

Constituting a Right to Association: A Postcolonial Exploration

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In this article, I emphasize the social realm, rather than legislative action or judicial enumeration, as the preferred site for understanding the constitution of the legal right to association. I argue that the substance of a right – what we understand when we claim a right – emerges through contextual socio-historical processes before it penetrates the imagination of either the legislature or the judiciary. This emphasis on the social realm in understanding the contour of a right is particularly important for postcolonial societies such as India, where a Western universalist rights language is constitutionally adopted to unify a country that comprises heterogeneous socio-cultural milieux. Partha Chatterjee articulates this disjunction by offering a distinction between the formal (constitutional) civil society and the informal political society. Drawing on Chatterjee's distinction and interpreting historical ideas and their continued relevance on the nature of industrial relations, I show how the judiciary failed to take note of, and the legislature only belatedly reacted to, the validity of worker cooperatives as a legal right to association even when it received broad social recognition.

Keywords: Right to Association, Cooperative Movement, Postcolonialism and Law, Social Basis of Legal Right, Tagore, Gandhi

1 INTRODUCTION

The point of entry of legal scholarship on the question of workers' well-being and entitlements is often the human, constitutional, or statutory *rights* – legitimate claims – of such workers. This basic premise, that a right as a knowable substantive claim *already exists* – in the sense of certainty – where there exists an enumerated declaration (a legal provision) then prompts legal scholars to channel their efforts to addressing the problem of the actual realization of such rights.¹ In keeping with this intellectual concern, legal scholars seek to understand the realization of the

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¹ Jeremy Waldron underscores the possibility of dissensus on rights along philosophical and interpretative trajectories. In the interpretive trajectory, Waldron notes, disagreement arises in applying abstract principles of right to legislation and hard individual cases. In this article, in elaborating workers' right to association, I will characterize the latter proposition as a problem of the lawmaking process (i.e. the

right to association from two strategic perspectives: first, judicial enforcement, and second, legislative entitlement. While the judicial enforcement strategy emphasizes the strengths of the judicial authority in (re-)legitimizing and outlining the contours of the right to association, the legislative entitlement enterprise builds on the inherent strengths of the lawmaking process, including stakeholder participation and detailed institutional enumeration in actual realization of the right.²

In this article, I pursue a third realm of inquiry – not unrelated to the above two – for exploring the right to association in pragmatic terms regarding its content, and relatedly, its actual realization in specific contexts. Drawing on specific instances and mindful of the political nature of the right to association, I argue that the proper locus for analysing the ‘constitution’ of the right – the process of ‘composing’ the right – is the socio-historical processes through which the different components of the right take shape before it permeates the imagination of the legislature or the judiciary. Unlike the individual-focused labour rights, the right to association is meaningless if it is not exercised alongside other rights. It is a socially embedded right to engage in the political process. Due to the inherently political nature of the right, the authenticity of the lawmaking process, that is, the historical process of constituting the right in practical terms, must lie in its socio-legal evolution, rather than its formal institutional-legal validation.

A shift in emphasis from judicial or legislative validation to contextual socio-cultural authentication of the right to association also helps to reconceptualize the idea of the right as a constitutive process, not merely an enumerated certainty. This move, shifting the analytical focus from a top-down legalistic lens to a bottom-up socio-historical conceptualization, underlines the socio-cultural heterogeneity in the constitution of the right, thus problematizing the universalizing – and homogenizing – pull of the right to association. By the constitution of the right to association, I mean the socio-cultural processes through which the very idea of association as a fundamental legitimate claim is composed, its components deciphered, its institutions clarified, and the framework and limits of its operationalization determined. This approach to understanding the constitution of the right to association is particularly consequential in the context of postcolonial societies such as India, which are often the site of contrasting legitimacies. While the formal institutional (constitutional or statutory) legitimacy remains an important source of social ordering, social conduct often derives

process of making of a right), rather than its interpretation. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115(6) Yale L. J. 1346, 1366–1367 (2006).

² See e.g. Grégoire Webber et al., *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press 2018); Judy Fudge, *Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes*, 68 Current Legal Prob. 267 (2015); Harry Arthurs, *The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems*, 19(4) Soc. & Legal Stud. 403, 405–406, 411–414 (2010); Alan Bogg, *Subsidiary or Freedom of Association? A Perspective from Labor Law*, 61(1) Am. J. Jurisprudence 143, 159–172 (2016).

its legitimacy from customary ideas and practices that may have been institutionally marginalized or disregarded. Unless these contrasting legitimacies are recognized and articulated through an integrated narrative, both the idea of the right to association and its social relevance will remain obscure. Thus, adopting a postcolonial lens to evaluate the lawmaking process – the process of making the right to association – I trace the historical-cultural context of cooperatives as workers' associations and the subsequent constitutional enumeration of the right to cooperative societies in India.

In the next part (Part 2), in setting the tenor of the article, I explain the centrality of the socio-historical process in the making of a right and note how such an understanding of the right to association is particularly important for postcolonial societies such as India. In Part 3, following the lineage of postcolonial theorizing, I elaborate the idea of political society, as offered by the political theorist and anthropologist Partha Chatterjee, to contrast the validity of demands made by non-industrial workers (informal workers) in India from the legitimacy of the formal constitutional or legal order (of Western heritage). I also examine the historical-cultural ideas and practices that offer the bases of validity in formulating the claims of non-industrial workers. Drawing on the ideas discussed in Part 3, I examine the evolution of the institutional structure of cooperatives and its formal legal validation (in Part 4), before analysing its continued relevance in pursuing the claims of non-industrial workers (in Part 5). In Part 6, I note how the socio-cultural-historical constitutive process of a right to association manages to coalesce into the formal justiciable constitutional safeguard of the 'right to form co-operative societies' in India. In conclusion, I revisit the pertinence of the contextual socio-historical analysis in examining the constitutive process of a right to association and propose directions for future research.

2 CONSTITUTING A RIGHT: A GENESIS STORY

The question of usefulness of a right – de facto realization of a legitimate claim – is inseparable from the inquiry into the constitution of such a right. By constitution, I mean the process of making of a right. This constituting process contributes to the eventual meaning that a right comes to acquire: the meaning that we understand when we assert that there is an enforceable 'right' to some specific claim. Construction of this meaning, that is, the different components of a right, is generally explained as legislative creation or judicial interpretation. However, there is a third realm, where a right emerges and consolidates through socio-historical processes before it penetrates the imagination of the legislator or the judge. Unless these socio-historical constitutive processes of a right are understood and integrated into the juridical imagination, there will be a disconnect between rights-in-action and rights-in-legal-imagination. In this situation, juridical

articulation of a right might hinder the realization of the right even when the intention of the juridical institutions is the opposite.

The case of the right to association of non-industrial informal workers in India offers an illustration of the above thesis. Although it has often been difficult for informal workers, particularly those whose working arrangements do not conform to the industrial employment model, to have their right to association in the form of a trade union recognized,³ trade unions are not the only legal form assumed by informal workers' collective action. Informal workers also organize extensively as cooperative societies. While the use of cooperative societies as a front is old, pervasive, and legally consolidated, cooperative societies were juridically envisaged as (small-scale) business corporations in India before their constitutional enumeration as a right to association.⁴ As I document in parts 4, 5, and 6, this constitutional enumeration is the culmination of an extended socio-historical process of imagining cooperatives primarily as expressions of collective action – *legitimate claim to association* – to undertake collaborative projects. However, before this constitutional enumeration, the judiciary failed to recognize cooperative societies as workers' associations and undermined workers' autonomy in the formation and working of cooperative societies.⁵

While it is the workers in their heterogeneous activities, not conforming to the industrial employment model, who recognized the strength of cooperatives as an expression of their right to association, the judicial 'interpretation' failed to envisage the right and the legislature offered a much delayed recognition of the right. This indicates that an important analytical space is lost if the constitution of a right through its socio-historical complexity is discounted in favour of an exclusively institutional-legalistic discourse on rights focusing on legislative action and judicial interpretation. The authenticity of a right as a legitimate claim is better assessed in its emergence and evolution through lived experiences, in particular, workers' lived experience in negotiating their livelihood concerns in all their contextual complexity. This focus in understanding the contours of a right is authentic because, irrespective of the juridical articulation of the constituents of a right and prescriptions for its realization, if this articulation fails to correspond to the lived experience of workers, it is the juridical articulation that loses its social validity, not the social legitimacy in asserting a valid claim as a right.

In his 1880 Lowell Institute Lectures in Boston, United States, in documenting the development of the common law, Oliver Wendell Holmes Jr perceptively

³ Ela R Bhatt, *We Are Poor but So Many: The Story of Self-Employed Women in India* 17–18 (Oxford University Press 2007); Supriya Routh, *Informal Workers' Aggregation and Law*, 17 *Theoretical Inquiries in L.* 283, 314 (2016).

⁴ See Art. 19 (1) (c), the Constitution of India, 1949.

⁵ See *Daman Singh & Others v. State of Punjab & Others*, 1985 SCR (3) 580.

(and famously) proclaimed, that '[t]he life of the law has not been logic: it has been experience'.⁶ It might be useful to unearth the significance of this thesis, in Holmes' own words:

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.⁷

The general thrust of Holmes' thesis is that even if some legal concepts and propositions seem obvious to us, their contour took a long time to evolve within specific socio-historical contexts, through the customs, beliefs, and needs of specific communities.⁸ The creation of substantive legal rules is tied to the social conditions in which they emerge, and their content, far from being fixed, evolved through complex social processes.⁹ Thus, for a judge, which Holmes went on to become, what constitutes knowledge of the law is not its formal doctrine, or *a priori* postulates, but the history of its making.¹⁰ Mere adherence to precedents and justifying them in a new context is a mechanical exercise (in mathematical axioms) unless judges are able to appreciate the components of a given law or right as emerging from broader social interaction. The very meaning of what it is to have a right – and how this right gradually manifests itself through the constraints and opportunities of concrete social conditions – is a dynamic *making process* of the right.

This making process of the right, in practical terms, is not statutory or judicial: it is better recognized as a somewhat organically-evolving social process of lived experience.¹¹ However, emphasizing the social lawmaking process is not to deny the important role played by the legislature and the judiciary in progressively specifying and nuancing different components of a right in a jargon familiar to legal institutions (such as, determining legal tests or apportioning entitlements and duties).¹² Thus,

⁶ Oliver Wendell Holmes Jr, *The Common Law* vii, 3 (The Belknap Press of Harvard University Press 2009). Holmes Jr's own life, it is said, unfolded more as a lived experience, rather than a set of consistently logical episodes. See Noah Feldman, *The Many Contradictions of Oliver Wendell Holmes*, New York Times (28 May 2019), <https://www.nytimes.com/2019/05/28/books/review/oliver-wendell-holmes-stephen-budiansky.html> (accessed 25 Apr. 2020).

⁷ Holmes Jr, *supra* n. 6, at 3–4.

⁸ *Ibid.*, at 4, 7.

⁹ *Ibid.*, at 4–5, 7.

¹⁰ *Ibid.*, at 35–36, 72–74.

¹¹ *Ibid.*, at 102.

¹² *Ibid.*

although legislation and judicial opinion – to different degrees – remain the formal institutional apparatus in legally making a right, in the absence of lived experience, which constitutes the ontological foundation of such a right, none of the institutions are able to conceive of a right in its social complexity.

However, in assessing this organic socio-historical basis of a right, we need to begin by taking account of the history of the social rather than the history of the ‘doctrine’ or ‘postulate’ of the right. While the history of the social and that of the right might not always diverge, as I note (in the case of cooperative societies as collective action), there are circumstances where they do. This assessment of a right is not merely a problem of contextual interpretation: it is a conceptual issue capable of disturbing the ontological consensus about a right. For example, the idea of the right to association has a universalist postulate, an understanding originating in and consolidated by Western industrial democracies. This imagery of the right to association primarily identifies the right with autonomous trade unionism and collective bargaining in industrial relations. While an interpretation of this universalist understanding for specific contexts may adjust the contours of this imagery, it cannot alter the constitutive core of the imagery. Re-imagination of *the* right to association – or alternatively, imagination of *a* right to association – should begin with *sui generis* social history. We thus begin not with the postulate but with lived experience.

The significance of socio-political genealogy in constituting a right – a right to association – could be better assessed through an analysis of heterogeneous post-colonial societies such as India. The relationship between the Indian workforce and the state unfolds through two interrelated trajectories: first, through the constitutionally recognized universalistic industrial relations model whereby the state, predominantly the legislature and the judiciary, mediates the right-duty relationship between employees and employers; and second, through direct day-to-day negotiations between workers and various instrumentalities of the state, predominantly the government, wherein workers negotiate the authenticity of their claims with the government. It is this latter relationship that occupies the greater part of the labour relations space in India. In this space, the authenticity of workers’ claims is not exclusively dependent on what is institutionally considered legitimate, but it emerges from socio-political ideals rooted in the society that may not always have legal-institutional backing. Following the Western model of the constitutional nation state, even though the political organization in postcolonial independent India is structured through the legal relationship between the civil society and the nation state, the idea of the civil society does not capture the range and breadth of the Indian population. Outside the constitutionally validated civil society-state relationship, there remains a concurrent ‘legitimate’ domain where citizens interact

with the state, complicating the nature of labour relations in the country. I discuss this unique nature of postcolonial Indian society in the following part.

3 INDUSTRIAL RELATIONS IN THE POLITICAL SOCIETY: THE APPEAL OF TRUSTEESHIP & COOPERATION

Chatterjee notes that democratic institutions in the postcolonial world, particularly in India, evolved by means of a different sequence from that of European and North American societies. Whereas in the West the idea of citizenship gradually evolved through the processes and institutions of civic rights (in civil society) to political rights (in the nation state) to social rights (in the welfare state), in postcolonial states, welfare entitlements (that is, social rights) predate political rights, particularly when there are long histories of colonialism.¹³ Although many of the independence movements in Asia and Africa were centred on the claim to republican citizenship and the accompanying political rights, the urgent need to overcome poverty and social backwardness meant that the newly independent ‘developmental state’ almost always took precedence over the nation state–citizen relationship.¹⁴

Chatterjee suggests that because of this history of postcolonial states, democratic politics in postcolonial states cannot be explained either by means of the (somewhat) universally accepted civic nationalism or global cosmopolitanism.¹⁵ He argues that the universal narrative of nationalism and global cosmopolitanism both produce domestic asymmetries by privileging certain (universal) institutional forms of modern democracy and are therefore unable to capture the heterogeneity of postcolonial states. In his view, in postcolonial states, democratic politics follows two simultaneous trajectories: first, as a relationship between the formal civil society–universal citizenship and the constitutional nation state, and second, by means of ‘governmental systems’, that is, through the relationship between government (welfare) policies and populations (groups of populations).¹⁶:

¹³ Chatterjee notes:

‘In South Asia, for instance, the classification, description and enumeration of population groups as the objects of policy relating to land settlement, revenue, recruitment to the army, crime prevention, public health, management of famines and droughts, regulation of religious places, public morality, education, and a host of other governmental functions has a history of at least a century and half before the independent nation-states of India, Pakistan, and Ceylon were born. The colonial state was what Nicolas Dirks has called an “ethnographic state.” Populations there had the status of subjects, not citizens. Obviously, colonial rule did not recognize popular sovereignty’ (internal citations deleted). Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* 36–37 (Columbia University Press 2004). Also see Partha Chatterjee, *Lineages of Political Society: Studies in Postcolonial Democracy* 12–13 (Columbia University Press 2011).

¹⁴ Chatterjee, *The Politics*, *supra* n. 13, at 37.

¹⁵ *Ibid.*, at 4, 23.

¹⁶ *Ibid.*, at 3–4; Chatterjee, *Lineages*, *supra* n. 13, at 13–15.

[T]he classical idea of popular sovereignty, expressed in the legal-political facts of equal citizenship, produced the *homogeneous construct* of the nation, whereas the activities of governmentality required multiple, cross-cutting and shifting classifications of the population as the targets of multiple policies, producing a necessarily *heterogeneous construct* of the social.¹⁷

This disjuncture between the ideal and the real in postcolonial societies leaves certain spaces of democratic engagement undertheorized at best and misunderstood at worst. Chatterjee contends that the second of the two trajectories, the governmental system, constitutes a ‘different domain of politics’.¹⁸ In contrast to civil society (in the nation state), he prefers to call it the political society.¹⁹ Whereas civil society is constructed through the constitutional state and law, the political society largely remains outside this construction.²⁰

In the postcolonial Indian state, Chatterjee notes, it is only a small section of the population that interacts with the state within the formal constitutional parameters created by the industrial capitalist state.²¹ The most significant part of the citizens’ political relationship with the state is established by means of their engagement with various governmental agencies seeking to promote the well-being of the different groups of the population.²² However, the distinction between civil and political society is neither categorical nor exclusionary. Rather, in the context of Chatterjee’s theorization, this distinction suggests the different, but entangled, manners of political engagement pursued by a small minority of the population employing the conceptual categories and institutions of the constitutional state, and the large majority adopting a range of political strategies that are not always bound by such conceptual categories.²³

The domain where the political society can be traced prominently in India is in the political-economic domain of informal economic activities, which remains largely outside the mainstream industrial relations model. Much like its colonizers, after political independence India adopted the industrial model of economic development and distributive justice, in continuation of the colonial modernization project. After independence, the difference between the colonial state and the (administratively) postcolonial state was marked only by the change in the ruling elite. Post-independence, a Western-educated national elite decided in favour of the same political order replicating European institutions of governance and

¹⁷ Chatterjee, *The Politics*, *supra* n. 13, at 37.

¹⁸ *Ibid.*, at 38.

¹⁹ *Ibid.*, at 37–38.

²⁰ See Nick W Barber, *The Principles of Constitutionalism* 123 (Oxford University Press 2018).

²¹ Chatterjee, *The Politics*, *supra* n. 13, at 38; also see Chatterjee, *Lineages*, *supra* n. 13, at 82–86; also *ibid.*, at 122.

²² Chatterjee, *The Politics*, *supra* n. 13, at 38.

²³ *Ibid.*, at 39–40.

entitlements. In this constitutional order, liberal institutions and entitlements – including human rights claims – were geared towards large-scale capitalist industrialization. The constitutionally safeguarded human rights claims have the typical nation state-civil society imprint, wherein rights are to be claimed by the civil society against the state, often mediated through the industrial employment relationship. Not only does the Indian Constitution elaborate human rights safeguards for the civil society, it also goes on to define what a proper *constitutionally obligated* civil society should look like. In the chapter on Fundamental Duties,²⁴ the Constitution requires every citizen to comply with certain duties, including respect for the constitutional ideals and institutions of the state, and ‘strive towards excellence in all spheres of individual and collective activity so that *the nation constantly rises* to higher levels of endeavour and achievement’ [emphasis mine].

Although the idea of a civil society – and an ideal citizen – was created by the constitutional order, the vast majority of the Indian workers would not fit the ideal. For example, often the very identity of workers engaged in heterogeneous economic activities outside the mass industrial factories and mines are defined on the basis of their distance from this ideal (that is, ‘informal’ in contrast to ‘formal’ workers). Occupational groups such as street vendors exist by flouting constitutional ideals of public property and norms of institutions of the state; informal transport workers often employ violence and threats in disrupting public order and property rights while guarding their operating space; and in asserting their waste collection claims from specific regions and receptacles within a city, waste recyclers undermine the desire for harmony in public space while also violating property rights and criminal law.

Thus, not only do these heterogeneous informal workers fail to comply with the descriptive category of the civil society in the Constitution, but the very spirit of the civil society – as one striving to uplift the nation to higher levels of achievement – also flies in the face of the struggles of these workers to earn a living. Moreover, the constitutional entitlements do not always capture the complex and heterogeneous situation of informal workers such as domestic workers, home-based workers, transport workers, waste recyclers, street vendors, and a range of other economic activities for which there are no specified normative categories or industries. Precisely because these constitutional safeguards sound distant from their specific contexts, these workers have been at the forefront of innovation and collective action in the political society, as I discuss in Part 5.

In articulating the idea of the political society, Chatterjee’s premise is that the experience of postcolonial democracies, particularly the Indian version, shows the limits of the normative model of Western democracy and diminishes its claim to

²⁴ Part IV A, the Constitution of India, 1949.

universality.²⁵ He argues that instead of trying to characterize – or distinguish – practices and experiences of postcolonial societies with reference to the Western democratic model, it is necessary to theorize postcolonial experiences independently for their *sui generis* characteristics.²⁶ However, it is useful to remember that in postcolonial democracies, colonial ideas and structures coexist with – and often dominate – traditional (indigenous) wisdom and practices. Postcolonial theorizing must therefore account for this tension rather than aspiring to purity (that is, Western-influence neutrality) in such theorizing. This is particularly important for socio-legal theorizing wherein legal logic, structures, and institutions in postcolonial democracies are mostly replicas of Western imaginations, whereas the bases of social authenticity in these societies sometimes differ starkly from Western arrangements.

It is at this intersection that the foundational logic of informal labour relations and collective action in India should be located. As noted above, occupational groups such as street vendors, informal transport workers, waste recyclers, domestic workers, and many others (including home-based, sweatshop, construction, and agricultural workers, depending on their working arrangements) occupy the political society – or governmental systems – wherein their relationship to the government, and eventually with the state, is predicated on a demand/obligation correlation that does not fit the idealized civil society–nation state relationship.²⁷ Since constitutional and legislative rights owe their legitimacy to this citizen–state relationship, the legitimacy of claims in the political society must rest elsewhere for them to hold any moral or legal appeal. This legitimacy is derived from socio-political authenticity, that is, ideas and practices that survived social scrutiny and are accepted as valid justification even when not aligned with the logic of the formal institutions. Some of the moral bases of this legitimacy can be traced to the prominent ideas and categories explored and employed during the Indian independence movement, although their lineage is ancient.

Foremost among the ideas articulated and practised during the independence movement is *satyagraha* or righteousness in attaining *swaraj*, or self-rule.²⁸ *Satyagraha* signifies the urge for truth, or eternal justice, by non-violent means,

²⁵ Chatterjee, *Lineages*, *supra* n. 13, at xi, 2–4.

²⁶ *Ibid.*, at xi–xii.

²⁷ Although this is not to deny that there are productive relations, as in the case of mass production in factories, mines, government services, and so on, which are arranged on an industrial relations model replicating the Western (collective) right-duty correlation model, particularly the one emerging from the Industrial Revolution in the United Kingdom. My aim is to indicate the simultaneous existence of another productive relations model that stands on a different justificatory basis compared to the Western mass industrial relations model.

²⁸ Chatterjee, *Lineages*, *supra* n. 13, at 53–54; Ananya Vajpeyi, *Righteous Republic: The Political Foundations of Modern India* 5–10, 50 (Harvard University Press 2012). Unless specified, the terms italicized are in Sanskrit.

particularly in opposing laws and institutional structures that violate the sense of eternal justice, and (proudly) facing the consequences for such opposition.²⁹ Since the very bases of unjust laws were being challenged, the legitimacy of those laws could not have been found in the formal lawmaking process. Thus, the straightforward proposition of formal legislation, or the goals that such legislation furthers, could not establish the legitimacy of the legislation. Moral and legal legitimacy were asserted in the name of justice beyond the procedural mandate of the state, that is, in the idea of *dharma* as righteous action (that is, normative order).³⁰ Both individual citizens and the state were to be bound by the idea of righteous action. At a general conceptual level, for individual citizens *dharma* signified personal sacrifice in contrast to (autonomous) self-interest, whereas for the state it signified ideological integrity and dedication towards the citizenry.³¹ *Dharma* as an ideal of justice, has had an illustrious career and fuelled many a movements in India, including the independence movement led by Mohandas K Gandhi.³²

A critic of the modern nation state, Gandhi's quest was the founding of a non-violent decentralized political community based on the ideals of *dharma* or 'virtuous normativity'.³³ 'Civilization is that mode of conduct which points out to man the path of duty'.³⁴ His ideal of non-violence was a formative principle, wherein people would have to actively inculcate and cultivate non-violence in establishing relationship between themselves and others, which is the basis of *swaraj*.³⁵ According to Gandhi, '[u]nless there is freedom from fear (*abhaya*), the achievement of true non-violence (*ahimsa*), and the adherence to the truth (*satyagraha*), all India can hope for is "English rule without the Englishman."'³⁶ Gandhi understood India's self-reliance, or narrowly construed, the use of indigenous goods (*swadeshi*) – in contrast to Western modernity – as the basis of true *swaraj*, in the sense of 'moral stature of a nation'.³⁷ Some scholars have since evaluated *swadeshi* as having generated a 'politics

²⁹ Mohandas K. Gandhi, *Hind Swaraj or Indian Home Rule* 57–58 (Navajivan 1946); also Chatterjee, *Lineages*, *supra* n. 13, at 53, 71–72.

Gandhi notes:

When I refuse to do a thing that is repugnant to my conscience, I use soul-force. For instance, the Government of the day has passed a law which is applicable to me. I do not like it. If by using violence I force the Government to repeal the law, I am employing what may be termed body-force. If I do not obey the law and accept the penalty for its breach, I use soul-force. It involves sacrifice of self. See Gandhi, *Hind Swaraj*, at 57.

³⁰ Ramachandra Guha, *Makers of Modern India* 159–162 (Penguin 2012); Chatterjee, *Lineages*, *supra* n. 13, at 53–54; also Vajpeyi, *supra* n. 28, at 17.

³¹ Gandhi, *Hind Swaraj*, *supra* n. 29, at 50, 57; Chatterjee, *Lineages*, *supra* n. 13, at 62–65.

³² Chatterjee, *Lineages*, *supra* n. 13, at 53–54, 59–60.

³³ Vajpeyi, *supra* n. 28, at 50–51; also see Karuna Mantena, *On Gandhi's Critique of the State: Sources, Contexts, Conjunctures*, 9(3) Mod. Intell. Hist. 535, 559–560 (2012).

³⁴ Gandhi, *Hind Swaraj*, *supra* n. 29, at 44.

³⁵ *Ibid.*, at 47; Vajpeyi, *supra* n. 28, at 66–67.

³⁶ Vajpeyi, *supra* n. 28, at 79.

³⁷ Gandhi, *Hind Swaraj*, *supra* n. 29, at 11; Vajpeyi, *supra* n. 28, at 71–72.

of affinity' that largely delegitimized the idea of the nation state, thus articulating a 'new historical understanding of transformation'.³⁸

Although the idea of *swadeshi* was not introduced by Gandhi (it originated in Bengal in the early twentieth century), he adapted it as part of his idea of *swaraj*. India's economic self-reliance was to emerge from the country's villages, wherein the village households would dedicate their energies to practising 'ancient and sacred handlooms', the product of which would be distributed to the market by industrial mill owners.³⁹ Simultaneously, for the sake of *swaraj*, Indians should give up industrial and foreign goods.⁴⁰ 'Swadeshi is that spirit in us which restricts us to the use and service of our immediate surroundings to the exclusion of the more remote'.⁴¹ In emphasizing that India should be a republic of self-sustaining villages, Gandhi argued:

It will have houses of worship for all; also a common meeting place, a village common for grazing its cattle, a co-operative dairy, primary and secondary schools in which industrial education will be the central fact, and it will have panchayats for settling disputes. *It will produce its own grains, vegetables and fruits, and its own khadi [homespun cloth].* This is roughly my idea of a model village. In the present circumstances its cottages will remain what they are with slight improvements. Given a good zamindar, where there is one, or *co-operation among the people*, almost the whole of the programme other than model cottages can be worked out at an expenditure within the means of the villagers including the zamindar or zamindars, without government assistance.⁴² [emphasis mine]

This idea of *swadeshi* was to be conceptually based on Gandhi's doctrine of industrial trusteeship (*aparigraha* or non-possession), wherein the rich would subsidize – or at least support – the village handloom.⁴³ The industrialist was to commit profit beyond her own needs to the community.⁴⁴ According to Gandhi, the affluent class – capitalists and landlords – were to hold wealth for the benefit of the poor, in trust (similar to legal trusts), so that a small minority (capitalists and landlords), with the help of machines, cannot systematically exploit the masses for their greed.⁴⁵ Trusteeship thus constitutes the moral foundation of business and industrial relations.⁴⁶ Gandhi was opposed to both

³⁸ Dilip M. Menon, *The Many Spaces and Times of Swadeshi*, 47(42) Econ. & Pol. Weekly 44, 51 (2012).

³⁹ Gandhi, *Hind Swaraj*, *supra* n. 29, at 69; also Lisa N. Trivedi, *Visually Mapping the 'Nation': Swadeshi Politics in Nationalist India, 1920–1930*, 62(1) J. Asian Stud. 11, 13–14, 16 (2003).

⁴⁰ Gandhi, *Hind Swaraj*, *supra* n. 29, at 69–70, 76.

⁴¹ Mohandas K. Gandhi, *Swadeshi*, in *Speeches and Writings of M. K. Gandhi* 273 (G. A. Natesan & Co., 3d ed. 1922).

⁴² Guha, *supra* n. 30, at 303; Gandhi, *Hind Swaraj*, *supra* n. 29, at 44–45, 68–69; also Mantena, *supra* n. 33, at 540–541, 550, 556–557.

⁴³ Kazuya Ishii, *The Socioeconomic Thoughts of Mahatma Gandhi: As an Origin of Alternative Development*, 59 (3) Rev. Soc. Econ. 297, 306–307 (2001).

⁴⁴ Mohandas K. Gandhi, *Theory of Trusteeship*, *Harijan* 145 (3 June 1939).

⁴⁵ Ishii, *supra* n. 43, at 305–306.

⁴⁶ Chinnam Gopinath, *Trusteeship as a Moral Foundation for Business*, 110(3) Bus. & Soc'y Rev. 331 (2005).

large-scale industrial capitalism and Marxism.⁴⁷ To be true to his idea of non-violence, he did not envisage forcible redistribution of land or resources. Instead, if landlords failed to adhere to his mandate of trusteeship, they were to face (minimally violent) consequences.⁴⁸ In spite of this threat, in formulating his idea of trusteeship, Gandhi primarily appealed to the individual morals of industrialists.⁴⁹ Rather than literally interpreting the idea of trusteeship as a redistributive political programme, it is possibly better understood as a conceptual tool of his larger framework of *swadeshi* (and *swaraj*).⁵⁰ Thus, Gandhi saw India's industrial relations or more broadly, economic self-reliance (i.e. *swadeshi*), to be based on voluntary cooperation between capitalists (and landlords) and workers on the basis of the principle of trusteeship.

Rabindranath Tagore – a Nobel laureate poet, public intellectual, and institution builder – on the other hand, invoked his ‘own *dharma*’ to mount a critique against Gandhi’s imagination of the Indian nation and its socio-economic programme.⁵¹ A critic of nationalism (and like Gandhi, of the nation state), Tagore appealed to the idea of *dharma* to argue that the ‘religion of eternal truth’ mandates that we should neither confine our aspirations to merely following the prescribed rituals of *swaraj* (spinning of the wheel or boycotting foreign goods) mandated by Gandhi, nor should we aspire to model our country in the ideal of Western nationalism.⁵² He recognized that Indian society had traditionally been a society of households or a domestic society wherein social norms rested in family and community elders.⁵³ However, that social space, in his view, was expanding

⁴⁷ Vajpeyi, *supra* n. 28, at 49; Ishii, *supra* n. 43, at 300–302.

⁴⁸ Mohandas K. Gandhi, *Trusteeship: Not a Legal Fiction*, Mod. Rev. 412 (Oct. 1935); also Ishii, *supra* n. 43, at 307.

⁴⁹ Mohandas K. Gandhi, *Enjoy Thy Wealth by Renouncing It*, Harijan 20 (1 Feb. 1942).

⁵⁰ Gandhi clarifies:

Absolute trusteeship is an abstraction like Euclid's-definition of a point, and is equally unattainable. But if we strive for it, we shall be able to go further in realizing a state of equality on earth than by any other method. See Gandhi, *supra* n. 48, at 412.

His idea of trusteeship was harshly criticized by the first prime minister Jawaharlal Nehru and the communist leader E. M. S. Namboodiripad, as a conservative political agenda. See Ishii, *supra* n. 43, at 305–306.

⁵¹ Chatterjee, *Lineages*, *supra* n. 13, at 112.

⁵² Tagore emphasized that India as a political entity was never constituted as a nation:

We had known the hordes of Moghals and Pathans who invaded India, but we had known them as human races, with their own religions and customs, likes and dislikes [...] – we had never known them as a nation. We loved and hated them as occasions arose; we fought for them and against them, talked with them in [a] language which was theirs as well as our own, and guided the destiny of the Empire in which we had our active share. But this time [under British colonialism] we had to deal, not with kings, not with human races, but with a nation [...] – we, who are no nation ourselves. See Rabindranath Tagore, *Nationalism* 19 (The Macmillan Company 1917).

Also see Chatterjee, *Lineages*, *supra* n. 13, at 99–113; also see Suresh Sharma, *Swaraj and the Quest for Freedom – Rabindranath Tagore's Critique of Gandhi's Non-Cooperation*, 39 Thesis Eleven 93, 97–98 (1994).

⁵³ Chatterjee, *Lineages*, *supra* n. 13, at 76–77.

and a new ‘public’ space was emerging.⁵⁴ In view of this emerging public space, that is, the non-traditional and somewhat ‘artificial’ (that is, not characterized by intimate bonding) space, new social rules needed to emerge and in view of India’s contact with Europe, it was not surprising that many of the new social rules would have an European imprint on it.⁵⁵ Tagore emphasized that just because (presumably, some of) these new social rules emerged out of Europe cannot *per se* be the reason for their rejection.⁵⁶

However, while some European social rules were welcome, Tagore argued that India was not a nation in the sense that European nation states were, since it always lacked a geographically-bounded common memory, collective identity, aspiration, and sense of destiny.⁵⁷ While the fairly homogeneous peoples of Europe could evolve into a nation, India, with its heterogeneous population, should be better conceptualized as a collection of communities (*samaj*, in Bengali).⁵⁸ It was the unity of the communities in India that historically rendered social assistance on the basis of the ideals of *dharma*, whereas the state had the residual responsibility of engaging in charity for the destitute and imparting religious and moral teachings to the people.⁵⁹ Tagore termed the unity of communities as *swadeshi samaj* (in Bengali) and advocated its revival and reconstruction.⁶⁰ He argued that India’s destiny thus lay in overcoming the narrowness of nationalism and embracing the high ‘ideals of humanity’ by strengthening its communities, since these ideals are what evolved naturally in the country.⁶¹

In Tagore’s *swadeshi samaj*, every individual’s relationship to *swadesh* (that is, one’s country or abode) is an intimate personal relationship, which is only probable in a small village structure.⁶² When this structure is to be replicated extensively, a machinery, consisting of the institutions of the modern state, is required, which, according to Tagore, is to be imported from Europe since India historically did not have it.⁶³ Thus, in his contemplation, India is to be politically structured along two dimensions – the mostly rural *swadeshi samaj* and the political structure connecting those communities in a larger political landscape. Tagore’s substantive understanding of *swadesh* as an individual’s intimate relationship to her country is somewhat

⁵⁴ *Ibid.*, at 77–78.

⁵⁵ *Ibid.*, at 76–78.

⁵⁶ *Ibid.*; also see Tagore, *Nationalism*, *supra* n. 52, at 130–131.

⁵⁷ Chatterjee, *Lineages*, *supra* n. 13, at 94–95.

⁵⁸ *Ibid.*, at 96–99.

⁵⁹ *Ibid.*, at 99–100.

⁶⁰ *Ibid.*, at 99–100, 104–105.

⁶¹ Tagore, *Nationalism*, *supra* n. 52, at 127–128; also Chatterjee, *Lineages*, *supra* n. 13, at 99, 101.

⁶² Chatterjee, *Lineages*, *supra* n. 13., at 104.

⁶³ *Ibid.*, at 104–105.

different from Gandhi's idea of *swaraj*, which mandated collective opposition to the British rule, taking the practical form of the spinning of wheels (to make hand-spun cotton) and the boycotting of foreign goods. Tagore ascribed to Gandhi political cunning in the manipulation of Indians to surrender their freedom of individual judgment in the name of political independence.⁶⁴ He was of the opinion that Gandhi's idea of *swaraj* was a narrow economic-political formulation that glorified non-contemplative labour while not making space for the heterogeneity of human life and actions.⁶⁵

The organization of sustainable communities should be based on human beings' 'higher instincts of sympathy and mutual help' rather than legally imposed structure of the nation state.⁶⁶ Human communities should share the 'spirit of cooperation' and 'combine in fellowship', failing which they will only survive in a 'state of degradation'.⁶⁷ Accordingly, Tagore advocated the idea of cooperatives as an economic-political alternative to the Gandhian programme of *swaraj*, going on to embark on his own cooperative society experiment in Sriniketan in West Bengal.⁶⁸ According to Tagore, it is by means of cooperatives that collective efforts of heterogeneous Indian villages could realize their true *swadesh*.⁶⁹ In addition to giving expression to heterogeneous lives and actions, the values inherent in mutual cooperation (i.e. cooperative societies) were exceptional leadership, personal bonds among members of the cooperatives, mutual trust, sympathy, tolerance, and planned collective action to resolve contextual problems.⁷⁰ According to Chatterjee, while Gandhi's idea of *swaraj* became an internationally dominant idea for emancipatory movements, Tagore's ideal of cooperatives did not find widespread favour.⁷¹ Although it may be true that Gandhi's political formulations have received widespread adulation and international acclaim, in the

⁶⁴ *Ibid.*, at 110–111.

⁶⁵ *Ibid.*, at 115, 118; Vajpeyi, *supra* n. 28, at 85.

⁶⁶ Tagore, *Nationalism*, *supra* n. 52, at 120.

⁶⁷ *Ibid.*, at 120, 153–154.

⁶⁸ Chatterjee, *Lineages*, *supra* n. 13, at 114–116.

⁶⁹ Tagore articulates:

In India the production of commodities was brought under the law of social adjustments. Its basis was cooperation having for its object the perfect satisfaction of social needs. But in the West it is guided by the impulse of competition whose end is the gain of wealth for individuals. But the individual is like the geometrical line; it is length without breadth. It has not got the depth to be able to hold anything permanently. Therefore its greed or gain can never come to finality. In its lengthening process of growth, it can cross other lines and cause entanglements, but will ever go on missing the ideal of completeness in its thinness of isolation. See Tagore, *Nationalism*, *supra* n. 52, at 141; also see Chatterjee, *Lineages*, *supra* n. 13, at 115.

Gandhi's support for the cooperative movement was, it must be noted, conditional on the cooperatives meeting the high moral standards that Gandhi mandated for them. See for a discussion of his evaluation of the cooperative movement, Mohandas K. Gandhi, *The Moral Basis of Co-operation in Speeches and Writings*, *supra* n. 41, at 293–301.

⁷⁰ Chatterjee, *Lineages*, *supra* n. 13, at 118–121.

⁷¹ *Ibid.*, at 116, 122.

following two parts of this article, I will discuss how the ideal of cooperatives came to signify a prominent mode of workers' collective action, combining Gandhi's notion of trusteeship-based industrial relations with Tagore's faith in cooperatives.

In spite of India's two most prominent thinker-actors' historically grounded, context-specific, alternative formulation of an autonomous political community (that is, alternative to the Western constitutional nation state), both Gandhi's and Tagore's aspirations for the national⁷² economic-political trajectory lost out. Instead, independent India decided in favour of the centralized constitutional nation state as its political destiny, and large-scale industrialization as its economic policy.⁷³ Despite their internal differences, both of these intellectual-activists derived the legitimacy of their respective formulations from the ancient idea of *dharma* or eternal truth – which is variously defined as law, order, duty, custom, quality, classification, adjudication, model, and truth⁷⁴ – instead of constitutional rights (or the relationship between civil society and the nation state). Both of their organizing principles of industrial relations – trusteeship and the cooperative principle – are expressed within the overarching justificatory framework of *dharma*.

Despite their marginalization in the constitutional industrial relations framework, these two organizing principles of industrial relations socially coexist alongside the constitutional framework in India (particularly, Parts III and IV of the Indian Constitution) and find practical expression in the collective action of informal workers, who primarily occupy the political society or engage the governmental system. However, even though informal workers and their collective action primarily occupy the political society, their socio-political interaction is not limited to that space: they often employ the vocabulary and strategies of the civil society, including the language of constitutional and legal rights. Before documenting informal workers' collective action by means of cooperative societies in Part 5, in the following part, I briefly describe the history of cooperative action in India, including the legal form such initiatives have taken.

4 SOCIAL EMBEDDEDNESS & LEGAL VALIDATION OF THE COOPERATIVE MOVEMENT

In charting the history of cooperative initiatives in Indian villages and their formal legal recognition, in this part, my aim is to characterize the developmental process of cooperative societies as an instance of an organic social norm production

⁷² In this case, 'national' signifies 'a pluralistic, inclusive and relaxed nationalism' based on historical democratic values. See S. Irfan Habib, *Indian Nationalism: The Essential Writings* ix, 5 (Aleph 2017).

⁷³ Vajpeyi, *supra* n. 28, at 85–86; also Mantena, *supra* n. 33, at 536; also Ishii, *supra* n. 43, at 301.

⁷⁴ See generally Paul Horsch, *From Creation Myth to World Law: The Early History of Dharma*, 32 *J. Indian Philosophy* 423 (2004) [translated by Jarrod L Whitaker].

process, whereby the different socio-legal elements of cooperative initiatives emerge through interactive processes of trial and error. However, I am also mindful that the eventual legal form taken by cooperative societies in India may also have been a legal imposition (by the colonial government). This, however, should not be taken to downplay the social lawmaking process whereby the ‘sense’ of cooperative societies evolved in the public imagination before such imagination took a legal form. This social sense, or experience, of an evolving legal institution is akin to the idea conveyed by ‘immemorial custom’ that has been part of the oral tradition of common law and continues to define the idea of common law.⁷⁵ Thus, the following paragraphs emphasize the primacy of lived experience as a lawmaking process.

Tagore imagined cooperatives as local (village-centric) autonomous community development institutions capable of promoting ‘ethical communitarian subjectivity’ in contrast to self-interested market participants under capitalism.⁷⁶ Tagore hoped that villages in India would adopt and propagate the cooperative model for socio-economic development, eventually giving shape to the broadest embodiment of the Indian identity, the Indian nation, without extensive intervention of political institutions controlling and restricting such local cooperation.⁷⁷ In his view, workers’ real freedom lies in their voluntary union capable of collectively generating economic benefits that could be shared by all.⁷⁸ In this solidarity-based ethical economy, surplus wealth produced by workers would be collectively shared with the broader community in which they are based.⁷⁹ It is from his conviction that cooperative societies characterize non-exploitation, collective distribution, and ideological production of individuals as cooperative citizens that Tagore began his cooperative experiment *Sriniketan*, a production cooperative for rural development, in 1922.⁸⁰

Tagore may have been a prominent advocate of cooperative societies for rural development, but he was not the first to either conceive or employ it in India. While the first legal structure of cooperatives was provided through the Co-operative Credit Societies Act, 1904, cooperative collective action (the pooling of resources) for community development was not completely

⁷⁵ Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* 166–173 (Harvard University Press 1990).

⁷⁶ Anjan Chakrabarti & Anup Kumar Dhar, *Development, Capitalism, and Socialism: A Marxian Encounter with Rabindranath Tagore’s Ideas on the Cooperative Principle*, 20(3) *Rethinking Marxism* 487, 489–490, 494 (2008); Chatterjee, *Lineages*, *supra* n. 13, at 120.

⁷⁷ Chatterjee, *Lineages*, *supra* n. 13, at 120–121.

⁷⁸ Chakrabarti & Dhar, *supra* n. 76, at 492.

⁷⁹ *Ibid.*, at 495–498.

⁸⁰ *Ibid.*, at 496. Sanjoy Mukherjee & Summauli Pyne, *Cooperatives as Alternative Form of Organization for CSR Effectiveness: Insights from Rabindranath Tagore*, 17(6) *Global Bus. Rev.* 1497, 1499–1504 (2016).

unknown in Indian villages. Depending on the nature of their initiatives – namely, creation and management of permanent assets such as water tanks, forest resources; resource pooling such as food grains and cash for lending; communal transportation; joint cultivation; and produce distribution – cooperative initiatives were termed *Chit* funds, *Devarai*, *Vanarai*, *Kuries*, *Bhishie*, *Vishi*, *Phads*, *Lana*, and other vernacular expressions.⁸¹ Many of the pre-1904 Act cooperative initiatives were legally established under the Companies Act, 1882.⁸² The 1904 statute offered legal corporate existence to cooperative credit societies that avoided the complex legal structure of a company.⁸³ With the increasing popularity of cooperatives, a new statute, the Cooperative Societies Act, 1912,⁸⁴ was enacted to create a legal corporate structure for cooperatives also providing non-credit services.⁸⁵

In addition to recognizing cooperative societies registered under the 1904 law, the 1912 Act laid down a detailed registration procedure for cooperative societies aimed at promoting the economic interests of their members. It also delineated the rights and liabilities of members, outlined duties and privileges of registered societies, specified the management structure of cooperative property and funds, provided for the inspection of cooperative affairs, and stipulated conditions and procedures for the dissolution of cooperative societies.⁸⁶ Not only did the 1912 legislation offer a detailed structure and *modus operandi* for cooperative societies, it also prohibited cooperative initiatives not registered under the Act from using the expression ‘co-operative’.⁸⁷ After the Government of India Act, 1919, transferred legislative power on cooperative initiatives to the provinces, several provinces enacted legislation on the model of the 1912 statute.⁸⁸ Once the popularity of cooperatives was recognized, legislative regimes became increasingly sophisticated

⁸¹ Government of India, *Report of the High Powered Committee on Cooperatives*, Ministry of Agriculture, Government of India 5 (May 2009); also see Nikolay Kamenov, *Imperial Cooperative Experiments and Global Market Capitalism, c. 1900–c. 1960*, 14(2) *J. Global Hist.* 219, 235 (2019).

⁸² Kamenov, *supra* n. 81, at 224.

⁸³ The 1904 Act aimed at constituting and controlling cooperative societies of agriculturists, artisans, and people of limited means. The law offered a legal basis for cooperative initiatives, specifying formation, registration, membership, eligibility, shares and interests of members, privileges of societies, liabilities of members, disposal of profits, claims against members, audit, inspection and inquiry, exemption from taxation, and dissolution of legally constitutes cooperative societies. See Co-operative Credit Societies Act, 1904 (Act No. X of 1904). Also see Government of India, *Report*, *supra* n. 81, at 6; Govindaraj Veerakumaran, *India in International Handbook of Cooperative Law* 449, 450 (Dante Cracogna, Antonio Fici & Hagen Henry eds, Springer & Euricse 2013).

⁸⁴ Act No. 2 of 1912.

⁸⁵ Veena Nabar, *The State, Cooperatives and Cooperative Legislation in India: Changing Contexts and Emerging Trends* 5, <http://www.socialeconomyhub.ca/sites/socialeconomyhub.ca/files/CIREIC/Papers/G1%20-%20Nabar.pdf> (accessed 20 Apr. 2020).

⁸⁶ See generally, the Cooperative Societies Act, 1912 (Act No. 2 of 1912).

⁸⁷ Section 47, *ibid*.

⁸⁸ For example, the Bombay Cooperative Societies Act, 1925, the Madras Cooperative Societies Act, 1932, and so on; also see Veerakumaran, *supra* n. 83, at 450.

with the intervention of governmental commissions and committees.⁸⁹ The Multi-unit Cooperative Societies Act, 1942 was enacted to register cooperative societies having membership in more than one state.⁹⁰ This Act was repealed in 1984, which was further amended in 2002.⁹¹ The 2002 Act facilitates the voluntary formation and operation of autonomous cooperative societies, operating in more than one state, in promoting socio-economic development of their members.⁹² In addition to these changes to the cooperative societies' statutes, the Companies Act, 1956 was amended to allow cooperative producer initiatives as companies under the Act.⁹³ Additionally, operation of the Banking Regulation Act, 1949, was extended to cover cooperative banking initiatives.⁹⁴

Under the Government of India Act, 1935, cooperatives remained exclusively provincial subject matter, which was later modified by the Constitution of India, 1949.⁹⁵ Article 246 of the Constitution of India demarcates legislative boundaries of the Indian Parliament and the state legislatures.⁹⁶ While the Parliament has legislative power with respect to List I (Union List) and List III (Concurrent List), the state legislatures possess legislative power on matters in List II (State List) and List III of the Seventh Schedule of the Constitution.⁹⁷ In this constitutional distribution of legislative power, whereas the state legislatures are entitled to regulate cooperatives in their respective jurisdictions, the Parliament is entitled to regulate cooperatives operating in more than one state.⁹⁸ Accordingly, in addition to the above parliamentary legislation, all Indian states have their respective cooperative societies laws.⁹⁹ All of these laws aim at providing detailed structuring of cooperative activities in the respective states, including provisions for registration, partition, amalgamation, rights and duties of members and cooperative societies, borrowing parameters, investment restrictions, inquiry, inspection, auditing, surcharges, and liquidation.¹⁰⁰

In India, the cooperative movement is fairly expansive, with cooperative societies engaging in a range of collective activities including production, processing, marketing,

⁸⁹ Government of India, *Report*, *supra* n. 81, at 7–16; Arun Kumar Ghosh, *Cooperative Movement and Rural Development in India*, 37(3) Soc. Change 14, 16–20 (2007).

⁹⁰ Veerakumaran, *supra* n. 83, at 450.

⁹¹ *Ibid.*

⁹² *Ibid.*, at 452–453.

⁹³ *Ibid.*, at 450–451.

⁹⁴ *Ibid.*

⁹⁵ Government of India, *National Policy on Cooperatives*, Department of Agriculture and Cooperation, Ministry of Agriculture, Government of India, New Delhi 1 (Mar. 2002).

⁹⁶ Article 246, the Constitution of India, 1949.

⁹⁷ Seventh Schedule, the Constitution of India, 1949.

⁹⁸ See Entry 32 of List II (State List) and Entries 43 and 44 of List I (Union List) of the Seventh Schedule, the Constitution of India, 1949.

⁹⁹ Veerakumaran, *supra* n. 83, at 451.

¹⁰⁰ *Ibid.*

housing, banking, manufacturing industries, health, and education.¹⁰¹ They are prominent strategic apparatuses in the socio-economic development of the country. In spite of their prominence as institutions of autonomous collective action, an influential Government of India-sponsored committee report in 2009 suggested that ineffectual governance is a hindrance for cooperative societies in realizing their foundational ideals of voluntary, autonomous, democratic collective action for the marginalized population, and called for ‘legal enablement’ of cooperatives to promote the formative ideals of the cooperative movement.¹⁰² Although the notion of independent pooling of limited resources by means of voluntary collective action was not unknown in rural India, legal enablement was, and still remains, a central condition for the cooperative movement’s continued viability.

The Cooperative Credit Societies Act of 1904 gave a specific legal expression to a notion of collective action that the Indian rural communities were already familiar with. The 1904 Act offered a ‘legal basis’ with attendant details about formation, scope, entitlements, liabilities, governmental oversight, and corporate dissolution of cooperative societies.¹⁰³ While these legislative details helped clarify the idea of cooperative societies, and offered consistency to the idea, they were not adopted in a conceptual vacuum. The very ‘feel’ – in an ontological sense – of what it means to constitute a cooperative movement (i.e. even without the legal concept of the cooperative society) emerged through social interaction, by way of the manner of actually organizing these collective actions. I elaborate on this combined strength of social- and legal-basis of the cooperative movement as workers’ collective action in Part 6. To better appreciate that discussion, it is useful to note some concrete instances of collective action based on the ideas of trusteeship and cooperation. It is on the combined strength of social embeddedness and legal formulation that non-industrial (informal) workers build and sustain their collective action through cooperative societies, which I document in the following part.

5 TRUSTEESHIP & COOPERATION: CO-OPERATIVE SOCIETIES AS WORKERS’ COLLECTIVE ACTION

In this part, I examine how the ideals of trusteeship and cooperation are coopted in informal workers’ collective action. In explaining the ‘validity’ of claims made by squatter settlements – illegal occupants (therefore, not members of the constitutionalized civil society) – on to the government, Chatterjee notes¹⁰⁴:

¹⁰¹ *Ibid.*, at 453.

¹⁰² Government of India, *Report*, *supra* n. 81, at i–ii.

¹⁰³ *Ibid.*, at 6.

¹⁰⁴ Chatterjee, *Lineages*, *supra* n. 13, at 15. On the validity of a range of ‘illegal’ claims, see *ibid.*, at 15–17.

If as squatters they have violated the law, they do not necessarily deny that fact, nor do they claim that their illegal occupation of land is right. But they insist that *they have a right to housing and livelihood* in the city, and, if they are required to move elsewhere, they must be rehabilitated. They form associations to negotiate with governmental authorities and seek public support for their cause. Their political mobilization involves an effort to turn an empirically formed *population group* into a moral community. The force of this moral appeal usually hinges on the generally recognized *obligation of government* to provide for the poor and the underprivileged. [emphasis mine]

The foundation of the ‘right’, that is, validity of the claim to livelihood by the squatters and the ‘obligation’ of the government, as much as it seems to conform to the right-duty framework, does not emanate from constitutional or legislative rights. The validity of the claim, even if formally illegal, rests on (the government’s) social obligation towards a moral community, which traces its legitimacy back to the ideals of *dharma*, *trusteeship*, and *cooperation*, as I presently discuss.

Chatterjee’s understanding is that by advancing these ‘illegal’ claims, specific groups of people appeal to the government’s ‘arbitrary power’ exercised for the public good.¹⁰⁵ However, appraising governmental obligation as arbitrary, or extra-legal, would amount to ignoring alternative sources of legal validity that actors in the political society seek to cultivate. I propose that legitimacy of actors and action – the so-called extra-legal sources of validity – in the political society is often derived from long-cherished home-grown ideals rather than the formal institutional framework of the postcolonial nation. In offering the above proposition, I will primarily invoke the working of the Self Employed Women’s Association (SEWA), which is active in the political society in organizing informal women workers.

In the political society, collective action is often concerned with claims for legitimizing the illegal. As noted earlier, for street vendors, operating on the streets and on other restricted land often amounts to illegal encroachment of public space. Likewise, for waste recyclers, operating in public dumping sites amounts to trespassing on public property. In the same way, informal transport workers often require (illegal) use of public space. Domestic workers subvert the classic contractual employment relationship by working in others’ homes. Thus, legalization of existing illegal practices is often the rallying cry of collective action in the informal domain. In doing so, actors in the political society, such as SEWA, derive their moral legitimacy not from constitutional doctrines and institutions, but from higher ideals carrying social currency.

SEWA, a registered trade union that functions through numerous cooperative societies, combines the Gandhian idea of non-violent trusteeship with the

¹⁰⁵ Chatterjee, Lineages, *ibid.*, at 17. By arbitrary power, Chatterjee means power exercised outside the law, but for promoting the public good, i.e. creating an exception to the application of the legal mandate.

cooperative agenda. The organization derives its moral legitimacy from the higher ideal of *dharma* as employed by Gandhi during India's independence movement. More tangibly, SEWA inherits Gandhian ideals of trusteeship and non-violence from its parent organization, the Textile Labour Association.¹⁰⁶ The idea of trusteeship denotes labour-management relationship not as inherently conflict-ridden but as a cooperative engagement marked by partnership and unity. According to SEWA's founder, the Gandhian approach 'put great emphasis on forging a partnership between labour and capital and solving disputes through mediation and negotiation[;] [s]trikes [are] considered less effective because their coerced solutions do not last'.¹⁰⁷ It is primarily in this ideal, rather than the institutions of the constitutional state, that SEWA bases the moral legitimacy of its actions. This approach is helpful because the ideal of trusteeship and cooperation is used as sources of legitimacy – bases for demands against the state – where many of the demands may, de jure, fall foul of the existing regulatory regime.

Since SEWA is not a traditional workers' organization (that is, an industrial trade union) engaged in collective bargaining with the employer, the ideal of trusteeship in SEWA's context should be seen more as an attitude to negotiation, a conciliatory and collaborative approach, with the state and other non-state institutions, rather than actual profit-sharing between employer and employees. As its organizational agenda, SEWA aims at livelihood and social security for its members.¹⁰⁸ In this respect, SEWA's collective activism extends to its relationship with the state (the government and elected representatives), the market (cooperatives), and provisioning (service delivery and training).¹⁰⁹ The organization also engages in political activism in collaboration with other organizations.¹¹⁰ SEWA organizes its extensive activities (i.e. engagement with the market and service provisioning) – from waste-recycling business to banking services for informal workers – by constituting independent cooperative societies.¹¹¹ SEWA is prominent not only for its size and heterogeneity: it is also a pioneer in combining trade unionism and the cooperative movement, generating vibrant collective action by women workers that is not only influential nationally, but also well recognized globally.

¹⁰⁶ Bhatt, *supra* n. 3, at 5–9.

¹⁰⁷ *Ibid.*, at 6.

¹⁰⁸ Aditi Kapoor, *The SEWA Way: Shaping Another Future for Informal Labour*, 39 *Futures* 554, 555 (2007); Elizabeth Hill, *Worker Identity, Agency and Economic Development: Women's Empowerment in the Indian Informal Economy* 46–47 (Routledge 2010).

¹⁰⁹ Bhatt, *supra* n. 3, at 66, 71, 98; Hill, *supra* n. 108, at 76–77, 139–42.

¹¹⁰ Bhatt, *supra* n. 3, at 98–213.

¹¹¹ *Ibid.*, at 16–17, 53–54, 70, 99–122; Janhavi Dave et al., *The Self-Employed Women's Association (SEWA) Organising Through Union and Co-operative in India in Refusing to Be Cast Aside: Waste Pickers Organising Around the World* 27 (Melanie Samson ed., WIEGO 2009).

SEWA may be prominent for its extensive use of the cooperative ideal in workers' collective action, but it is only one of several instances of collective action through cooperative societies.¹¹² The unique status of SEWA, however, lies in the fact that it combines the cooperative form with the trusteeship ideal, thus constituting an important site of alternative legitimacy for a right to collective action (that is, the right to cooperative society), before such a right found its way into the Constitution. However, even in the absence of this combined ideal, a right to collective action was being socially recognized through its extensive use. While it is possible to multiply instances of workers' cooperatives, such extensive documentation is not necessary for the purposes of the present argument. It should suffice to note that by extensive use of the cooperative model as a collective socio-economic initiative, workers in the political society occasioned the 'right' to cooperative society through socio-historical processes, which I elaborate on in the following.

6 CONTEXTUALIZING LAWMAKING: FROM SOCIAL AUTHENTICATION TO CONSTITUTIONAL VALIDATION

The idea of cooperative societies as workers' collective action – in which workers assert their right to association – could not be imagined by the judiciary before their formal legal institutionalization, and was only belatedly imagined and constitutionalized by the Indian Parliament. This delayed legal institutionalization of a ubiquitous right to association constitutes an important case for recognizing the organic socio-historical making process of a right, which forms the ontological foundation of such a right. In particular, the Indian Supreme Court's conceptualization of cooperative societies should help establish the centrality of socio-historical processes as the site of rights' ontology under conditions of concurrent legitimacies of postcolonial societies. In *Daman Singh v. State of Punjab*,¹¹³ the Supreme Court examined the constitutional validity of several provincial statutes on cooperative societies (Cooperative Societies Acts) insofar as these statutes mandate compulsory division or amalgamation of cooperative societies when the

¹¹² For example, see Sharit K. Bhowmik & Kanchan Sarker, *Worker Cooperatives as Alternative Production Systems*, 29(4) Work and Occ. 460 (2002) (for case studies of several worker cooperatives, including their successes and failures); Anita Hammer, *Institutional Analysis and Collective Mobilization in a Comparative Assessment of Two Cooperatives in India*, in *Alternative Work Organizations* 157 (Maurizio Atzeni eds, Palgrave Macmillan 2012) (comparing a worker cooperative with a producer cooperative in two different Indian states); G. Mitu Gulati, T. M Thomas Isaac & William A Klein, *When a Workers' Cooperative Works: The Case of Kerala Dinesh Bidi*, 49 UCLA L. Rev. 1417 (2002) (examining the success of a worker cooperative in the Indian state of Kerala); Timothy Kerswell & Surendra Pratap, *Worker Cooperatives in India* (Palgrave Macmillan 2019) (analysing several worker cooperatives, including construction workers' cooperative run by SEWA, in different states of India).

¹¹³ 1985 SCR (3) 580.

government-appointed registrar of cooperative societies is satisfied that such a division or amalgamation is necessary in the interests of such societies and the public.¹¹⁴ Even though the Court acknowledged the history of the cooperative movement in the country and recognized the need to promote a vibrant cooperative movement, it refused to see the constitutional challenge as a problem of independence and autonomy of collective action. The Supreme Court resolved the issue on the more technical ground that under the Constitution, legislation mandating the amalgamation of corporate entities (including cooperative societies) in the public interest or for the purposes of better management¹¹⁵ is immune from challenge on the grounds of violation of fundamental rights to equality and freedom.¹¹⁶

Far from recognizing the autonomy of cooperative members and the independence of cooperative societies, the Court noted: '[o]nce a person becomes a member of a co-operative society, he loses his individuality qua the society and he has *no independent rights* except those given to him by the statute and the by-laws'.¹¹⁷ This notion stands in contrast to that of the right to form trade unions. Even though the constitutional right to unionization was interpreted narrowly by the Supreme Court, the Court noted that workers' right to unionization is realized in the formation of a trade union¹¹⁸ although the right does not consist of claims essential for fulfilling the objectives of a trade union (such as collective bargaining or strikes). According to the Court, in the context of cooperative societies, the only right to be considered is the statutory right of cooperatives enumerated in the cooperative societies legislation since cooperative societies have no existence outside the legislation. Statutory intervention (such as re-composition) in the workings of the cooperative societies does not amount to violation of the individual right to freedom of association.¹¹⁹

Drawing on the (provincial) cooperative societies' legislation and a constitutional provision,¹²⁰ the Supreme Court construed cooperative societies in functional terms as similar to companies, that is, exclusively as corporate entities for economic activity, promoting cottage industries in the public interest, rather than institutions of autonomous collective action.¹²¹ Even when cooperative societies claimed breach of independence and autonomy in collective action, the Court could not imagine a right to 'collective action'. This is a problem of construction,

¹¹⁴ *Ibid.*

¹¹⁵ See Art. 31A (1)(c), the Constitution of India, 1949.

¹¹⁶ See Arts 14 and 19, the Constitution of India, 1949.

¹¹⁷ *Ibid.* [emphasis mine].

¹¹⁸ *All India Bank Employees' Association v. National Industrial Tribunal & Others*, (1962) 3 SCR 269.

¹¹⁹ 1985 SCR (3) 580.

¹²⁰ Article 43, the Constitution of India, 1949.

¹²¹ See 1985 SCR (3) 580; also see Art. 43, the Constitution of India, 1949.

and a complex one at that. The specific socio-historical context in the making of a right (that is, the right to collective action in the political society), as indicated by Holmes, is difficult to discern in the present context. Historical investigation into the ontological basis of cooperative societies as collective action would need to follow an unusual trajectory, which the judiciary is ill-equipped to carry out. Unless legislated through a statute or constitutionalized, the judiciary – because of its formal institutional embeddedness – is blinded to the informal social law-making processes or lived experiences of the citizenry in the political society in India. The legislature, then, needs to mediate the social conception of rights and its formal juridical formulation.

As an expression of workers' collective action, the socio-historical lawmaking account of cooperative societies in India should be approached in a cautious context-specific manner. As noted above, in conceiving the postcolonial Indian state, there were influential alternative ideas for the constitution of the political community other than as a constitutional nation state on the European model. The idea of a nation as a series of loosely combined rural socio-political communities permeated the thoughts of both Gandhi and Tagore, albeit in different conceptualizations. In spite of some constitutional concessions,¹²² both Gandhi's and Tagore's ideas were sidelined in favour of industrial capitalism and constitutional bureaucracy. However, instead of becoming a homogeneous constitutional state, independent India could be seen as functioning on two interrelated planes of legal legitimacy: first, constitutional citizenship and second, political citizenship.

It is this disjuncture of legal legitimacy that is captured in Chatterjee's idea of political society or governmental systems. On the one hand, constitutional legitimacy is secured by means of the social contract between the state and the civil society, whereas on the other, governmental legitimacy could be traced to the high ideals of eternal truth or *dharma* (expressed as *satyagraha* in Gandhi's case). It must, however, be remembered that in the political society, in interactions between the government and the citizens, *dharma* as a regulatory ideal is rarely, if ever, explicitly invoked. Righteousness underlying the idea of *dharma* takes the more strategic and relatable concepts of trusteeship and cooperation, particularly in the context of productive economic relationships.

While the more familiar right to association, in the form of trade unionism in industrial relations, is authenticated by the constitutional order and implemented through parliamentary and state legislation, the cooperative society *as a right to association* derived its legitimacy primarily from the home-cultivated, if not

¹²² In the forms of local self-governing bodies or village panchayats, and the policy of promoting cooperative societies. See Arts 40, Part IX, Art. 19, Art. 43, Part IXB, the Constitution of India, 1949 (some of these constitutional provisions were introduced as recently as in 2011).

exclusively indigenous, political ideals,¹²³ before it became a justiciable constitutional right in 2011.¹²⁴ However, it must be remembered that before becoming a constitutional right in 2011, cooperative societies had been legally constituted through legislation for over 100 years. Still, this legislation – that offered a structure to erstwhile cooperative initiatives – perceived such societies as less complex forms of companies furthering smaller-scale economic activities. The fact that cooperative societies were also manifestations of collective action remained obscured from the legislative consciousness.

It is by means of the performance of collective action, in *sui generis* socio-political circumstances, by organizations such as SEWA that a ‘right’ to association emerged. In fact, SEWA (along with similar organizations) organizes informal workers such as street vendors, waste recyclers, domestic workers, informal transport workers and various other categories of workers who are not typical industrial workers tied to an employment contract. Many of these workers’ livelihoods violate constitutional and legal rights (to property), constitute criminal wrong, bypass taxation, and bend formal civic norms. Yet their livelihoods are tolerated and their demands (often illegal, such as unauthorized claim to public spaces and public services) are met. These workers do not bring their claims against an employer or bargain with the management: their demands are directed at the government. As noted above, these workers occupy the political society, negotiating their well-being with the government as the governed ‘population’. Since these workers are not typical industrial workers and the socio-political space they occupy is not that of traditional industrial democracy, trade union-based collective action is somewhat marginal for their situation. It is true that SEWA is registered as a trade union, but its programmes are all conceived as collective ‘cooperative’ action.

SEWA explicitly bases its authenticity on the ideals of trusteeship and cooperation. Its general approach is conciliatory and collaborative, and it aims at the ‘collaborative’ economic self-sufficiency of its members. With this intent, SEWA creates economic opportunities for its members, lobbies with the government, and undertakes political campaigning. What features prominently through all of these functional trajectories is the autonomy and independent participation of SEWA members in decision-making processes. These processes are precisely what the Supreme Court denied to cooperative society members in *Daman Singh*. However, just because trusteeship and cooperation are guiding principles of SEWA, the

¹²³ However, it may be worthwhile to note here that there is some constitutional recognition of ancient – and modern – Indian ideals, such as, ‘cherish[ing] and follow[ing] the noble ideals which inspired [India’s] national struggle for freedom’ and ‘valu[ing] and preserv[ing] the rich heritage of [India’s] composite culture’ are two of the important fundamental duties of every Indian citizen. See Arts 51A (b) and 51A (f), the Constitution of India, 1949.

¹²⁴ Article 19 (1) (c), the Constitution of India, 1949. Also see generally The Constitution (Ninety Seventh Amendment) Act, 2011.

organization does not refrain from employing the language of constitutional human rights. Arguably, SEWA does not exclusively belong to the political society: it also invokes the legal tools of the civil society, including the constitutional right to form trade unions.

In recognition of SEWA's (and a range of other cooperative societies') vision of cooperative society as a right to association, the right to set up cooperative societies was constitutionalized as a justiciable fundamental right alongside the right to form trade unions through the Constitution (Ninety Seventh Amendment) Act, 2011.¹²⁵ In the absence of this social imagination of the contours of the 'right' (that is, through socio-historical processes) the judiciary could not 'conceive' of such a claim as a right. It is true that for a claim to become a justiciable right, it needs to be mediated by the legislature.¹²⁶ It is also true that it is the legislature that is better able to conceive a right when it emerges through socio-historical interaction.¹²⁷ However, by focusing solely on the role of the legislature, or for that matter, on that of the judiciary, we miss an important element of the lawmaking process – perhaps the most important one where a right organically transpires – which is simultaneously responsible for the realization of the right. When a society is already accustomed to the practice of a right, its institutionalization follows (rather than precedes) and facilitates its realization.

In the context of our preoccupation, it would seem that even though the legislature created institutional space for rural cooperative action (since 1904), its conceptualization of cooperatives as an associational right was substantially delayed (until 2011), and occurred only after the cooperative societies had conceived of such a right and socially experimented with it. Much of the scholarly debate on the making and realization of constitutional and human rights, and in particular, the right to association, begins with the truism that there exists a right (a legitimate entitlement) that is identifiable and knowable, howsoever vaguely.¹²⁸ I argue that this consensus may not work in heterogeneous postcolonial societies. In this article, my attempt has been to indicate that we should not discount the social lawmaking process by means of which the very idea of a legitimate claim – a legal right – comes to life.

7 CONCLUSION

Postcolonial societies such as India are complex sites of multiple legal legitimacies. Unless we acknowledge these multiple legitimacies, and adequately

¹²⁵ A government-appointed committee recommended the inclusion of right to cooperatives under Art. 19 of the constitution. See Government of India, *Report*, *supra* n. 81, at 30–31.

¹²⁶ Webber et al., *supra* n. 2, at 1, 14, 21, 102.

¹²⁷ *Ibid.*, at 3, 93–94, 99–100, 115.

¹²⁸ See references cited in fn. 2.

explain them, our understanding of the unique sources and sites of lawmaking in these societies is likely to remain incomplete. The workers' right to association, or the legal basis of collective action, is a political right, that is, the right to engage in the industrial democratic process. For an important political right such as the right to association, then, contextual sensitivity in legal evaluation is essential. It should not merely be explained with reference to the universal industrial relations model. In the *sui generis* space of the political society, this right navigates an even broader field, that of the general political process (involving a worker-state relationship in contrast with the employee-employer relationship). Due to the unique nature of this right, it should be deciphered as a narrative about the lawmaking process which is centred on lived experiences – immemorial custom – of workers and their collectives.

In 1904, the Co-operative Credit Societies Act offered a legal basis for the continued realization of cooperative initiatives through a formal institutional structure, thereby bringing cooperative societies within the formal monitoring and adjudicative apparatus. After more than 100 years, in 2009, a government-appointed committee recognized that cooperative societies needed legal enablement for their proper functioning. Thus, it is true that legislation gave institutional meaning – and a legal form – to the cooperatives and helped that institutional form to evolve, but the legislative process did not occur in a vacuum and required gradual updating, all the while taking a cue from social interaction. The modern idea of cooperative societies as a right to association – at least since 2011 – emerged through the interaction between social experimentation and legal intervention. It is this combined lawmaking process that we should examine to decipher the evolution of rights in postcolonial societies.

Lastly, it might be a useful future exercise to assess the constraints of judicial imagination under the institutionalized Western industrial democracy model in adequately evaluating the complexities of postcolonial societies. In this respect, the Canadian Supreme Court's jurisprudence on the right to association serves as a useful contrast to that of the Indian Supreme Court.¹²⁹ In expanding the notion of the right to association to include collective bargaining, the Canadian Supreme Court noted that collective bargaining as an entitlement emerged through the labour movement in Canadian society: it was a fundamental aspect of society before its recognition as a legal right under Canadian law.¹³⁰ This genealogical vindication of social values, to borrow Alan Bogg's eloquent phrase, we must remember, occurs through the orthodoxy of

¹²⁹ I draw this comparison while fully aware of the complexities arising from the settler-colonial legal and structural impositions on Canadian society.

¹³⁰ Alan Bogg, *The Constitution of Capabilities: The Case of Freedom of Association*, in *The Capability Approach to Labour Law* 241, 258 (Brian Langille ed., Oxford University Press 2019).

the universal labour relations model involving the trade union movement.¹³¹ When social values emerge outside the universal industrial relations model, as in the political society in India, is the judiciary – in spite of its institutional embeddedness in the above model – able to vindicate such social values? Insofar as the case of the Indian judiciary is concerned, with its institutional embeddedness in the dominant industrial relations framework, such vindication remained unrealized.

¹³¹ *Ibid.*, at 259.

