policy or any other matter on competition. Section 49 further provides that the Commission take suitable measures for the promotion of competition advocacy, creating awareness and imparting training on competition issues. Each of these strategies mandated through the Competition Act, 2002 once again require a clear articulation of what constitutes effective competition, the nature of the relationship between effective competition and the interests of the consumers, and the nature of the relationship between effective competition and the freedom of trade of market participants.^{xlvi}

Given the characterization of the informal segment in our economy earlier in this section, it is indeed critical that that the informal segment feature prominently in competition discourse revolving around effective competition, consumer interests, and the freedom of trade. At the outset, this would of course provide competition regulators and theorists with a more accurate determination of the relevant market when considering competition and competitive constraints. A starting point for this analysis could proceed from identifying the informal segment’s relationship to the three main sources of competitive constraints that firms are subject to: demand substitutability,^{xlvii} supply substitutability,^{xlviii} and potential competition^{xlix} - each of these constraints is critical for a definition of the relevant market (ie the relevant product market or the relevant geographic market) for the purposes of competition law.¹

The determination of relevant market, of course, remains the foundational step for preventing anti-competitive agreements, the abuse of dominant position, combinations having an adverse effect on competition, and for successfully pursuing the larger goals of competition advocacy.^{li} A clear appreciation of the role of the informal segment would enable competition regulators and theorists to more accurately determine market share, market power, and consequently, actual or possible market domination across the relevant market (potentially comprising both formal and informal segments).^{lii} To take street food vending as a concrete example of informal vendors, the relevant product market comprises small value items (typically perishable) for whom the competition comes from petty shops rather than organized retail of the kind associated with larger malls. In these items, contrary to widespread belief, street vendors need not necessarily be at a competitive disadvantage vis-à-vis petty traders who function from established markets, provided the market is otherwise well-governed and we have the rule of law. However, given the ground realities of harassment by local police, threats of eviction from civic authorities etc the playing field is often skewed against small vendors.

Can Competition law or policy address these concerns so that small vendors are not unfairly out-competed by their immediate rivals- petty shop keepers?

The US contribution to the OECD Global Forum on Competition, Competition Policy and the Informal Economy succinctly details corresponding responsibilities of the competition regulator: *“In cases in which informal market participants play a role in an antitrust market under investigation, the role of those market participants is taken into account just as formal participants are. Their market shares would be estimated according to the best available data and their ability to constrain an anticompetitive rise in prices or decrease in output would be considered. Consideration of their ability to constrain prices would, of course, need to take into account any limitations on their competitive significance that is caused by the informal nature of their market participation, the likelihood of market exit that might be caused by law enforcement efforts, and the extent to which price discrimination is feasible against an infra-marginal group of purchasers who insist on lawful products and who qualify as a distinct market.”*^{liii}

Interestingly, as has been the case in Ukraine, El Paso (Texas, USA), INDECOPI in Peru and more recently in Hialeah (Florida, USA), competition policy can also directly focus the spotlight on anti-competitive governmental arrangements, regulations and procedures that limit entry of the informal segment and its legitimate contributions to effective competition in the economy (including, specifically, the contribution of street vendors to effective competition).^{liv} Much empirical and theoretical work needs to be done on the effect of the informal segment on both demand-side substitutability and supply-side substitutability while determining competitive constraints in the relevant market under consideration. Further, the effect of capital mobility between the informal and formal segments on overall competitive constraints would be critical for any deep analysis and articulation of effective/fair competition in relevant markets of the economy.^{lv}

Most significantly, a clear recognition and articulation of the vision underlying competition policy helps appreciate the relevance of the informal segment and the importance of integrating the analysis of the informal segment into all aspects of competition law, policy and advocacy. Therefore, a closer appreciation of the varying approaches that undergird competition theory, policy and law requires careful re-examination in light of the socio-economic dimensions of the informal segment of the economy, the provisions of India’s competition legislation and policy, and the legal and constitutional milieu of the country as applicable to the informal segment. We address this aspect in some greater detail in the succeeding and final sections of this paper.

II. Legal situation of Street Vending

The provisions of the Competition Act, 2002 are effective notwithstanding anything inconsistent therewith contained in any other law in force (as of 2003 when the Act came into force).^{lvi} Further, S. 62 of the Competition Act, 2002 provides that the provisions of the Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force

(again, as of 2003 when the Act came into force). In this section, we further excavate the relationship between competition law, competition policy and the informal segment by briefly elaborating on the legal situation pertaining to one particular component of the informal segment in the Indian economy – street vendors.

A clear appreciation of the laws pertaining to street vendors helps appreciate the nature of the legal environment within which competition law and policy interact with the informal segment of the economy – this in turn enables an appreciation of deeper theoretical issues concerning culture, citizenship, commodification, consumption, public space, social movements, constitutional fairness and so on.^{lvii} Consequently, the main features of a competition discourse that effectively accommodates informality in its approach towards effective competition, consumer interests, freedom of trade and other avowed goals of India's national competition policy (in light of India's constitutional order) may be attempted.

A few general comments on street vending and attitudes thereto are in order first. Street vending varies greatly in scale, timing, location, remuneration; it varies in terms of workforce, and types of goods and services.^{lviii} *Prima facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying on his trade according to his own discretion and choice.^{lix}

Bromley's global review of street vending provides a useful summary of the major arguments that are frequently used to justify and to oppose the continuation and proliferation of street vending. The eleven major arguments in support of street vending include: 1) street vendors contribute directly to the overall level of economic activity, and to the provision of goods and services; 2) citizens have constitutional rights to choose their occupations and to engage in entrepreneurial activities; 3) Street vending is an actual or potential source of government tax revenues; 4) street vending serves as a social safety-net; 5) Street vending is a laboratory for entrepreneurship, family business and social interaction; 6) Street vending provides entrepreneurial opportunities to people who cannot afford to buy or rent fixed premises; 7) Street vendors greatly expand the range of places and times where goods and services can be provided, and sometimes they also offer goods and services which are not available in off-street locations; 8) Street vendors bring life to dull streets; 9) Because of its low capital requirements and its potential mobility, street vending is a very effective way to cater for seasonal, sporadic and special demands; 10) Street vending offers its workers considerable flexibility in hours and levels of activity and; 11) Street vending is a remarkable example of self-help and grass-roots initiative.^{lx}

In contrast, the sixteen major arguments commonly used against street vending may be summarized as: 1) Street vendors are not evenly spread across the city. They concentrate very heavily in a few locations, and those locations are typically the points with the highest levels of pedestrian and vehicular congestion; 2) By contributing to vehicular and pedestrian congestion,

street vendors may cause traffic accidents, increase the levels of vehicle-generated air pollution, and impede the flow of police, fire, ambulance and other emergency vehicles; 3) Street vending reduces the number of routes available to motor vehicles, it impedes door-to-door deliveries and collections, and it may create access problems for emergency vehicles; 4) Street vendors may block the routes of egress from crowded buildings like theaters, stadiums and department stores, increasing the scale of the tragedy in the event of a major fire, explosion, toxic gas escape or mass hysteria; 5) Street vendors can and often do “forestall” off-street businesses, attracting potential purchasers as they walk into a concentration of on- and off-street business activity; 6) Street vendors often fail to give receipts and keep accounts, to pay taxes on their earnings, and to charge sales or value added taxes to their customers; 7) Because they can leave or relocate their businesses more easily, street vendors have greater opportunity to swindle their customers and avoid official regulation than vendors in fixed retail establishments; 8) Street vendors of food and drink pose major public health problems; 9) Street vendors may be less professional, committed and responsible than off-street vendors; 10) Street vendors often include substantial numbers of minors; 11) A small minority of street vendors engage in such highly disreputable and often illegal trades as ticket-touting, pimping, prostitution, and the retailing of narcotics; 12) Street vendors contribute to the underground economy of undocumented cash transactions, not only through their sales, but also through the bribes they are often required to pay to police and municipal inspectors; 13) Through the activity and congestion that they generate, street vendors provide opportunities for pickpocketing, snatch thefts and armed assaults; 14) Some pedestrians and many motorists are disturbed, irritated and even frightened by street vendors’ solicitations; 15) Street vendors are often considered unsightly, they may generate a lot of noise with their announcements, and they and their customers often leave garbage on the streets; 16) In orthodox Marxist visions, street vendors are viewed as the epitome of surplus labor and underemployment, inserting additional middlemen into marketing chains, promoting superfluous consumption, and supporting a petty capitalist, competitive ethic.^{lxi}

The significance of the different arguments varies considerably from country to country, from city to city, and in accordance with the specific characteristics of the vendor, merchandise and neighborhood.^{lxii} Significantly, most of the most heated debates on street vending concern ‘conflict-zones’ of agglomeration or hyper-agglomeration (usually less than five percent of the urban area and including the central business district, various neighbourhood and suburban commercial centres, the major sports and entertainment centres, tourist attractions, religious sites, monuments, etc.).^{lxiii} Consequently, the relationship between each argument (whether for or against street vending) and effective/fair/desirable competition in the relevant market deserves careful empirical study before flexible, adaptable, experimenting, and multiple-governance models of regulation may be put in place.^{lxiv}

In the Indian context, the street vendors segment of the informal economy is addressed in the non-binding National Policy on Urban Street Vendors, 2009.^{lxv} The policy document revises and updates the older 2004 National Policy on Urban Street Vendors.^{lxvi} The Ministry of Housing

and Urban Poverty Alleviation also prepared the Model Street Vendors (Protection of Livelihood and Regulation of Street Vending) Bill in 2009.^{lxvii}

On average, street vendors are estimated at around 2 % of the population of cities.^{lxviii} In terms of total numbers, there are an estimated 10 million or more street vendors in India (and an estimated 350,000-500,000 in New Delhi alone).^{lxix} In general, street vendors earn very meager wages (often below the minimum wage mandated by labour laws) – therefore, it would be accurate to generalize that most street vendors are desperately poor relative to their counterparts in the formal segment of the economy.^{lxx} The 2009 policy document explicitly recognizes that street vending is a source of employment as well as a way of providing ‘affordable’ and ‘convenient’ services and commodities to a majority of the urban population.^{lxxi} Paragraph 1.7 of the 2009 Policy states: “*Street vendors provide valuable services to the urban masses while eking out a living through their own enterprise, limited resources and labour. They facilitate convenient, efficient and cost-effective distribution of goods and services to the public. They also contribute significantly to local economic growth and vitality of the urban economies. This Policy recognizes that street vendors constitute an integral and legitimate part of the urban retail trade and distribution system for daily necessities of the general public.*”

In October 2010, a Division bench of the Supreme Court of India (comprised of Justice G.S. Singhvi and Justice Asok Kumar Ganguly) in *Gainda Ram v. MCD* reiterated that the right to street vending was a fundamental right protected under Article 19(1)(g) of the Constitution of India.^{lxxii} Significantly, the Supreme Court in *Gainda Ram v. MCD* also held that this right could be reasonably restricted only through a law (and not through governmental/municipal schemes), and therefore mandated that legislation be enacted by the appropriate Government by 30th June, 2011.^{lxxiii} While no new legislation has been enacted at the time of writing, it should be noted that this decision was the latest development in a long series of judicial pronouncements spanning almost five decades where the Supreme Court had considered the legal status of street vending and the precise contours of the rights implicated in the phenomenon of street vending and its governmental regulation.^{lxxiv} As long back as 1954, the Supreme Court of India had held that though all public streets and roads in India vest with the State, the State holds them as trustees on behalf of the public.^{lxxv}

While, in general, the decisions of the Indian courts reflect a particularly thin engagement with the numerous theoretical and constitutional issues raised by street trade and street vending, the decision of the Madras High Court in *M. A. Pal Mohammed v. R. K. Sadarangani* represents a particularly sophisticated judicial treatment of the rights (and competitive effects) of street vendors in cities when balanced with the rights of other citizens and users of public streets.^{lxxvi} The constitutional position, briefly summarized, seems to be that street vending is an enforceable fundamental right under Article 19(1)(g); this right is however subject to existing or new laws that impose “in the interests of the general public, reasonable restrictions on the exercise of the

right” or that specify “the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.”^{lxxvii}

In the absence of a comprehensive national legislation regulating street vending, the actual restrictions on the fundamental right to street vending are found in a wide variety of municipal, state and national laws and schemes (including police laws, health laws, food safety laws, public order laws, town planning laws, traffic laws, etc.) that vary from municipality to municipality, city to city, and state to state.^{lxxviii} In general, these statutes, delegated legislations, and executive schemes do not adequately incorporate a nuanced understanding of constitutional economics, competition law or competition policy while imposing “reasonable” restrictions on street vending in our cities.^{lxxix}

It should be noted that India is a party to several international agreements relevant to the regulation of street vendors including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the International Convention on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), over forty two International Labour Organization (ILO) Convention that (should) influence executive and judicial interpretation and have an enforceable effect when there is a lacuna in the domestic law on the point.^{lxxx}

Several studies have documented contexts (and relevant markets) which clearly indicate that street vendors do not compete with brick-and-mortar establishments, and instead often contribute directly to the economic value that brick-and-mortar establishments enjoy.^{lxxxii} In other contexts, street vendors could directly compete with off-street establishments in a positive way so as to increase consumer choices and bring down anti-competitive high-prices – this is particularly true for street vending of handicrafts, ethnic textiles, foods etc. Despite positive efforts in some cities like Bhubaneswar and Imphal, street vendors continue to face a number of very significant and ‘unconstitutional’ problems - these primarily include the myriad difficulties in getting a license from corrupt or insensitive state bodies, and the constant threat of over-enthusiastically enforced, outdated regulations that might threaten their livelihood, dignity, profitability, etc. or might position them away from the natural markets where they would otherwise tend to be positioned.^{lxxxiii} Consequently, a movement towards enabling comprehensive site-specific overhaul of the regulatory framework, as informed by empirical realities; a correct constitutional interpretation of the relevant regulatory framework, the Competition Act, 2002 and India’s competition policy is very much the need of the hour.

III. Street Foods: Regulation, competition and constitutional economics in our cities

As Tinker’s multi-city global study compellingly demonstrates, today, street foods provide an essential source of inexpensive, healthy and ready-to-eat food for workers of every class and occupation.^{lxxxiii} Bhowmik’s NASVI-commissioned study of street vending in seven Indian cities confirms Tinker’s finding in the urban pan-Indian context.^{lxxxiv} Tiwari points out that the road

environment design and nature of road traffic in Indian cities (including pedestrians, bicycles, animal-driven carts, non-motorized rickshaws, etc) imply both that street vendors of edibles are inevitable and that such street food serves a very real and otherwise largely un-fulfilled demand.^{lxxxv}

Several studies have documented that street vending directly contributes to consumer convenience and satisfaction, overall safety, live-ability, and productivity in urban landscapes apart from indirectly generating value through promotion of gender equality, dignity of livelihood, amelioration of race, religion and ethnicity based discrimination, and basic sustenance needs for a large number of desperately low-income persons (apart from college students, white-collar workers and street food aficionados).^{lxxxvi} Despite these insightful findings on the ubiquity and value of street foods (particularly in natural markets such as the railway station, large hospitals, open recreation grounds, etc.), there have been almost no focused studies of the competitive market impacts of street food in specific or general contexts. One notable situation-specific example of special interest that evidences a nuanced multi-dimensional approach is El Paso (Texas, USA) where city officials passed a new ordinance on April 26, 2011 eliminating protectionist regulations against mobile street food vendors in response to a federal civil rights lawsuit (*Castaneda v. City of El Paso*) that challenged the city's mobile vending restrictions on grounds (*inter alia*) of serving the sole purpose of 'protecting favoured businesses from competition.'

Generalising, one may state that in Indian cities, street food vendors do provide a very useful competitive influence on non-street retail food enterprises in several product and geographic markets (including snacks, chaats, ice-cream, etc. and including the entire gamut of food options in low-income neighbourhoods), apart from directly contributing to effective competition within the informal food segment by reducing prices and increasing choices.

James Scott's classic *Seeing Like a State – How Certain Schemes to Improve the Human Condition Have Failed* analyzes diverse failures in high-modern, authoritarian state planning – collectivization in Russia, the building of Brasilia, compulsory *ujamaa* villages in Tanzania, Le Corbusier's grand vision of urban order, Lenin's Russia, etc. – and concludes that “[c]ollectivized command economies virtually everywhere have limped along thanks to the often desperate improvisation of an informal economy wholly outside its schemata.”^{lxxxvii} Scott cautions against relying on the case against high modernism to blindly rush to an ostensibly optimal invisible hand scenario of markets (as opposed to centralized economies) by pointing out that the “market is itself an instituted, formal system of coordination, despite the elbow room that it provides to its participants, and it is therefore similarly dependent on a larger system of social relations which its own calculus does not acknowledge and which it can neither create nor maintain.” The larger system of social relations that Scott mentions refers to elements of contract and property law, the state's coercive power to enforce these laws, and “antecedent patterns and

norms of social trust, community, and cooperation, without which market exchange is inconceivable.”

In all modern cities, the nonconforming informal practice is an indispensable condition for formal order. In all modern nation states, the economy is “*a subsystem of a finite and nongrowing eco-system,*” whose carrying capacity and interactions it must respect as a condition of its persistence.^{lxxxviii} This fragile, often invisibilized, relationship between the street economy and the eco-system suffers the most when state activities and state officials insist on treating people on the streets according to high modernism influenced schemata (the economic plan, city plan, development plan, city map, survey map, zonal map, record of ownership, kiosk license, market vending license, fixed cart license, zone management plan, classification of religion or caste or ethnicity, arrest record, map of political boundaries, etc. constitute the synoptic data that the state uses for its miniaturized legibility and simplification schemata of the city streets) that does not reflect constitutional realities or constitutional economics informed by well-developed competition law and policy.

Legal systems around the world presume or explicitly guarantee the legal subject's access to food.^{lxxxix} Similarly, at the transnational and international levels, treaty obligations, customary law, and other authoritative sources of law also recognize the every individual's access to suitable and adequate food as part of a legally recognized interest such as dignity, self-determination, personhood, equal treatment, market fairness, etc.^{xc} The correlative state duty to ensure that local, regional and national policies effectively realize access to food and choice at all levels of societal system planning, is not adequately discussed in the literature. This silence on the nature and extent of the state's affirmative duty to integrate access to adequate and suitable food into its planning and governance creates a host of complex problems in rapidly expanding, heterogeneous, multi-cultural, urban contexts.^{xcii}

Most importantly, private efforts at generating access to food in public spaces remain cast in ethical ambiguity, given the uncertainty on whether and to what extent the state is obligated to make accessible food for all. This constitutional grey area also encourages unwarranted legal and moral assumptions that street food as a phenomenon is 'not good', 'illegal', 'not valuable', 'a nuisance' and/or 'unaesthetic'. Site-specific factors such as consumer purchasing power, overall food security, employment levels and patterns, market dynamics, population pressure, city carrying capacity, transportation efficiency, and societal mores that vary from street to street and city to city add further complexity to the effort of agreeing on generalised norms, rules, principles or policies relevant to the urban ubiquity of street food.

Cities across the world have had a long history of continually evicting and harassing street food vendors. Antiquated ill-informed municipal laws, centralized authoritarian economic policies, corrupt city administrators and regulators, violent and unaccountable police, a desperately poor urban population, and a growingly insensitive and uninterested middle class all contribute to a

usually sorry tale of overall realized justice on the streets and in the courts of many modern cities in the developing and the developed world.^{xcii} The Institute for Justice's excellent June 2011 monograph *Streets of Dreams – How Cities Can Create Economic Opportunity by Knocking Down Protectionist Barriers to Street Vending* captures this apparently paradoxical situation well with its opening lines: “*For as long as there have been American cities, there have been street vendors – and regulations intended to limit their opportunities to vend.*” It is this paradoxical reality that forms the focus of this final section. The narratives of the economies of food and hunger in our city streets provide a particularly compelling account of the legal, political and moral violence asserted in the name of the city and its residents in many democratic constitutional orders.^{xciii}

Street foods may be viewed as “compossible” (*to borrow a term from Leibniz*) with, and not competitive to, other legally and normatively recognized or authoritative desires in cities, nations and supra-national institutions. Street foods meet a felt need of the communities they serve. And to that extent need to be assured of a level-playing field, if not outrightly protected on grounds of livelihood and welfare concerns. Health, safety and nutrition related concerns of street food can be easily enough tackled through the active sensitive engagement of the health and municipality officials with street food vendors, civil society organizations, and educators in deliberative communicative process.^{xciv} The perspective of constitutional economics sketched earlier in this paper proves useful in realigning our economic development models keeping in mind the empirical realities of the entrepreneurs in our midst, our constitutional order, and the real demands of our customers as citizens.

UN-HABITAT declarations on urban settlements commit states to cooperating not destabilizing or harassing existing informal structures.^{xcv} The picture in legal practice relating to street food vending across most cities surveyed in India is far from encouraging. We need to focus attention on simplifying the laws applicable to street food; the promotion of street food micro-enterprise through economic incentives, urban planning, legal and moral outlooks, and community-neighbourhood norms; the need for narrowly-tailored laws regulating health, safety, nutrition and hygiene; and a holistic and revitalised recognition of the enormous value that street food brings to our cities and lives.^{xcvi}

In conclusion,

Policy prescriptions that will effectively respond to the reality of a large urban street vending sector, in rapidly-expanding, high-population, economically heterogeneous, constitutionally competitive, urban centres in developing countries (like India) with site-specific spatial, transport and cultural/aesthetic geographies, and where street vending has been long prevalent are required. The goals of such law and policy realignments could be based on broad constitutional-economic goals such as: ensuring equitable access to public space for street vending; promoting

economic activity and employment through street vending, and; using street vending as a tool to advance related citywide planning goals.^{xcvii}

In practice, however, the debate is confined to the choice of regulation between one that contemplates a licensing model, where licenses are provided to select vendors, and a system of open registration, in which any potential vendor may register with the local authority and get into business. The relative effects of these two models are best understood from the perspective of the theory of monopolistic competition since street vendor markets, typically, are characterised by the following attributes:

- There are multiple consumers and producers, with none being a monopoly.
- There is some amount of product differentiation, in that consumers perceive non-price differences between different goods offered.
- There is little or no barrier to entry and exit.
- Producers may exert some control over price.
- There is imperfect information about price and quality (both among consumers and producers).

Economic theory says if vendors in a particular neighbourhood are either inefficient (providing low quality goods at high prices) or are overcharging consumers (high profit margins), then there is an incentive for other vendors to locate in that neighbourhood and share in the profits. If entry is easy and relatively costless, then other vendors do in fact enter the market. The consequence is that inefficient vendors are squeezed out of business or forced to improve, and the profit margins reduce. Importantly, whether such large scale entry happens or not, the potential threat of it forces existing vendors to behave competitively.

The number of vendors that the market supports in equilibrium depends, of course, on a number of factors. For example, the more differentiated the market (i.e. the more the difference between the different goods on offer), the fewer the firms that exist in equilibrium. Also, more obviously, the greater the fixed costs of business, or the cost of entry, the fewer the firms that finally operate. Street vending, with its low fixed costs and low direct costs of entry, is particularly vulnerable to entry, which has the effect, as argued, of keeping prices and profit margins down.

At the moment, however, this is not the case. Street vendors operate in an environment of *de facto* protected markets. Licenses are limited and difficult to acquire, causing serious barriers to entry. Existing vendors thus have a protected business. Moreover, although incumbent vendors may have to pay protection money to the police, putting pressure on their margins, these payments also ensure that competitors are driven away or forced to shut down, usually by the police itself. Thus, incumbent vendors have little external threat.

However, though their business is ‘protected’, this condition is hardly to street vendors’ advantage. There is a high price they have to pay for the ‘right’ to conduct their business. Also, the consumer suffers from a lack of options.

The current licensing system, therefore, creates artificial shortages in supply, with negative effects on price and consumer welfare. Moreover, the limited supply of vendors makes them prone to price manipulation. It is observed in many instances that neighbouring shops / hawkers exhibit cartel behaviour, by agreeing on prices for certain goods that are often at a level above competitive pricing. Thus the same products might have different prices in different neighbourhoods, but within a neighbourhood all shops sell that product at the same price.

Moving to a system to open registration would lower the cost of entry but could lead to an increase in the number of street vendors with implications for urban zoning laws and town planning.

Endnotes

ⁱ See generally Hart, J. Keith. "Informal Income Opportunities and Urban Employment in Ghana," *Journal of Modern African Studies*, 11 (1973), pp. 61-89; International Labour Organization, 1972, *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya*. Geneva, ILO; International Labour Organization, 2002, *Decent Work and the Informal Economy: Report IV*, 90th Session, Geneva: ILO; International Labour Organization and Delhi Group, 2007, ‘Concepts, Definitions and Sub-classifications’, (draft chapter 2), *Manual on Surveys of Informal Employment and Informal Sector*, Geneva: ILO. Bromley points out that “[i]n other Third World countries, however, with longer histories of colonialism and independence, with higher levels of urbanization, and with longer-established and more diverse production systems, the contrast between modern/formal and traditional/informal is far less evident. Instead of a polarization, more perceptive authors emphasize a continuum with numerous overlaps, ambiguities, and functional interdependencies based on sub-contracting, franchising, disguised wage labor, and dependent working, and this view seems much more appropriate to countries such as India [9; 32], Peru [30; 46], and Mexico [6; 27].” See Ray Bromley, “A New Path to Development? The Significance and Impact of Hernando De Soto's Ideas on Underdevelopment, Production, and Reproduction”, *Economic Geography*, Vol. 66, No. 4, *Production and Reproduction in Latin American Cities: Concepts, Linkages, and Empirical Trends* (Oct., 1990), pp. 328-348. See also Peattie, Lisa. "An Idea in Good Currency and How it Grew: The Informal Sector," *World Development*, 15 (1988), pp. 851-60; Lewis, W. Arthur. "Economic Development with Unlimited Supplies of Labour," *Manchester School of Economics and Social Studies*, 22 (1954), pp. 139-91.

ⁱⁱ See also R. Jhabvala, R. M. Sudarshan, & J. Unni (Eds.), *Informal Economy Centre Stage*, New Delhi, India: Sage, 2003.

ⁱⁱⁱ Estimates show that the shadow economy (a term broader in its connotations than informal economy) in 1999/2000 accounted for, on average, 41.2% of the GDP of 24 African economies, 41.5% of the GDP of 17 Central and South American economies, 26.3% of the GDP for 25 Asian economies, 37.9% of the GDP for 23 transition economies, and 16.8% of the GDP for 21 OECD countries. The estimates also indicate that, for the 11 year period studied and for the economies for which estimates are available, the extent of informality grew by 7.3% in Africa, 7.3% in Central and South American economies, 5.4% in

Asian economies, 6.4% in transition economies and 3.6% in OECD countries. See Schneider, Friedrich and Enste, D. 2002, —The Shadow Economy: An International Survey, Cambridge, UK: Cambridge University Press.

^{iv} National Commission for Enterprises in the Unorganised Sector (NCEUS), 2007, Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector, New Delhi: GOI. The size of the informal labour market is similarly large in many other developing countries. See PR Agenor, ‘The Labour Market and Economic Adjustment’, IMF Staff Papers, 32: 261-335 for a detailed survey of the literature estimating the size of the informal labour market in developing countries.

^v See Martha Chen, Rethinking the Informal Economy, 531 SEMINAR 12 (2003); Sharit K Bhowmik, India – Labour Sociology Searching for a Direction, Work and Occupations, Volume 36, Number 2, May 2009, p. 139, 142.

^{vi} The report of the 55th Round of the National Sample Survey (1999-2000) shows that 397 million persons were employed in the informal sector. This figure increases to 458 million in the 61st Round (2004-2005). 66th Round (2009-10) data confirms the growth of the informal segment.

^{vii} See in general, Hernando de Soto, The Mystery of Capital (2000); The Other Path: The Invisible Revolution in the Third World (1989). De Soto's ideas on informality, which lead to deregulation, debureaucratization, and privatization, provide an informative contrast with the International Labour Office's “informal sector” concept that advocates increased state support for small enterprises through credit, technical assistance, and training. For an interesting recent work on general equilibrium analysis of the features embedded in the interactions between the formal and the informal sectors, see S Marjit and S Kar, The Outsiders – Economic Reform and Informal Labour in a Developing Economy, 2011. For economic frameworks for modelling formal-informal labour markets, see A Carruth and AJ Oswald, 1981, “The Determination of Union and non-union Wage Rates”. European Economic Review, 16 (2/3): 285-302; PR Agenor and P Montiel, Developmental Economics, 1996; P. Agenor, 2006, ‘External Shocks and Urban Poor’, mimeo, University of Manchester; MR Gupta, 1997, “Informal Sector and Informal Capital Markets in a Small Open Less Developed Economy”, Journal of Development Economics, 52 (2): 409-28; GS Fields, 1990, Labour Market Modeling and the Urban Informal Sector: Theory and Evidence, in D Turnham, B. Salome and A Schwarz (eds.), Informal Sector and Evidence Revisited, Paris: OECD; - 2005, “A Welfare Economic Analysis of Labour Market Policies in the Harris-Todaro Model”, Journal of Development Economics, 76 (1): 127-46; B Gibson, “The Transition to a Globalised Economy: Poverty, Human Capital and the Informal Sector in a Structuralist CGE model”, Journal of Development Economics, 78 (1): 60-94; PR Agenor and J. Aizenman, 1999, “Macroeconomic Adjustment with Segmented Labour Markets”, Journal of Development Economics, 58(2): 277-96; S. Chaudhuri and U Mukhopadhyay, 2002, “Economic Liberalization and Welfare in a Model with an Informal Sector”, The Economics of Transition, The European Bank for Reconstruction and Development, 10 (1): 143-72; - Revisiting the Informal Sector: A General Equilibrium Approach, 2009; O Stark, 1982, “On Modeling the Informal Sector”. World Development, 10 (5): 413-16. See also Breman, Jan. "A Dualistic Labour System? A Critique of the 'Informal Sector' Concept," Economic and Political Weekly, 11 (1976), #48, pp. 1870-76, #49, pp. 1905-09, and #50, pp. 1939-44; Barbara Harris-White, (2003) *India Working, Essays on Society and Economy*, Cambridge: Cambridge University Press; Barbara Harris-White and Judith Heyer (Eds.), *The Comparative Political Economy of Development – Africa and South Asia*, Routledge, 2010.

^{viii} See generally Bhowmik, S. K. (2004), Work in a Globalising Economy: Reflections on Outsourcing in India, Labour Capital and Society, 37(1&2), 76-96; Holmstrom, M. (1976), South Indian Factory Workers: Their life and their Work, Cambridge, UK: Cambridge University Press; Holmstrom, M. (1986), Industry and Inequality: The Social Anthropology of Indian Labour, Cambridge, UK: Cambridge University Press; R. Jhabvala, R. M. Sudarshan, & J. Unni (Eds.), Informal Economy Centre Stage, New Delhi, India: Sage, 2003; Chen, M., J. Vanek, F. Lund, J. Heintz, R. Jhabvala and C. Bonner, 2005, *Progress of the World's Women 2005: Women, Work, and Poverty*. New York: UNIFEM;

^{ix} See National Sample Survey Organization, 1999-2000, National Sample Survey (55th Round), Non-agricultural Enterprises in the Informal Sector in India, 1999-2000-Key Results, Report No. 456/55/2.0/1; 2004-5; 2005-06, National Sample Survey (62nd Round), Unorganised Manufacturing Sector in India – Employment, Assets and Borrowings, Report No. 525/62; National Sample Survey on Employment-Unemployment (66th Round) 2009-10.

^x See University Grants Commission (UGC) India, 1996, “Financial Viability of Informal Sector in Calcutta”, Mimeo, Department of Economics, Calcutta University.

^{xi} S Marjit and S Kar, *The Outsiders – Economic Reform and Informal Labour in a Developing Economy*, 2011, p. 64.

^{xii} The definition of factory in S. 2(m) of the Factories Act, 1948 results in the statute applying only to manufacturing units that employ a minimum of 10 workers and use electrical power in manufacturing or a minimum of 20 workers if the unit does not use electrical power. Legislations such as the Employees State Insurance Act, 1948, the Workmen’s Compensation Act, 1923, the Employees Provident Fund and Family Pension Act, 1952 and the Payment of Gratuity Act, 1972 apply only to establishments covered by the Factories Act, 1948. See Sharit K Bhowmik, *India – Labour Sociology Searching for a Direction, Work and Occupations*, Volume 36, Number 2, May 2009, pp. 126-144. Significantly, S. 85 of the Factories Act, 1948 enables State Governments to declare that all or any of the provisions of the Act apply to manufacturing process that don’t meet the above-stated numerical requirements - this provision, however, does not apply to family-run enterprises and is seldom/never used for the benefit of informal segment enterprises in any of the States (this assertion needs checking for confirmation - AN).

^{xiii} Davala, S. C. (Ed.), (1995), *Unprotected Labour in India*. New Delhi, India: Friedrich Ebert Stiftung. See also, Elaine Jones et al, *Trading our Way Up: Women Organizing for Fair Trade*, WIEGO, 2011.

^{xiv} For a discussion of the channels leading to informality among individual, firms, and societies from various perspectives, see Hernando de Soto, *The Mystery of Capital* (2000); *The Other Path: The Invisible Revolution in the Third World* (1989); D McKenzie and YS Sakho, 2010, “Does it Pay Firms to Register for Taxes? The Impact of Formality on Firm Profitability”, *Journal of Development Economics*, 91(1) 15-24; Avinash Dixit, *Lawlessness and Economics: Alternative Modes of Governance*, 2004; Dabla-Norris et al, 2008, “What Causes Firms to Hide Output? The Determinants of Informality”, *Journal of Development Economics* 85 (1-2): 1-27; Barbara Harris-White and Anushree Sinha, *Trade Liberalization and India’s Informal Economy*, 200; Basudeb Guha-Khasnobis and Ravi Kanpur (eds.), *Informal Labour Markets and Development*, 2006. See also National Commission for Enterprises in the Unorganised Sector (NCEUS), 2007, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector*, New Delhi: GOI; papers published in *The Yale Law Journal*, Vol. 103, No. 8, Symposium: *The Informal Economy* (Jun.,1994).

^{xv} See Report of the OECD Global Forum on Competition, Competition Policy and the Informal Economy – 2009.

^{xvi} See *Gloucester Grammar School*, (1410) 11 Han IV, 47.

^{xvii} (1901) AC 495, 539.

^{xviii} See *Mogul Steamship Co. v. McGregor, Gow & Co.*, (1892) AC 25. English law does recognise a tort of “*interfering with the trade or business of another person by doing unlawful acts.*” See *Merkur Island Shipping Corpn. v. Laughton*, (1983) 2 ALL ER 189 (HL) p. 196; *J.T. Stratford & Son Ltd. v. Lindley*, (1965) AC 169 (HL) pp. 324, 329.

^{xix} See, for example, Josef Drexel et al, *Economic Theory and Competition Law*, 2009; Paula Cook et al, *Competitive Advantage and Competition Policy in Developing Countries*, 2007. See generally, Andrew McNab (Ed.), *Bellamy & Child – Materials on European Community Law of Competition*, 2010.

^{xx} The changed approach in the European context is particularly evident in the Ryanair/ Aer Lingus decision where the European Commission carefully re-assessed the econometric submissions put forward by the parties and carried out its own empirical analysis. See Commission Decision, 27 June 2007, Case No COMP/M.4439 – Ryanair/ Aer Lingus.

^{xxi} Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 5 February 2004, [2004] OJ C 31/7.

^{xxii} See for example, M de la Mano, “For the Customer’s Sake: The Competitive Effects of Efficiencies in European Merger Control”, 2002, Enterprise Papers No. 11; M Motta, Competition Policy – Theory and Practice, 2004; RJ Van Den Berg and PD Camesasca, European Competition Law and Economics: A Comparative Perspective, 2006, p. 16; W Kerber and U Schwalbe, “Economic Foundations of Competition Law” in FJ Sacker et al (eds.), Competition Law: European Community Practice and Procedure – Article-by-article Commentary of the EC Competition Law (2008).

^{xxiii} Allocative efficiency is also referred to as static efficiency because the set of products, production technologies, production factors and preferences are assumed as given and constant and are not supposed to change as a result of competition.

^{xxiv} For more on general equilibrium theory and perfect competition, see Arrow K. J. and G. Debreu (1954). “The Existence of an Equilibrium for a Competitive Economy” *Econometrica*, vol. XXII, 265-90.

^{xxv} Wolfgang Kerber, “Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law”, in Josef Drexel et al, *Economic Theory and Competition Law*, 2009, p. 121 [Hereafter Kerber].

^{xxvi} Kerber, p. 96.

^{xxvii} See any advanced text on microeconomics. See also See Asian Development Bank, *Economic Foundations of Competition Law*, available at <http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/documents/chap1.pdf>.

^{xxviii} Kerber, p. 98.

^{xxix} See for example, G Dosi, “Sources, Procedures and Microeconomic Effects of Innovation”, 1988 26 *J Econ Lit* 1120; RR Nelson, “Recent Evolutionary Theorizing about Economic Change”, 1955 33 *J Econ Lit* 48; JA Schumpeter, *The Theory of Economic Development, An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle*, 1934; JS Metcalfe, *Evolutionary Economics and Creative Destruction*, 1998; FA Hayek, “Competition as a Discovery Procedure” in FA Hayek (ed.), *New Studies in Philosophy, Politics, Economics and History of Ideas*, 1978; RR Nelson, “Recent Evolutionary Theorizing about Economic Change”, 1995, 48 *J Econ Lit* 48; W Kerber and NJ Saam, “Competition as a Test of Hypotheses: Simulation of Knowledge-generating Market Processes, 2001, 4 *JASSS* No. 3; FA Hayek, “The Meaning of Competition” in FA Hayek (ed.), *Individualism and Economic Order*, 1948; H Demsetz, *Economic, Legal, and Political Dimensions of Competition* (1982), as cited from Kerber *supra*.

^{xxx} Schumpeter’s emphasis on the importance of the entrepreneur and innovation to economic development is representative of the tradition of evolutionary innovation economics as an alternative to traditional equilibrium theory. See generally JA Schumpeter, *The Theory of Economic Development, An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle*, 1934.

^{xxxi} See FA Hayek, “The Meaning of Competition” in FA Hayek (ed.), *Individualism and Economic Order*, 1948.

^{xxxii} For example, EU competition policy’s ‘more economic approach’ has generated concerns that long-term effects on dynamic efficiency will be neglected compared to short-term static-efficiency effects. See C Kirchner, “Goals of Antitrust and Competition Law Revisited” in M Albert, D Schmidtchen and S Voigt (eds.), *The More Economic Approach to European Competition Law*, Conference on New Political Economy, Vol. 25 (2007) 7.

^{xxxiii} See PS Crampton, “Alternative Approaches to Competition Law, Consumers’ Surplus, Total Surplus, Total Welfare and Non-Efficiency Goals”, 1994, 17 *World Comp* 55; RJ Van den Bergh and PD Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2006), p. 29, as cited from Kerber *supra*.

^{xxxiv} Therefore, the total-welfare standard would correspond to the so-called Kaldor-Hicks welfare criterion and principle of wealth-maximization. For detailed discussion of the total-welfare standard and the Kaldor-Hicks welfare criterion, see generally K Heyer, “Welfare Standards and Merger Analysis: Why Not the Best?”, 2006, 2 *Comp Pol’y Int’l* No 2; AM Feldman, ‘Kaldor-Hicks Compensation’ in P

Newman (ed.), *New Palgrave Dictionary of Economics and the Law*, Vol. II (1998), 417; T Scitovsky, “A Note on Welfare Propositions in Economics”, 1941 9 *Rev Econ Stud* 77; RA Posner, “The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication”, 1980, *Hofstra L Rev* 487; L Kaplow and S Shavell, “Why the Legal System is Less Efficient than Income Tax in Redistributing Income”, 1994 23 *J Leg Stud* 667; RA Posner, “Utilitarianism, Economics and Legal Theory”, 1979. 8 *J Leg Stud*, as cited from Kerber *supra*.

^{xxxv} For examples of approaches that advocate the use of the consumer welfare standard, see DJ Neven and LH Roller, “Consumer Surplus v. Welfare Standard in a Political Economy Model of Merger Control”, (2000) CEPR Discussion Paper No. 2620; BR Lyons, “Could Politicians be More Right than Economists? A Theory of Merger Standards” [2002] CCR Working Papers 02-01; RJ Van den Bergh and PD Camesasca, *European Competition Law and Economics: A Comparative Perspective* (2006), pp. 35-45; J Farrell and M Katz, “The Economics of Welfare Standards in Antitrust” (2006) 2 *Comp Pol’y Int’l No. 2*, 1; DW Carlton, “Does Antitrust Need to be Modernized?”, (2007) 21 *J Econ Persp* 155, as cited from Kerber *supra*.

^{xxxvi} Roger Zach, Competition law should promote economic and social welfare by ensuring the freedom to compete – a lawyer’s view, in Josef Drexel et al, *Economic Theory and Competition Law*, 2009, pp. 121 – 125, at 125.

^{xxxvii} See on this theme, AK Sen, “The Impossibility of a Paretian Liberal”, (1970) 78 *J Pol Econ* 152; L Kaplow and S Shavell, *Fairness versus Welfare* (2002); LA Kornhauser, “Preference, Well-being and Morality in Social Decisions”, (2002) 32 *J Leg Stud* 303; J Waldron, “Locating Distribution”, (2003) 32 *J Leg Stud* 277.

^{xxxviii} See G Brennan and JM Buchanan, *The Reason of Rules – Constitutional Political Economy* (1985); JM Buchanan, *The Constitution of Economic Policy* (1986) 77 *Am Econ Rev* 243; V Vanberg, “Markets and Regulation: On the Contrast between Free-Market Liberalism and Constitutional Liberalism”, (1999) 10 *Const Pol Econ* 219; V Vanberg, “Market and State: the Perspective of Constitutional Political Economy” (2005) 1 *J Inst Econ* 23, as cited from Wolfgang Kerber, “Should competition law promote efficiency? Some reflections of an economist on the normative foundations of competition law”, in Josef Drexel et al, *Economic Theory and Competition Law*, 2009 pp. 108 – 120.

^{xxxix} Kerber, at p. 119.

^{xl} Statement of Objects and Reasons, Competition Act, 2002. See also Section 18 of the Competition Act, 2002 that enumerates the duties of the Competition Commission in a similar language.

^{xli} The National Competition Policy “*aims to achieve highest sustainable levels of economic growth, entrepreneurship, employment, higher standards of living for citizens, protect economic rights for just, equitable, inclusive and sustainable economic and social development, promote economic democracy, and support good governance by restricting rent seeking practices.*” See Paragraph 4.1, draft National Competition Policy 2011, Ministry of Corporate Affairs, GOI, 2011. The National Competition Policy (expected to be formally released in March 2011) is currently undergoing consideration from a wide variety of stakeholders. See also the recommendations made by the Planning Commission, under the XI Five-Year Plan: Policy Document: “Inclusive Growth”, (Chapter XI) towards a competition policy, which was adopted by the National Development Council (NDC) in December, 2007

^{xlii} “*Whereas, Competition Policy provides guidance for government entities for use in analysing policies, laws, and regulations that affect market activity and help achieve national strategic objectives such as attaining highest sustainable levels of economic growth with inclusion, improving investment climate and attracting investment, generating entrepreneurship and employment, checking inflationary forces, promoting economic democracy, protecting economic rights of citizens for just, equitable, inclusive and sustainable economic and social development and supporting good governance by restricting rent seeking practices, competition law sets forth binding prohibitions of anti-competitive conducts. It would be seen that a competition law is a regulatory instrument to check the prevalence of anti-competitive practices whereas a competition policy is a proactive and positive effort to build competition culture in an economy. To strengthen the forces of competition in the market, both competition law and competition*

policy are required - the two complement each other. The competition law prohibits and penalises anti-competitive practices by enterprises functioning in the market i.e. addresses market failures whereas competition policy seeks to correct the anti-competitive outcomes of various government policies and laws, and help in development of competitive markets.” See Paragraph 2.5, draft National Competition Policy 2011, Ministry of Corporate Affairs, GOI, 2011.

^{xliii} Section 3, Competition Act, 2002.

^{xliv} Section 4, Competition Act, 2002. S. 4(2) states: “There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group] —

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access in any manner; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5.”

^{xlv} Sections 5 and Section 6, Competition Act, 2002.

^{xlvi} “Importantly, competition is not automatic, and requires to be promoted, protected and nurtured through appropriate regulatory mechanism, by minimising market restrictions and distortions and access to related productive inputs as markets, capital, technology, infrastructure services, human capital etc.”

See Paragraph 2.2, draft National Competition Policy 2011, Ministry of Corporate Affairs, GOI, 2011.

^{xlvii} “The assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer.... Conceptually, this approach means that, starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included in, or excluded from, the market definition depending on whether the competition from these products and areas affect or restrain sufficiently the pricing of the parties’ products in the short term.....The question to be answered is whether the parties’ customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered. If substitution were enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographical areas is such that small, permanent increases in relative prices would be profitable.” See Paragraphs 13, 15, 16 & 17 of Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), OJ C 372, 9.12.1997, p.5.

^{xlvi} “Supply-side substitutability may also be taken into account when defining markets in those [situations] in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved. Such an impact in terms of effectiveness and immediacy is equivalent to the demand substitution effect.....These situations typically arise when companies market a wide range of qualities or grades of one product; even if, for a given final customer or group of consumers, the different qualities will be grouped into one product market, provided that most of the suppliers are able to offer and sell the various qualities immediately and without the significant increases in cost...In such cases, the relevant product market will encompass all products that are substitutable in demand and supply, and the current sales of those products will be aggregated so as to give the total value or volume of the market. The same reasoning may lead to group different geographic areas.” See Paragraphs 20 and 21, Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), OJ C 372, 9.12.1997, p.5.

^{xlix} “The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.” See Paragraph 24, Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), OJ C 372, 9.12.1997, p.5.

ⁱ S. 2 (r) of the Competition Act, 2002 defines relevant market as “the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.” S. 2(s) defines a relevant geographic market as “a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.” S. 2 (t) defines a relevant product market as “a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.”

ⁱⁱ JM Clark characterizes the purpose of market determination as central to modern competition theory given that the basic requirement for workable competition is the rivalry between suppliers manifesting in presenting the consumer the most attractive offer for “the same product”. It is this rivalry that should be the starting point for defining the relevant product market. See JM Clarke, “Towards a Concept of Workable Competition”, Proceedings of the American Economic Association, American Economic Review, Bd. 30 (194), pp. 241, 243; See also Franz Jurgen Sacker, The Concept of the Relevant Product Market – between demand-side substitutability and supply-side substitutability in competition law, 2008.

^{lii} “Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimensions is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behavior and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article 81.” See Paragraph 2, Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), OJ C 372, 9.12.1997, p.5.

^{liii} Report of the OECD Global Forum on Competition, Competition Policy and the Informal Economy – 2009, pp. 103-104.

^{liv} “.....competition agencies may be among those within government who institutionally appreciate the importance of applying a cost-benefit analysis to regulation. They may thus be well positioned to assist legislators and regulators to develop an approach to regulation informed by an understanding of how their actions can create or destroy incentives for entrepreneurs to participate in the formal economy. In some cases, the competition agency may be the only government institution with the expertise, interest, and resources to balance the costs and benefits of regulation and to advocate publicly for the removal of regulations that prevent entrepreneurs from entering the market.” See Report of the OECD Global Forum on Competition, Competition Policy and the Informal Economy – 2009, pp. 105, 249; *Castaneda v. City of El Paso - El Paso Mobile Food Vendors Challenge City’s Effort to Run Them Out of Town*, available at <http://www.ij.org/about/3648>; *Membreno v. City of Hialeah - Vindicating the Right to Earn an Honest Living Under the Florida Constitution*, available at <http://www.ij.org/about/4088>.

^{lv} For an initial effort that addresses this question to some degree, see S Marjit and S Kar, *The Outsiders – Economic Reform and Informal Labour in a Developing Economy*, 2011, p. 64.

^{lvi} S. 60, Competition Act, 2002.

^{lvii} “[S]treet vending as a lens through which to explore several theoretical issues: 1) the ways in which culture-power-difference are mutually shaped and reconfigured in the public sphere; 2) how shifting from political-economy analyses to cultural politics analysis within the context of governance yields insights into activism and emerging conceptualizations of public space and citizenship; 3) the questioning of commodified cultural identities that go beyond simple touristic consumption practices; and 4) a clearer understanding how street vendors participate in social movements that are part of larger transnational political and economic forces.” See Street Economies, Politics, and Social Movements in the Urban Global South, Advanced Seminar, March 13–17, 2011, available at http://sarweb.org/?advanced_seminar_street_economies

^{lviii} “Over the centuries and across the world, street vending has been practiced in many different ways. Most vendors sell goods, but some sell services, and some sell a mixture of the two. Some vendors are fixed in one location, using a kiosk or a heavy stall which remains in the same location for months or even years and is locked up and left under the supervision of a watchman when not in use. Others use heavy mobile stalls which are pushed from a storehouse into the sales position at the beginning of the working day, and pushed back at the end. Still others are fixed in location, but simply lay their merchandise out on the ground or on a sheet of cloth or plastic. Truly mobile vendors may push stalls on wheels, carry their merchandise on their persons, or operate a stall off a cart, a tricycle, or a motor vehicle. Some mobile vendors sell to passers-by, some do door-to-door delivery, and still others hawk from building to building.... Street vending may be practiced full-time, part-time, seasonally or occasionally. It can be fixed, occasionally mobile, or almost continuously mobile, and it can go on at any or all times of the day and night. The firms involved can range from one-person micro-enterprises, through numerous forms of partnership and family business, up to franchisees, pieceworkers and wageworkers of larger off-street businesses. Some street vendors are branch operations of off-street stores, sometimes right outside the store, at other times some distance away. Other street vendors create their own branch operations, dividing their merchandise and sending some of it with a relative, partner or employee to sell at another location..... Most street operations are much smaller in scale than fixed stores or supermarkets in off-street locations, but a few are quite substantial, ranging from truck-borne mobile stores, to big fixed stalls and kiosks in strategic high-demand locations. The income distribution of street vendors is highly skewed, with a few making quite high incomes, comparable to those of successful storekeepers and career professionals, and most making relatively low incomes, comparable to those of unskilled manual laborers.” See Ray Bromley, *Street Vending and Public Policy: A Global Review*, *International Journal of Sociology and Social Policy*, Vol. 20, No. 1/ 2, 2000, pp. 2-3.

^{lix} *Hilton v. Eckersley*, (1855) 6 E & B 47, 74, 75, cited in, R & D, *Law of Torts*, 25th Edn., rep. 2009, p. 94. This is also the position under Article 19(1)(g) read with Article 19(6) of the Constitution of India.

^{lx} See Ray Bromley, Street Vending and Public Policy: A Global Review, *International Journal of Sociology and Social Policy*, Vol. 20, No. 1/ 2, 2000, pp. 5-6.

^{lxi} See Ray Bromley, Street Vending and Public Policy: A Global Review, *International Journal of Sociology and Social Policy*, Vol. 20, No. 1/ 2, 2000, pp. 9-10.

^{lxii} *Ibid.* Bromley, at p. 5.

^{lxiii} *Ibid.*, Bromley at pp. 15 – 16.

^{lxiv} See generally Bromley, Ray.1978. “Organization, Regulation and Exploitation in the So-called ‘Urban Informal Sector’: The Street Traders of Cali, Colombia.” *World Development* 6:1161-71; Cross, John C. 1998. *Informal Politics: Street Vendors and the State in Mexico City*. Stanford: Stanford University Press; Illy, Hans F. 1986. “Regulation and Evasion: Street-vendors in Manila.” *Policy Sciences* 19:61-81; McGee, T. G. and Y. M. Yeung. 1977. *Hawkers in Southeast Asian Cities: Planning for the Bazaar Economy*. Ottawa: International Development Research Centre.

^{lxv} Ministry of Housing and Urban Poverty Alleviation, National Policy on Urban Street Vendors 2009, New Delhi, India, 2009, GOI. For a recent overview of this policy and the ongoing story of its implementation across Indian states and cities, see Shalini Sinha and Sally Roever, India’s National Policy on Urban Street Vendors, Urban Policies Briefing Note. 4, WIEGO, April 2011.

^{lxvi} Ministry of Housing and Urban Poverty Alleviation, National Policy on Urban Street Vendors 2004, New Delhi, India, 2004, GOI. While both policy documents recognize the importance of national markets, and explicitly state that street vending provides meaningful employment and valuable products and services to a wide range of persons, the 2009 policy documents marks several advancements over the older 2004 policy. While the 2004 policy considers spatial planning norms strictly in terms of vending zones and non-vending zones, the 2009 policy advocates free-vending zones, restricted-vending zones, and no-vending zones. Second, the 2009 policy clarifies the three different types of street vendors (stationary, peripatetic, and mobile), and provides much needed detail and clarity as regards policy imperatives pertaining to peripatetic and mobile vendors. Third, the 2009 policy introduces much-needed clarity on the principles for determining quantitative norms for street vendors through the introduction of the “holding capacity” terminology. Fourth, while the 2004 policy was decidedly unclear on licensing and its relation to vendor registration, the 2009 policy clarifies that licensing pertains to site/space allotment for stationary vendors whereas registration applies to all kinds of vendors. Fifth, the 2009 policy greatly clarifies the provisions in the 2004 policy as regards the composition, duties and functions of the Town Vending Committees. Finally, the 2009 policy clarifies the uncertainty relating to ‘planning authority’ terminology in the 2004 policy through the use of the carefully defined term ‘local authorities’. Apart from these changes, the 2009 policy considerably improves upon the 2004 policy on a number of related other areas: provision of civic facilities, registration procedures, registration fees, collection of revenue, eviction, relocation, confiscation, organization of vendors, participative processes, public health and hygiene, self-regulation, credit and insurance, rehabilitation of child vendors, education and skill development, housing, social security, monitoring and review, dispute settlement, and capacity building,

^{lxvii} Generally speaking, this Model Bill is not as explicit as the 2009 Policy in recognizing the inherent and instrumental value of street vending.

^{lxviii} Ministry of Housing and Urban Poverty Alleviation, National Policy on Urban Street Vendors 2009, New Delhi, India, 2009, GOI, Paragraph 1.1.

^{lxix} Sharit Bhowmik, Street Vendors in Asia: A Review, *Econ. & Pol. Wkly*, May-June 2005, at p. 2256; Transnational Development Clinic – Jerome N. Frank Legal Services Organization, Working Paper – Developing National Street Vendor Legislation in India: A Comparative Study of Street Vending Regulation, Yale Law School, January 2011, p. 7.

^{lxx} See TISS-YUVA survey; Sharit K Bhowmik, *Hawkers and the Urban Informal Sector – A Study of Street Vending in Seven Cities*, SEWA, 2000.

^{lxxi} Paragraphs 1.1 and 1.4, 2009 National Policy.

^{lxxii} *Gainda Ram v. MCD*, (2010) 10 SCC 175, at paragraph 77. The fundamental right of street vendors to carry on business on public streets under Article 19(1)(g) of the Constitution of India had been

articulated by the Supreme Court in earlier decisions including *Saudan Singh v. NDMC*, (1992) 2 SCC 458; *Sodan Singh v. New Delhi Municipal Committee*, (1989) 4 SCC 155; *Bombay Hawkers Union v. Bombay Municipal Corporation*, (1985) 3 SCC 545; *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545.

^{lxxiii} *Gainda Ram v. MCD*, (2010) 10 SCC 175, at paragraphs 77, 78.

^{lxxiv} See *Pyare Lal v. New Delhi Municipal Committee*, AIR 1968 SC 133; *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545; *Bombay Hawkers Union v. Bombay Municipal Corporation*, (1985) 3 SCC 545; *MCD v. Gurnam Kaur*, (1989) 1 SCC 101; *Sodan Singh v. New Delhi Municipal Committee*, (1989) 4 SCC 155; *Saudan Singh v. NDMC*, (1992) 2 SCC 458; *Ahmedabad Municipal Corporation v. Nawab Khan*, (1996) 11 SCC 123; *Gainda Ram v. MCD*, (1998) 1 SCC 188; *Romesh Chander v. Imtiaz Khan*, (1998) 4 SCC 760; *Sarojini Nagar Market Shopkeepers Assoc. v. NDMC*, (2000); *Navi Mumbai Municipal Corporation v. Navi Mumbai Hawkers and Workers Union*, (2002) 10 SCC 369; *Maharashtra Ekta Hawkers Union v. Municipal Corporation, Greater Mumbai*, AIR 2004 SC 416; *Sudhir Madan v. MCD*, (2007) 7 SCR 1; *Patri Vyapar Mandal Delhi v. MCD Town Hall*, (2009) 12 SCC 475. The decisions have recognized that subject to reasonable restrictions vendors should be allowed to vend where they are most useful to consumers – what has been described as ‘natural markets’ or a ‘natural propensity of street vendors to locate in various places at particular times’ in the literature relating to street vendors and the 2009 National Policy.

^{lxxv} *Saghir Ahmad v. State of UP*, AIR 1954 SC 728, which referred to and approved the law on this point as contained in an earlier decision of the Madras High Court in *G. S. S. Motor Service v. State of Madras*, 1952 2 M. L. J. 894. The law on this point as recognized in *Saghir Ahmad v. State of UP* was subsequently relied upon by Justice Sharma of the Supreme Court in *Sodan Singh v. New Delhi Municipal Committee*, (1989) 4 SCC 155.

^{lxxvi} AIR 1984 Mad. 32. It is worthwhile to here quote at length Paragraph 30 of Justice Sathidev’s judgment: “*It is claimed by shop-owners that this trade is a public nuisance. Hawker trade, so long as it is regulated in a proper manner by concerned public authorities, could never be a public nuisance. Rather, general public by and large, are not only attracted by this type of trade, but look forward to it for more than one reason. Shorn of mounting overheads which assume alarming proportions when goods are sold in sophisticated shops, the same type of goods are sold for reasonable prices with less percentage of profit. Even traders and manufacturers look to hawker trade to dispose of their accumulated stocks, which they cannot sell, because either the design is not in vogue or the demand for such type of goods no longer exists, or due to rejection of goods by foreign buyers they could not be exported but still of good quality etc. Furthermore, when vegetables, fruits, flowers are required, general public invariably look forward to a hawker rather than go in for such stuff in shops, which are unreasonably expensive. The economic conditions of people is such, that they look forward to hawkers, who along could sell for lesser price, the type of goods carrying a quality which would suffice their needs and aspirations. Quite often the shop owner, before whose shop the hawker is trading depends on him for clearance of his accumulated stock, for a small margin he may earn. Even a shop owner who complains about the existence of hawkers, as he returns home buys his other household requirements from these hawkers. In many leading cities in the world on certain days in a week, the vehicular traffic in the earmarked street is prohibited, and hawkers congregate, and public in large numbers gather to buy their requirements. Hence it is not as if this type of trade is found only in India. It could never be characterised as an illegal or unethical trade. Mainly because public authorities have failed to regulate their locations, it has resulted in a grievance being made by shop-owners, as if it is a trade that should be excluded. If regulatory measures are introduced, bearing in mind the requirements of the public of free access, public hygiene, public safety and the like, they can also prosper and the general public thereby benefited. If specific plots are allotted and they are confined to those portions, there could be no conceivable objection for such a lawful trade to be carried out, particularly when it would provide an honest livelihood for those who have meagre capital but have a keen desire to carry on a trade. Once regulatory measures are introduced, it could never be a public nuisance.*” This insightful decision has been referred to in *Sodan*

Singh v. New Delhi Municipal Committee, where the Supreme Court of India similarly held that “if properly regulated according to the exigency of the circumstances, the small traders on the side-walks can considerably add to the comfort and convenience of the general public, by making available ordinary articles of everyday use for a comparatively lesser price. An ordinary person, not very affluent, while hurrying towards his home after a day’s work can pick up these articles without going out of his way to find a regular market. The right to carry on trade or business mentioned in Article 19(1)g of the Constitution, on street pavements, if properly regulated cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and no other use.” See (1989) 4 SCC 155.

^{lxxvii} Article 19(6), Constitution of India. It is important to note that the “professional or technical qualifications necessary” for “carrying on any occupation, trade or business” will also have to satisfy the requirements of ‘reasonableness’ as developed in Indian constitutional jurisprudence.

^{lxxviii} For an overview of the municipal, city and state level laws applicable to street vending, see Sharit K. Bhowmik, *Hawkers and the Informal Urban Sector – A Study of Street Vending in Seven Cities*, NASVI, 2000. See also, Shalini Sinha and Sally Roeber, *India’s National Policy on Urban Street Vendors*, Urban Policies Briefing Note. 4, WIEGO, April 2011.

^{lxxix} “However, there remain several residual restraints and anti-competitive effects of government policies and laws in several segments of the economy, mostly unintended..... This Policy, when implemented, will enable a coordinated effort to attain the full growth potential of the economy, in a faster, inclusive and sustainable manner..... The basic premise of competition policy is that Government should not restrict market activity any more than is necessary to achieve its social and other goals.... It has been observed that certain policies and laws at the state level sometimes tend to artificially segment the markets in India..... would also help to promote good governance through bringing in greater transparency and accountability on account of available competing responses and in the avoidance of any rent seeking practices. It would also have a positive correlation with various other strategic national objectives..... encourage adherence to competition principles in policies, laws and procedures of the Central Government, State Government and sub-State Authorities, with focus on greater reliance on well-functioning markets.... Market regulation procedures, whether by public authorities, regulatory bodies or through self-regulatory mechanism, should be rule bound, transparent, fair and non-discriminatory..... all policies and laws should use the touchstone of competition in their formulation and implementation..... A competition law lowers the entry barriers in the market and makes the business environment conducive to promoting entrepreneurship. It also ought to be acknowledged that each sector has its own set of issues and problems unique to them and efficient management of sector specific issues/problems at a micro level is equally critical in ensuring effective competition in the market.” See draft National Competition Policy 2011, Ministry of Corporate Affairs, GOI, 2011.

^{lxxx} For greater detail on international human rights norms relevant to protection of street vendors in India, see Transnational Development Clinic – Jerome N. Frank Legal Services Organization, Working Paper – Developing National Street Vendor Legislation in India: A Comparative Study of Street Vending Regulation, Yale Law School, January 2011, pp. 11-12.

^{lxxxi} See for example, *Manhattan’s 14th Street Vendors’ Market: Informal Street Peddlers’ Complementary Relationship with New York City’s Economy*, John Gaber, *Urban Anthropology*, Winter 1994; *Legal Responses to Sidewalk Vending: The case of Los Angeles, California*, Gregg W. Kettles, in *Street Entrepreneurs*, edited by John Cross and Alfonso Morales, May 2007; *The Value of Benefits of Public Street Market: the Case of Maxwell Street*, Alfonso Morales, Steven Balkin, Joseph Persky, *Economic Development Quarterly*, November 1995.”

^{lxxxii} See Abhigna AS, *Different Ideas for Licensing Street Vendors – Especially in Old Indian Cities*, CCS, Working Paper No. 235, 2010; Shalini Sinha and Sally Roeber, *India’s National Policy on Urban Street Vendors*, Urban Policies Briefing Note. 4, WIEGO, April 2011.

^{lxxxiii} Irene Tinker, *Street Foods: Urban Food and Employment in Developing Countries*, Oxford University Press, New York, 1997, cited in, Irene Tinker, *Street Foods: Traditional Microenterprise in a Modernizing World*, *International Journal of Politics, Culture, and Society*, Vol. 16, No. 3, Toward

GenderEquity: Policies and Strategies (Spring, 2003), pp. 331-349. A finding from field research in Pune (generally confirmed in the other cities studied) was that the cheapest street meals, cooked by the poorest vendors under the worst conditions, were equally or less contaminated with bacteria than samples taken from nearby restaurants.

^{lxxxiv} Sharit K. Bhowmik, *Hawkers and the Informal Urban Sector – A Study of Street Vending in Seven Cities*, NASVI.

^{lxxxv} Geetam Tiwari, *Encroachers or service providers*, SEMINAR.

^{lxxxvi} See generally, papers published in *The Yale Law Journal*, Vol. 103, No. 8, Symposium: The Informal Economy (Jun.,1994) – particularly the arguments in George Priest, *The Ambiguous Moral Foundations of the Underground Economy*; Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*; and Regina Austin, "An Honest Living": Street Vendors, Municipal Regulation, and the Black Public Sphere.

^{lxxxvii} Walter Scott, *Seeing like a State*, p. 351.

^{lxxxviii} Herman E Daly, "Policies for Sustainable Development", paper presented at the program in Agrarian Studies, Yale University, New Haven, February 9, 1996, p. 4, cited from Scott, p. 351.

^{lxxxix} India's forthcoming right to food legislation is a case in point.

^{xc} See for example, Declaration of the High-Level Conference on World Food Security: the Challenges of Climate Change and Bioenergy, 2008. "We pledge our political will and our common and national commitment to achieving food security for all and to an ongoing effort to eradicate hunger in all countries, with an immediate view to reducing the number of undernourished people to half their present level no later than 2015." See Rome Declaration on World Food Security, World Food Summit, 1996.

^{xci} "So long as freedom from hunger is only half achieved, so long as two-thirds of the nations have food deficits, no citizen, no nation can afford to be satisfied. We have the ability, as members of the human race, we have the means, we have the capacity to eliminate hunger from the face of the earth in our lifetime. We only need the will." --President J. F. Kennedy, World Food Congress, Washington D.C., 1963.

^{xcii} "We resolve further: To halve, by the year 2015, the proportion of the world's people whose income is less than one dollar a day and the proportion of people who suffer from hunger and, by the same date, to halve the proportion of people who are unable to reach or to afford safe drinking water." --*United Nations Millennium Declaration, New York, 2000*

^{xciii} Robert Cover, *Violence and the Word*, Yale Law Journal.

^{xciv} See Katie Rabinowicz and Andrea Winkler, *Street Food: What a City Could Taste Like*, available at <http://www.walk21.com> - for a thoughtful approach to integrating street foods into urban planning in the context of Toronto, Canada. See also I Chakravarty and C. Canet, *Street foods in Calcutta*, FNA/ANA 17/18, 1996 (available on FAO website).

^{xcv} See *The Habitat Agenda Goals and Principles, Commitments and the Global Plan of Action*.

^{xcvi} See *Streets of Dreams – How Cities Can Create Economic Opportunity by Knocking Down Protectionist Barriers to Street Vending*.

^{xcvii} See the excellent recently released report by the Columbia University Graduate School of Architecture, Planning and Preservation, *New York City Street Vendors*, 2011, available at <http://www.spacesofmigration.org/>.