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HOPE IN CONSTITUTIONAL DRAFTING: REORIENTATION IN THE CONSTRUCTION OF THE INDIAN CONSTITUTION

SUJATA GADKAR-WILCOX*

This article suggests that moments of contemporary constitution formation are often moments of rupture, but at the same time, the legitimacy of that break from the past paradoxically relies on establishing a continuity with the past. Drawing on ideas of hope and reorientation from Hirokazu Miyazaki, this article examines the formation of the Indian Constitution and argues that while that constitution embraces what appear to be liberal constitutional norms from other constitutions, it reorients their meaning to transform them into useful vehicles for contemporary Indian social reform.

INTRODUCTION

While contemporary critics problematize law as a static and hegemonic political modality, it is important to consider moments when the law as a formal structure becomes animated and re-imagined through social processes that create circumstances of generative and productive potential.[1] Constitutions are particularly evocative socio-legal devices because they operate within the frames of representation, rupture, and inception. More specifically, during the period of constitutional formation, originating constitutional conditions enable drafters to speak for "the people" and debate broader issues affecting the common good rather than merely narrow, self-interested political topics. Drafters are often able to do so because the point of constitutional formation is almost always a moment of rupture, in which an existing constitutional framework and social order has been challenged, providing the possibility of beginning anew. In this process, constitutional discourse is far from a mere rejection or mimetic representation of previous traditions but constitutes an

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1. L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (2001); Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053 (1993) [hereinafter Schlag, *Clerks in the Maze*].

epistemological reorientation that enables the articulation of a new legal rhetoric, one that incorporates the multiplicity of voices and experiences leading up to a revolutionary independence.

While the Indian Constitution has been widely discussed in connection with philosophical, legal, and political questions of national identity, citizenship, and popular sovereignty, the socio-discursive process of constitutional formation has not received the same attention.[2] Understanding the institutionalization of constitutional norms requires us to ask what factors have led to the conditions that gave rise to the instantiation of an increasingly globalized constitutional framework. I am interested in understanding how the pluralistic and quite diverse lived experience of the members of the Constituent Assembly allowed them to re-imagine the preexisting legal structure operating in the context of colonization.[3] Doing so will allow us to locate the conceptual plurality of different currents, voices, and experiences that shaped a new constitutional discourse.

This article will apply Hirokazu Miyazaki's conception of hope,[4] which I will call reorientation, to assess how, epistemologically, the discourse shaped during the moment of constitutional formation established a new paradigmatic socio-legal precedent, similar to the procedural precedent that Bruce Ackerman discusses in the context of the American constitutional tradition.[5] This outline, which introduces the theoretical framework for the comparative analysis, discusses Miyazaki's conception of hope as a reorientation of knowledge, as well as the use of legal narrative to reorient legal presumptions and practice by first "disorienting" the reader's understanding of legal precedent and procedure.[6] Even when the very same linguistic structure is borrowed from a pre-existing system, the context of the process of constitutional deliberation changes the operational and functional meaning of key terms and phrases.

This article applies these legal paradigms informing the Indian Constitution, with a particular focus on the fundamental rights framework, in

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2. *See generally* POLITICS AND ETHICS OF THE INDIAN CONSTITUTION (Rajeev Bhargava ed., 2008).

3. BIPAN CHANDRA, MRIDULA MUKERJEE, & ADITYA MUKHERJEE, INDIA SINCE INDEPENDENCE 48–49 (2008) ("[A] special effort was made to see that the Assembly did indeed reflect the diversity of perspectives present in the country.").

4. HIROKAZU MIYAZAKI, ARBITRAGING JAPAN: DREAMS OF CAPITALISM AT THE END OF FINANCE (2013) [hereinafter MIYAZAKI, ARBITRAGING JAPAN].

5. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 122–25 (1991).

6. HIROKAZU MIYAZAKI, THE METHOD OF HOPE: ANTHROPOLOGY, PHILOSOPHY, AND FIJIAN KNOWLEDGE 12–14 (2004) (describing how hope, as an entity oriented to what will come in the future, produces a new orientation of knowledge); ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS, 214–15 (2011) (describing how legal formalism, in the context of neoliberal demands, can provide surprising formal protections).

the context of reorientation. In the Indian context, the transcending dualities of legal formalism (the borrowing and implementation of abstract legal rules from a predominantly Western tradition as if such rules lack historic contingency) and legal pragmatism (the recognition of law as practice rooted in a particular social and political context) created a complex juxtaposition within constitutional discourse. On the one hand, members of the Constituent Assembly felt compelled to implement the constitutional principles of familiar world constitutions, which in their minds were already accepted as the foundation of any modern constitution. These models were borrowed without a proper accounting of the sociopolitical context that supported the articulation of the liberal positivist principles they contained. At the same time, the Constituent Assembly's rejection of the abstraction of such constitutional principles, the inaccessibility of such provisions, and the problematic application to the local and historical context of India, meant that the drafters incorporated, within a framework of positivism, a revision of the implicit meaning of these existing constitutional principles. Rights from speech and expression to freedom of religion to minority rights came to take on not only connotations of horizontal obligation and duty, but also a sense of positive obligations borne by the state, which contrasted with the classical liberal model of individual entitlements evident in the contexts from which they were incorporated.

I. HOPE AS REORIENTATION

In describing the relationship of hope to social theory and critiques of capitalism, Hirokazu Miyazaki claims that the emergent debate about hope is prompted by social theorists' shared sense of hopelessness in the face of the neo-liberal character of capitalism.[7] In particular, influential thinkers such as Chantal Mouffe and Brian Massumi argue that there is no hope when there is no conceivable alternative to the current capitalist system, which renders conventional critiques of capital obsolete.[8] Similarly, legal scholars have critiqued the law as a totalizing discourse without a possibility for productive transformation.[9] The application of this conception of hope is equally important in considering the productive value of legal reform.

Miyazaki, characterizing the view of thinkers such as David Harvey

7. Hirokazu Miyazaki, *Economy of Dreams: Hope in Global Capitalism and Its Critiques,* 21 CULTURAL ANTHROPOLOGY 147, 149, 163 (2006) [hereinafter Miyazaki, *Economy of Dreams*].

8. MARY ZOURNAZI, HOPE: NEW PHILOSOPHIES FOR CHANGES 135, 236 (2002).

9. Pierre Schlag, *Normative and Nowhere to Go,* 43 STAN. L. REV. 167 (1990) [hereinafter Schlag, *Normative and Nowhere to Go*]; Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981).

and Brian Massumi, states that "regaining hope in social theory depends on the possibility of finding alternatives to capitalism."[10] Miyazaki identifies several scholars who have attempted to reorient capitalism in their own fields by, for example, uncovering utopian cultures from mass culture (Fredric Jameson)[11] or finding emancipatory potential in the rhetoric of globalization (Michael Hart and Antonio Negri).[12] Although Miyazaki's discussion is centered in finance, his conception of hope is an application of the extensibility of gift exchange derived from the work of Marcel Mauss.[13] For Mauss, temporality is the key to gift exchange.[14] The gift, as symbolic capital, creates credit between individuals. The time between the giving of a gift and the reciprocation, or exchange of a gift, is what establishes the relationship between the giver and receiver. In other words, the reorientation of the temporal dimension creates a new relationship between the two parties.

While Miyazaki utilizes this notion of reorientation to demonstrate agency in a capitalist market, I am applying this conception of hope to law, and in particular, to the context of constitutional drafting. In the American context, Bruce Ackerman has already demonstrated the ability of lawmakers to reorient higher lawmaking principles under particular historical and political circumstances. In the Indian context, I will demonstrate that the ability of the Constituent Assembly to reorient the epistemological framework of fundamental rights, evidences the productive potential that arises in particular legal contexts, as well as provides support for the idea that lawmakers can be agents of structural change.

For Miyazaki, this reorientation is evident in the context of arbitrage

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10. Miyazaki, *Economy of Dreams*, *supra* note 7, at 163.

11. FREDRIC JAMESON, POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM 54 (1992).

12. MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 393–414 (2000).

13. *See generally* MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES (trans. W. D. Halls, Routledge 1990) (1950), (discussing the way that the idea of the gift can be extended to the economic or cultural exchange of any possession in Polynesia).

14. *Id.*

> If it is true that the lapse of time interposed is what enables the gift or counter-gift to be seen as inaugural acts of generosity, without a past or a future, that is, without calculation, then it is clear that by reducing the polythetic to the monothetic, objectivism destroys the reality of all practices which, like gift exchange, tend or pretend to put the law of self-interest into abeyance. Because it protracts and so disguises the transaction that a rational contract would telescope into an instant, gift exchange is, if not the only mode of circulation of goods that is practised, at least the only one that can be fully recognized in societies that deny 'the true ground of their life', as Lukács puts it; and also the only way of setting up durable relations of reciprocity—and domination—with the interposed time representing the beginnings of institutionalized obligation.

PIERRE BOURDIEU, THE LOGIC OF PRACTICE 112 (Richard Nice, trans.,1990).

in the Japanese derivatives market. Miyazaki's *Arbitraging Japan* is an ethnographic work that applies the logic of the gift to Japanese financial markets.[15] The book, Miyazaki claims, is an attempt to demonstrate the agency of financial market professionals beyond their common depiction as rational, irrational or hyperrational market actors. In contrast, these financial professionals "habitually reflect on and debate the complexity of the markets they seek to interpret and navigate; the inadequacy of the models, theories, and strategies they deploy in their work; and the possibility of adopting other ways of apprehending market phenomena."[16] Financial traders have an agentive power that enables them to go beyond the structural constraints inherent in financial markets.

Miyazaki follows the professional and intellectual lives of a major Japanese securities firm in Tokyo, which he calls Sekai Securities, and in particular, describes the reorientation of market strategies evidenced by Tada, the head of one of the Sekai derivatives trading teams. In the context of the radical reforms arising from the Japanese financial markets in the late 1990s, Miyazaki takes note of the reconception of Japanese subjectivity and society that was taking place at the time. Accordingly, the social phenomenon of the strong and risk-taking individual was being contrasted with the rationally embedded "company man" who promoted the collective interests of the group.[17] These understandings of subjectivity were also defined in the popular debate in terms of their temporality. On the one hand, risk and short-term market gains were emerging as current- and future-market norms centered on notions of individualism, which were informed by the American derivatives practice. In contrast, collectively-oriented practices, the building of social relations, and long-term market gains operated as past-market trends and were blamed at the time for the inefficiencies of the Japanese economy.[18]

For Tada, trading strategies based on logic were seen as a useful "constraint on intuitive impulses."[19] For younger traders, Tada's insistence on consistent action and disclosure of trade strategies in order to track long-term decision-making patterns resembled the "stereotypical collective decision-making process based on group-oriented values," which was being challenged by the individual agency and risk-taking model of the contemporary financial present.[20] However, Tada's ultimate purpose in implementing conceptions of logicality had neither to do with individualism nor collectivism. Tada sought to create an automatic trading machine, which

15. MIYAKAZI, ARBITRAGING JAPAN, supra note 4, at 144-149.
16. *Id.* at 6.
17. *Id.* at 96–97.
18. *See id.* at 96
19. *Id.* at 94.
20. *Id.* at 96.

would replace both notions of individual and collective agency, in order to be the only agent that acts based upon its calculations. Rather than a concern about linking the temporalities of long-term and short-term interests, i.e., past and present, "Tada was imagining a moment at which the machine, finally in operation, would displace these chains of temporally linked strategies altogether . . Tada's dream therefore reimagined the present from the perspective of the end, the moment of the machine."[21]

A. *Constitutive Agency and Counter-Instrumentalization: Annelise Riles*

It is precisely this shift in the usage of terminology that occurs in moments of crisis in the law. To counter the instrumentalization of agency that some social theorists identify as inherent in the capitalist system (and as critical legal theorists claim is inherent in the law),[22] Annelise Riles extends Miyazaki's application of hope to the field of law by looking at the agentive power of the act of replication in context of legal fictions.[23] Riles argues that Miyazaki's view of hope is analogous to the construction of legal fictions. Legal fictions, such as corporate personhood, are "factual statements" that are made by judges, lawyers and legal scholars and are simultaneously "not facts." The ability to create new legal standards is not solely in the hands of the lawmaker as the producer of legal fiction. In fact, what is most often ignored in the assignment of agency to the lawmaker who invented the legal fiction is what Riles calls the "afterlife of the fiction."[24] Once a legal fiction is established:

> [I]t is passed from legal hand to legal hand, dissected in law review articles, invoked in the briefs of countless housing lawyers, debated by generations of law students. This practice cannot adequately be captured by a view of legal knowledge as produced by some and consumed by others. We should rather say that legal knowledge comes into agentive being in the process of its handing from one legal actor to another, and in that process it comes to constitute the very actors

21. *Id.* at 97–98.

22. For a discussion on the instrumentalization of law and a critique of legal normativity, see Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 934 (1991) (asking whether "normative analysis, fine as it sounds," can "mask injustice and oppression or contribute to the maintenance of an unfair status quo") and Schlag, *Normatice and Nowhere to Go*, *supra* note 9, at 177–78 (arguing that legal scholars fall in the trap of thinking about what the legal scholars and judges should or ought to do before analyzing what it is and how it functions as in a milieu of social constructs).

23. Annelise Riles, *Is the Law Hopeful?* 5, 16 (*Cornell L. Fac. Working Paper* No. 68, 2010), https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1070&context=clsops_papers [https://perma.cc/D6KW-NCHR].

24. *Id.* at 20.

that deploy it.[25]

In other words, the *process* of deliberation, discussion, and debate enables the legal fiction to become constitutive of the legal actors that reproduce it. This agentive power of law lies in its reproduction, and, more importantly, in its reorientation.[26]

B. *Constitutive Agency and Counter-Instrumentalization: Michel Foucault and Giorgio Agamben*

Political philosophers Michel Foucault and Giorgio Agamben, though critical of the coercive nature of the law, also identify an agentive and potentially productive power in those moments when the rationalized discourse becomes disrupted, enabling individuals to recognize and subsequently change the underlying power structure informing such discourse. For Foucault, power, including the power at the root of governmentality, is not inherently repressive, nor is it imposed on individuals. Instead it is invested in a series of relations between individuals and is simply reconstituted and reaffirmed through the instruments that formulate and accumulate knowledge.[27] However, those discourses are only internalized through the agency of the individual and require methods of subtle coercion and control, such as discursive techniques, to maintain their legitimacy. Ultimately, once the underlying nature of a discourse is revealed, it provides individuals with the agentive power to reorient that power structure into a new one. While this process is far from teleological in the Hegelian sense, it demonstrates the agency that comes along with epistemological rupture.

Similarly, Agamben also provides some support for this conception of hope, in the sense of reorientation, which may be surprising given his grim assessment of contemporary politics. Agamben's work is perhaps most critically received because he claims the state of exception, in which a sovereign suspends the law, has in fact become the norm. Individuals in such a state are simultaneously subject to the law and also abandoned by it.[28] When this "state of exception [has] becomes the rule," it enables a

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25. *Id.*

26. Margaret R. Somers & Gloria D. Gibson, *Reclaiming the Epistemological 'Other': Narrative and the Social Construction of Identity* 48 (U. Mich. Ann Arbor, Compar. Study of Soc. Transformations Working Paper No. 94, 1993) (commenting on the power of conceptual narrativity in the legal context, Somers and Gibson point out that "[i]f 'one drop' of blood could be a narrative constructed to define and dominate a particular segment of the nation's population, could the story not also be changed so that a single drop of blood is a symbol of status and thus a source of empowerment?").

27. MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977, at 152 (Colin Gordon ed., Colin Gordon et al. trans., 1980), at 152.

28. *See generally* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Werner Hamacher & David E. Wellbery eds., Daniel Heller-Roazen trans., 1998).

sovereign to dictate the terms of everyday life in a manner that is often repressive to a given population.[29] However, Agamben provides a solution in his theorization of the "coming politics," which centers on the process of political deliberation as a means rather than an end in itself.[30] This key to this new experimental politics centers on the ability of individuals to reorient their understanding of the state and the role of individual in both the political and domestic spheres (the good and bare life).[31] Viewing the law as being in a constant process of reform and negotiation, rather than as a closed system codified in unchanging doctrine, is what provides hope within a political system. When preexisting structural, political, and economic structures have ruptured, the law can again be reimagined, reinterpreted, and reproduced based on the socio-political experiences that inform the drafters.

II. THE CONSTITUTION OF INDIA—LEGAL FORMALISM, LEGAL PRAGMATISM, AND PARADIGMATIC CONFLICTS

Constitution formation is an excellent example of a key moment of political and structural rupture. In the Indian experience of constitution formation, the deliberations of the Constituent Assembly demonstrate the paradigmatic conflict between formalism and pragmatism. On the one hand, these debates were governed by a universalistic logic that led drafters to borrow heavily from liberal Western frameworks such as those utilized in the United States, France, and Ireland, regardless of the social and political differences between European constitutional origins and those of India.[32] On the other hand, key participants in the Constituent Assembly debates embraced a particularistic logic, fairly specific to vexing issues in Indian politics and society, that was rooted in alternative conceptions of

29. GIORGIO AGAMBEN, STATE OF EXCEPTION 68–69 (Kevin Attell trans., 2005) (explaining that as the invoking of states of exception become the rule, the sovereign becomes a "living law" which means that "he is not bound by it").

30. GIORGIO AGAMBEN, MEANS WITHOUT END 117 (Sandra Buckley et al. eds., Vincenzo Binetti & Cesare Casarino trans., 2000) [hereinafter AGAMBEN, MEANS WITHOUT END]. Agamben's argument may be derived from Walter Benjamin, who transformed his view of politics over time from seeing politics as a "pure means" to use violence to maintain the law to a "redemptive but nonetheless 'revolutionary' action-generating orientation towards the past." Peter Osborne, *Small-Scale Victories, Large-Scale Defeats: Walter Benjamin's Politics of Time*, *in* WALTER BENJAMIN'S PHILOSOPHY: DECONSTRUCTION AND EXPERIENCE 59, 94 (Andrew Benjamin & Peter Osborne eds., 1994).

31. AGAMBEN, MEANS WITHOUT END, *supra* note 30, at 117.

32. GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE 5 (Oxfor Univ. Press 2003) (1999); GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 168 (2010) ("The world's longest constitution is remarkably consistent in its embrace of a fairly coherent transformational agenda, but its interpreters need not strain to find in their document ample opportunities for balancing universalist and particularist commitments."):

governance and structure, i.e., a federalism that is unitary in spirit in order to guard against provincial, religious, and caste hierarchies.[33] Moreover, the distinctive conceptualization of socio-legal obligations extended beyond the liberal framework of individualist entitlements. Instead, assembly members viewed these obligations as based in social and community relations. Moreover, these obligations were incorporated into the constitution as directive principles or fundamental duties that obligated citizens to their governments and to each other.[34]

Any discussion of the framework of the Indian Constitution cannot be separated from the history of the colonial context in which it arises, particularly since many substantive and procedural components come from the 1935 Government of India Act, a bill introduced and passed through the British Parliament endeavoring to provide a written constitution for India.[35] Although the people of India or their representatives had no direct voice in the creation of the Act, Dr. B.R. Ambedkar, the Chairman of the Constitution Drafting Committee, made no apology for its influence after independence.[36] Ambedkar noted that borrowing from British law, or for that matter any other Western legal framework, was not a matter of

33. Rajeev Dhavan, *The Road to Xanadu: India's Quest for Secularism*, *in* RELIGION AND PERSONAL LAW IN SECULAR INDIA: A CALL TO JUDGMENT 301, 310–11 (Gerald James Larson ed., 2001) (noting the philosophical tension between the particularist overspecification of religious freedoms for particular religions, such as the explicit allowance for Sikh *kirpans*, and the universalist constitutional bar on the "promotion and maintenance of any particular religion"); BRIJ KISHORE SHARMA, INTRODUCTION TO THE CONSTITUTION OF INDIA 34 (2007) (citing DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA (18th ed. 1997)) ("The federal constitution is neither purely federal nor purely unitary both is a combination of both").

34. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 4 (2005) ("The Constitution of India offers a range of civil and political rights, and also offers 'Directive Principles of State Policy,' saying that '[t]he state shall . . . direct its policy towards securing' certain rights, including 'an adequate means of livelihood,' 'equal pay for equal work for both men and women,' and more"); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 496–97 ("In addition to establishing the institutions of state, the constitution guarantees specific enforceable fundamental rights and non-justiciable 'Directive Principles' of state policy and governance. Painfully aware of the limitations of legalism, the judiciary of India has struggled over the last decade to bring law into the service of the poor and oppressed.").

35. V. B. MISHRA, EVOLUTION OF THE CONSTITUTIONAL HISTORY OF INDIA, 1773-1947, at 152 (1987) (explaining that although the 1935 constitution was amendable or revocable at the will of the British Parliament, it also "made possible the transference of India's destiny from British to Indian control").

36. Jaytilak Guha Roy, *Dr. Ambedkar's Contribution to the Framing of India's Constitution*, *in* SOCIO-ECONOMIC AND POLITICAL VISION OF DR. B.R. AMBEDKAR 79, 88 (S.N. Mishra ed., 2010) ("Responding to the accusation that the Draft Constitution has produced a good part of the provisions of the Government of India Act, 1935, Dr. Ambedkar made a very frank and fair submission as he said, 'I make no apologies. There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody hold[s] any patent rights in the fundamental ideas of a constitution.").

indignity since there exists no patent right for conceptions of fundamental constitutional values.[37] Accordingly, the Indian Constitution not only borrowed concepts from elements of the British constitutional tradition but also the United States Constitution, the Irish Constitution, and the Australian Constitution, among others.[38]

The juxtaposition of a universalistic and timeless aspect of constitutional formation based on tested rationality and the incorporation of particularistic exceptions enabled a reorientation of structural hierarchies that did not resonate with their own experience.[39] Thus, in crafting the Indian Constitution, members of the Constituent Assembly had to navigate the contradiction that to be legitimate the constitution needs to contain both universally valid truths and particularistic exceptions to those truths. This tension is precisely what leads to a constitutional moment of reorientation. In fact, *a fortiori,* the development of a new constitution marks the *sine qua non* of reorientation, since the (revolutionary) institution of a new constitutional foundation must be *ipso facto* a violation of a previous legal regime.[40] To contain that revolutionary potential, it is necessary both to establish a universalistic continuity with the norms of constitutional discourse globally and with the past (as with the 1935 law), and to reorient those purportedly universal discourses around particular and temporally situated problems.

A. *Legal Narratives, Narrative Imagination, and the Disorientation of Dominant Paradigms*

The discursive reorientation of the Constitution of India established throughout the Constituent Assembly deliberations must be understood, first, in connection with an underlying narrative imagination and narrative

37. SUBHASH C. KASHYAP, OUR CONSTITUTION: AN INTRODUCTION TO INDIA'S CONSTITUTION AND CONSTITUTIONAL LAW 40 (3rd rev. ed, 2001).

38. Candrasekhara Dharadhikari, REFLECTIONS ON THE INDIAN CONSTITUTIoN 17 (1978) ("Our Constitution has borrowed profusely from the Constitutions of England, America, Russia, Australia"); Mahendra Prasad Singh and Subhendu Ranjan Raj, *Introduction,* in THE INDIAN POLITICAL SYSTEM XXII (2013) (explaining the importance of constitutional borrowing from Ireland and the United States).

39. Sujit Choudhry, *Living Originalism in India? "Our Law" and Comparative Constitutional Law*, 25 YALE J.L. & HUMAN. 1, 10 (2013) (noting that the Indian Constitution incorporates both the agreed upon procedures of democratic self-government and operates as "a charter for the transformation of a deeply hierarchical and unequal society."); Maureen B. Callahan, *Cultural Relativism and the Interpretation of Constitutional Texts*, 30 WILLAMETTE L. REV. 609, 617–18 (1994) (contrasting the interpretative priority of the American drafters as focused on a preservation of the status quo rather than based on a transformative impulse).

40. JACQUES DERRIDA, *Force of Law: The "Mystical Foundation of Authority*, *reprinted in* ACTS OF RELIGION 230, 269 (Gil Anidjar ed., 2002) ("The foundation of all states occurs in a situation that one can thus call revolutionary. It inaugurates a new law; it always does so in violence.").

context (as it relates to the experience and proclamations of its key proponents), and second, based on an analysis of the structure of the document itself. Constitutional drafting is a socio-discursive process in which the framers insert their own political vision and localized experiences within the structure of the text. In India, this process was not only well documented but was routinely publicized and discussed within the lenses of independence, nation building, and social transformation.

Because of the nature of the anticolonial struggle and existing socioeconomic conditions at the time of independence, there was "no existing consensus on the nature of a new political or social order."[41] Accordingly, the framers had to balance their aspirational goals with the underlying material realities: "Their task could hence be defined as crafting a constitution that brings about the conditions of its own possibility."[42]

While they recognized the limitations of a classical liberal constitutional structure in bringing about the social transformation required for the political, economic, and social conditions they desired, they believed it necessary to create a constitution that was, at least facially, framed in the classical orientation. Ambedkar himself noted that a "constitution framed at this hour in the history of the world" cannot provide many innovative structural dimensions because the scope of what a constitution entails "has long been decided."[43] However, colonial exploitation created material conditions that were inexorably linked to social transformation as the precondition for the successful implementation and durability of the constitutional provisions. These social conditions were largely ignored in the classical contractarian model.

In crafting the discursive framework that necessitated such goals, the Constituent Assembly often struggled with the formulation of universally accepted and abstract procedural guarantees. This tension cuts through many of the debates in the Constituent Assembly, including issues such as due process, property, and equal protection, particularly as understood in the predominant discourses of the time. By creating a new political and constitutional imagination, the framers help reorient these principles in a manner that does not entirely reject the liberal model recast from Western Constitutions, but reinterprets the provisions in a manner that pursues the transformative agenda, and lays the foundation for subsequent interpreters of the text, namely the Indian Supreme Court, to redirect the epistemology of legal jurisprudence, accessibility and remedial power in a manner that supports the framers intent in incorporating an underlying agenda of social

41. Sandipto Dasgupta, "*A Language Which Is Foreign to Us": Continuities and Anxieties in the Making of the Indian Constitution*, 34 COMPAR. STUD. S. ASIA, AFR. & MIDDLE E. 228, 229 (2014).

42. *Id.*

43. KASHYAP, *supra* note 37, at 39–40.

and economic reform.

B. *Linguistic Narratives and Practical Action*

Legal narratives, operating as counter-narratives to traditional epistemological conceptions of law, are also devices of reorientation insofar as they disrupt the doctrinal form of legal discourse. Counter-stories often displace majoritarian myths and crystalize abstractions.[44] These narratives can help us "to engage in the clash of realities that breaks us out of the settled and complacent meanings and creates opportunities for insight and growth."[45] Legal narratives serve a different purpose than doctrinal jurisprudence insofar as narrative is affective and speaks to lived experience.[46] For philosopher Paul Ricoeur, linguistic narratives shape practical action.[47] The narrative imagination provides a symbolic structure and temporality for action. These structures are then incorporated into a text or story that mediates between individual events and a broader narrative. Constitutional texts, in Ricoeur's interpretation, are always intertextual, and acts of reading texts make them conduits between past and present.[48]

The narrative imagination can only be understood by examining the constitutive nature of the internal and political struggles that influential figures in the formation of the Indian Constitution experienced. We must examine their reflections on these struggles and how these struggles are made manifest within the constitutional text itself. The result can be understood as the creation of a new discourse that shaped the structure of not only the constitution, but influenced the creation of the modern Indian state. Because legal principles, including the permissible scope of rights, often become embedded in bounded, normalized discursive practices based on instantiating institutional arrangements, the establishment of an alternative discursive framework for subsequent interpretation and reorganization of predominant epistemologies is essential to understanding the agency inherent in such formulations.[49] While it has been argued that discursive reconstructions of legal conceptions of rights must be supported

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44. George H. Taylor, *Derrick Bell's Narratives as Parables*, 31 N.Y.U. REV. L. & SOC. CHANGE 225, 228 (2007); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414 (1989).

45. Martha Minow, *Foreword: Justice Engendered*,101 HARV. L. REV. 10, 95 (1987).

46. *See* Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1216 (1997).

47. *See* 1 PAUL RICOEUR, TIME AND NARRATIVE 52 (Kathleen McLaughlin & David Pellauer trans., The Univ. of Chi. Press. 1984) [hereinafter RICOEUR, TIME AND NARRATIVE].

48. *See id.*; *see also* David Wood, *Introduction Interpreting Narrative*, *in* ON PAUL RICOEUR: NARRATIVE AND INTERPRETATION 1, 11 (David Wood ed., 1991).

49. *See* Michael McCann, *The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era*, 48 L. & SOC'Y REV. 245, 250 (2014).

by material organizational power, the creation of alternative discursive agendas may perhaps be the starting point for challenging institutionalized hierarchies.[50]

C. *Insiders-Outsiders and the Codification of Personal and Political Struggles*

In the context of the Indian experience, this reorientation was based on narratives, allegories, and parables of the lived experience of particular key figures, themselves often subjugated by the preexisting social and political order, including on the basis of class and caste hierarchies, and thereby often representing particular communities of interest.[51] To analyze the discursive framework within a constitution, it is important to consider the various narratives reflected in the document, and the manner in which their authors contributed to the repurposing of a legal framework to suit particular social, economic or political aspirations. For purposes of the construction of a new legal order, I will consider the contributions, whether direct or implicit, of B.R. Ambedkar, Jawaharlal Nehru, Sardar Vallabbhai Patel, Mohandas Gandhi on the discursive framework of the Indian Constitution. I will begin with a shared characteristic, one that is an absolute prerequisite for reorientation, namely the classification as an insider-outsider. In the context of development ethics, David Crocker defines insiders as those immersed in a particular culture or tradition so as to understand its contradictions, practices and nuances.[52] Outsiders are those who operate largely externally of this tradition but become engaged in it for purposes of international development, policy-building, or any other social or economic collaboration. An insider-outsider is one who operates at the periphery of both worlds and is therefore well suited to see beyond an internalized rationale that legitimizes particular practices. They are also the only ones who can be instrumental in the process of reorienting a particular epistemology. Reorientation is an intentional redirecting of a body of knowledge to conform to a new purpose, grounded in different conditions and producing distinct expectations. The reconstitution of particular epistemology "must come about at the hands of someone who is able to see the tradition and see beyond it or see through it; who is unafraid

50. *Id.* at 257.

51. Bindeshwar Pathak, *Relevance of Dr. Ambedkar in Present Day Context*, *in* SOCIO-ECONOMIC AND POLITICAL VISION OF DR. AMBEDKAR 232, 239 (S.N. Mishra ed., 2010).

52. David Crocker, *Insiders and Outsiders in International Development*, 5 ETHICS & INT'L AFFS. 149 (1991); *Cf.* T.K. Oommen, *Insiders and Outsiders in India: Primordial Collectivism and Cultural Pluralism in Nation-Building*, 1 INT'L SOCIO. 53, 71 (1986) (describing the persistent tension between the dominant religious communities that "define themselves as the norm-setters, value-givers, [and] the cultural mainstream" with "a multiplicity of other primordial collectivities occupying the periphery of the system").

to question it and indeed realizes that it must be challenged."[53]

While leading figures in the process of constitutional drafting have often been criticized for their aloofness and elite education, it is precisely their understanding of both Western epistemology and the influence of key Indic texts that enabled them to reorient the predominant legal epistemology in a manner that changed the very nature of governance and constitutionality. As Kwame Anthony Appiah points out, these insider-outsiders have certain shared values with their colonial masters, which is precisely why they can resist effectively by pointing out when those values are not being lived up to. This is the reason why anti-British movements were led not by the "farmers and the peasants" but by the "Western-educated bourgeoisie," and why those in India who led the resistance to the British Raj consisted of:

> [a]n Indian-born South African lawyer, trained in the British courts, whose name was Gandhi; an Indian named Nehru who wore Savile Row suits and sent his daughter to an English boarding school; and Muhammad Ali Jinnah, founder of Pakistan, who joined Lincoln's Inn in London and became a barrister at the age of nineteen.[54]

Taking a slightly different view of the same issue, Homi Bhabha has told us that insider-outsiders can mobilize the symbols of the colonizers against them, and that such a "hybrid" act transforms and destabilizes the meaning of those symbols in an unsettling way that ultimately undermines colonial discourse.[55] Accordingly, reorientation requires an understanding of both indigenous and foreign legal traditions, which must be "adapted and transformed to meet new conditions and ways of thought, and at the same time new traditions have to be built up."[56]

On the other hand, the distinguishing characteristics of the figures discussed also contribute to the construction of constitutional discourse and are based on the particular issues that were central to their own personal and political struggle. For B.R. Ambedkar, the duality of purportedly universal principles such as equal protection, which served an egalitarian function, had to be balanced against the reality of entrenched caste hierarchies. The abstraction of positivism had to be balanced with the true experience that results from endemic and systemic inequality, within which abstract principles have no meaning. For example, Ambedkar ensures that abstract principles, such as equal protection and constitutional

53. ANANYA VAJPEYI, RIGHTEOUS REPUBLIC: THE POLITICAL FOUNDATIONS OF MODERN INDIA 70 (2012).

54. KWAME ANTHONY APPIAH, COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS 78–79 (2006).

55. *See* HOMI BHABHA, THE LOCATION OF CULTURE 41 (1994).

56. JAWAHARLAL NEHRU, THE DISCOVERY OF INDIA 40 (1946).

remedies, are qualified with reservations and precise remedial measures to make these provisions accessible and consequential. Ambedkar's struggle with various group-oriented interests and constant compromise throughout the process of constitutional drafting reflects his training in legal pragmatism, which also served to reorient the abstraction of timeless and universal notions such as equality by locating them in specific contemporary experiences of caste inequality in India. Ambedkar acknowledged that social hierarchies required the temporary codification of inequality in order to create a bridge between the past (caste hierarchy) and the future (egalitarian aspiration). Even universal legal principles are empty signifiers without the appropriate contextual reorientation that accompanies such norms and enables signification through the use of specific examples gleaned from life experience.

The Constituent Assembly accordingly established a structure that is often "described as quasi- federal, federal with a strong unitary or pro-centre bias, federal in structure but unitary in spirit, federal in normal times but with possibilities of being converted into a purely unitary one during Emergency . . . ."[57] In order to guard against unchecked power being provided to political, caste, and provincial hierarchy, the constitution reorients the federal structure to balance the limitations Ambedkar felt were inherent in the socio-political experience.[58] Moreover, as a part of the concern of avoiding factionalism, the Constituent Assembly debates at times evidence a refusal to recognize the communities of interest that were central to the anticolonial movement, such as Sikhs, in order to place a universalized conception of the individual citizen at the center of a new modern nation-state. The incorporation of the experience and rejection of hierarchy enabled the drafters to reorient avenues of factionalism toward a unitary power structure within a broader federal orientation by also distributing powers between the central government and the states. Paul Ricoeur insisted that "there is no structural analysis of narrative that does not borrow from an explicit or an implicit phenomenology of 'doing something.'"[59] In this case, the something that is done in Ambedkar's new (quasi-federal) notion of federalism is reorientation.

For Jawaharal Nehru, the duality between the aspirational quality of fairness inherent in transparent and equitable legal procedures had to be balanced with the reality that these procedures were inaccessible, arbitrarily implemented, and did nothing to remedy the basic needs that would enable individuals to live a dignified life. I will argue that Nehru reorients the Lockean contractual trinity of life, liberty, and property to one roughly

57. *Id.* at 45.

58. *See* RATNA G. REVANKAR, THE INDIAN CONSTITUTION: A CASE STUDY OF BACKWARD CLASSES 35 (1971).

59. RICOEUR, TIME AND NARRATIVE, *supra* note 47, at 56.

of "freedom" (state obligation to provide individuals the means for autonomy, inclusion, and accountability in decision-making), "food" (the obligation to provide the conditions for the attainment of basic needs required to achieve a dignified life) and "security" (state responsibility to ensure collective interests are not disrupted by exaggerated claims of individual entitlements).

> There are more powerful forces at work in the world today than courts of law; there are elemental urges for freedom and food and security which are moving vast masses of people, and history is being moulded by them. The future recorder of this history might well say that, in the hour of supreme trial, the Government of Britain and the people of Britain failed because they were drunk on the wine of imperialism and could not adapt themselves to a changing world.[60]

Unlike the colonial state, Nehru understood "that without an appeal that was fundamentally directed at the imagination of ordinary people, no modern state could survive and hold on to popular allegiance."[61] The forces that exist beyond the proclaimed laws of the colonial state require a new understanding of the purpose of law itself, a new epistemology. In other words, the limitations of colonial law were not derived solely from a textual reading of established doctrine, but from a failure of the government to fulfill its *dharma*, its responsibility to the people to establish the conditions by which they can lead meaningful and autonomous lives. This required not only a provision for fundamental rights, but also a limitation of those rights when they disrupted community interests and the establishment of a central government "responsible for the propagation and maintenance of dhamma throughout [the] territories."[62] For Nehru, equity applied to the community as well as the individual. And while he claimed that "no individual could override the rights of the community," the community was permitted, in only the most urgent circumstances, to invade the rights of the individual.[63] Though critiques of this position condemn the concentration of centralized power and control, for Nehru, the purpose of this reorientation may very well be premised on an alternative understanding of governance. As Ananya Vajpeyi articulated, Nehru's admiration of Ashoka and his quest to balance both *dharma* (virtuous ideals) and *artha* (instrumental purpose) indicate that this constitutional structure served to repurpose the nature of government to one that fulfills certain duties to protect the community, even at the cost of

60. Jawaharlal Nehru, Letter from District Jail, Gorakpur, National Archives of India, Sardar Patel Papers, 71 (Nov. 3, 1940).

61. VAJPEYI, *supra* note 53, at 182.

62. *Id.* at 190.

63. AUSTIN, supra note 32, at 77.

overriding individual liberties. According to this revisionist understanding of governance, Nehru gives primacy to the directive principles, claiming that it was in fact the "fundamental rights that were to subserve the directive principles of state policy and not *vice-versa*."[64]

I include Mohandas Gandhi even though he was not directly involved in the drafting process because his proclamations and ideals were nonetheless fundamental drivers of the resulting discursive framework.[65] I will focus on the discursive implications of Gandhi's reorientation of rights from a deontological perspective to one that created contingent social conditions for the true realization of rights. For Gandhi, socially-entrenched understandings of rights are contingent upon the fulfillment of certain obligations. Gandhi "correlates moral rights belonging to the human subject not with corresponding duties in an object, but with duties in the subject itself."[66] Thus, individuals cannot make unconditional claims to rights. Instead, rights must be earned by fulfilling your obligations to others and to the community.[67] The Indian Constitution incorporated a Gandhian understanding of rights in multiple dimensions, including a transcendence of the classical vertical orientation of rights by establishing the potential for horizontal obligations between individuals and the inclusion of dialogical process of constitutional formation,[68] which introduced new understandings of the relationship of the self and other (state and constituents) in the context of the implementation of constitutional principles.[69] The constitution was intended to be widely and publicly discussed, and the responsibility for the implementation of its principles was argued to rest not only with the state, but with the people as well.[70] Rohit De, in articulating a

64. I.P. MASSEY & B.R. SHARMA, *Nehru's Constitutional Vision: An Estimate*, *in* NEHRUVIAN CONSTITUTIONAL VISION 130 (1991).

65. *See* Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L & COMPAR. L. 49, 70 (2007) (noting that it was "Gandhi who most profoundly influenced India's nationalist movement and, thereby, indirectly shaped its constitutional destiny.").

66. Bindu Puri, *The Rights of Man: A Gandhian Intervention*, *in* HUMAN RIGHTS: INDIA AND THE WEST 231, 232 (Ashwani Peetush & Jay Drydyk eds., 2015).

67. *Id.* at 242.

68. *See* SARBANI SEN, THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS 101 (2007) ("In the founders' design, the Assembly was a public forum for deliberation where members would reflect about self-government and make a choice on the basis of their discussions.").

69. This reorients the constitutive conception of rights, which is based on a deontological notion of rights-bearers. *See* Sujit Choudhry, *After the Rights Revolution: Bill of Rights in the Postconflict State*, 6 ANN. REV. L. & SOC. SCI. 301, 316 (2010) ("According to the constitutive conception, a bill of rights constitutes the *demos* that it also contains. It encodes and projects a certain vision of political community–in particular, the idea of a political community as consisting of rights-bearing citizens of equal status.").

70. *See* Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model,* 10 J. DEMOCRACY 19, 28 (1999) (arguing that the Constitution of India was a "demos-enabling

constitutional history from below, confirmed that there was "daily use of constitutional structures and languages made by thousands of people within months of the constitution's commencement."[71] His claim is based on the provision of constitutional remedies under Articles 32 and 226 of the Constitution, which empowered citizens to challenge existing laws and administrative actions based on constitutional limitations. However, De's retelling does not account for the fact that this engagement was the product of a carefully crafted discursive structure, informed by the dialogical impulse of many of the drafters, as well as the influence of Mahatma Gandhi.

Moreover, while the Indian Constitution recognized and largely incorporated the justiciable rights prioritized in the Western context, such as civil and political rights, it also accounted for the pressing social and economic needs of the larger population through the establishment of directive principles, which were not designed to provide immediate judicial remedy but were noted to be fundamental governmental obligations and priorities. The constitution placed these individualist notions of rights as entitlements in the broader social context of obligations to others, the government, and society at large—i.e., horizontal obligations.[72] It also rigorously defined these rights within the constitution itself and carefully imposed limits on how those rights were to be interpreted.[73] In particular, the constitution delineated the limitations of fundamental rights because it recognized that the prioritization of rights, as they conflict with other rights or larger social obligations, must be established in order to provide any meaning to the rights framework itself.

The Indian Constitution's endorsement of social and economic rights, even as directive principles, and its willingness to understand these rights as conferring horizontal obligations represents a fundamental reorientation of the legal positivist framework of constitutional rights, in which rights are usually expressed as negative civil and political liberties, areas in which the state must avoid making law, rather than a right imposing a

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constitution" designed for popular participation in federalism); *Responsibility of Youth in India: Mr. Patel on Task Ahead*, TIMES OF INDIA, April 7, 1947 (asking youth to fulfill the responsibility for social transformation); HINDUSTAN TIMES, April 7, 1947 ("People, however, should rely on their own efforts for ameliorating the economic conditions of the nation, in spite of there being popular governments."); N.G. Ranga, Indian National Congress, 55th Session, Jaipur, December 18-19, 1948, National Archives of India, Patel Papers, no. 52/1 ("In view of the economic crisis through which the country is passing, it is the duty of the Government and also of the people to further the objectives that the Congress has laid down.").

71. Rohit De, *Rebellion, Dacoity, and Equality: The Emergence of the Constitutional Field in Postcolonial India*, 34 COMPAR. STUD. S. ASIA, AFR. & MIDDLE E. 260, 263 (2014).

72. *See* KALPANA KANNABIRAN, TOOLS OF JUSTICE: NON-DISCRIMINATION AND THE INDIAN CONSTITUTION 11 (2012) ("[T]he second [clause of Article 15 of the Constitution of India] speaks to the horizontal application of this right, [of non- discrimination] between citizens *inter se*.").

73. UDAI RAJ RAI, FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT 9–10 (2011).

positive obligations on a state or a society.[74] Instead, while the Constituent Assembly framed fundamental rights in the Indian Constitution in universalistic and positivistic terms, the incorporation of social and economic rights, as well as fundamental duties, amended and reoriented the more basic guarantees that were borrowed from other constitutions. The embracing of the idea that citizens have responsibilities to the nation and to protect one another's rights—the linchpins of the horizontal rights position— represents a rethinking of the tenets of Constitutional Law.[75]

III. CONSTITUTIONAL RESONANCE AND INTERPRETIVE POTENTIAL

Once this narrative is incorporated into a text, the process of interpreting that text takes on agentive power as the interpreter refigures the story in relation with her or his own lived experience.[76] This reading or interpretation "influences the [interpreter's] choices about how to act in the world."[77] The discursive framework of a constitution necessarily informs subsequent interpretations of the text.[78] In the context of legal narrative, facial contradictions, and the juxtaposition of a discourse exemplifying lived experience in the context of purportedly rational and objective legal doctrine enables one to reconsider the scope and legitimacy of formalistic doctrinal jurisprudence in the context of individual experience.[79] A reader's understanding is transformed through the disorientation of the story, which disrupts the existing order.[80] While critical legal scholars such as Richard Delgado and Jean Stefancic question the validity of discursive reorientation as a tool to effect social change without a simultaneous shift in material conditions, they nevertheless acknowledge the ability of discourse, text, and narrative to challenge presumptions of neutrality and privilege.[81] The discursive juxtaposition of affective narratives

74. *See* MATTHEW G. SPECTER, HABERMAS: AN INTELLECTUAL BIOGRAPHY 69 (2011).

75. *See* KANNABIRAN, *supra* note 57.

76. Wood, *supra* note 48 ("Narratives are not just configurations out there; they are completed only in the act of reading.").

77. Douglas Ezzy, *Theorizing Narrative Identity: Symbolic Interactionism and Hermeneutics*, 39 SOCIO. QUARTERLY 239, 244 (1998).

78. *See* Callahan, *supra* note 39, at 626.

79. *See* Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 818 (1992); Patricia J. Williams, ALCHEMY OF RACE AND RIGHTS (1992); Richard Delgado, *Derrick Bell's Racial Realism: A Comment on White Optimism and Black Despair*, 24 CONN. L. REV. 527, 530 (1991).

80. *See* PAUL RICOEUR, THE RULE OF METAPHOR: MULTI-DISCIPLINARY STUDIES OF THE CREATION OF MEANING IN LANGUAGE 22 (Robert Czerny et al. trans., 1981).

81. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1276 (1992); *see also* Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J.. 2279, 2280 (2001);

and objective rationale reveals the veiled aporias in the text, creating an opening for the kind of reorientation that Miyazaki and Riles call hope: an ability to change the directionality of the dominant discourse in a particular field.

The reorientation of governance, abstraction, and obligation within the framework of the Indian Constitution explain the Supreme Court's subsequent and quite expansive public interest litigation—which incorporated a different epistemological approach to legal remedy—beyond the narrow confines of legal formalism. The Indian Supreme Court justified its approach as emanating from the normative purpose and discursive mandate of the constitution. For example, in actively expanding its equity jurisprudence to creatively adjudicate and elaborate on fundamental rights, the court rejected mechanical rule-bound adjudications, viewing them as a way for judges to insulate themselves from accountability for their decisions and from the social impact of those choices, thereby prioritizing lived experience over objective abstractions. In doing so, the court frames legal questions in a way that emphasizes the actual conditions of inequality, and recognizes that judges may use appropriate discretion in crafting equitable remedies to address systemic vulnerabilities. The court refers to its constitutional grant of authority in granting broad remedial powers, not to correct a procedural error in a positivist sense, but to correct a social injustice.[82] Rather than serving as a protector of the judicial system, the court sees itself as doing what is necessary to prevent vulnerability. The court held that Article 32 of the Constitution of India "does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights" but also lays down a *constitutional obligation* "to forge new remedies and fashion new strategies" to give meaning to the notion freedom and liberty, which cannot be realized if the conditions establishing basic human rights are denied.[83]

CONCLUSION

In the moments of constitutional drafting, constructions of legal narratives and the reorientation of predominant epistemologies demonstrate the agentive power that lies within the production of legal knowledge and constitutional norms. While the Constituent Assembly established a new paradigmatic socio-legal precedent that balanced universalistic and particularistic applications of the law, that framework was later utilized by individuals and the courts for further innovation and social change. Employing a discursive analysis of the debates surrounding these

Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 148–50 (2003).

82. *See* M.C. Mehta v. Union of India, (1987) 1 SCC 395, 405 (1986).

83. *Id.* at 405.

constitutional moments, I hope to understand how particular lived experiences became integral to a new legal framework and created a framework for transcendence and epistemological reorientation. Of course, constitutional originalists, critics of legal normativity, and deconstructionists all share a pessimistic view of these constitutional moments of reorientation, which they view, alternatively, as either a moment of disjuncture in which the proper meaning of the constitution is evacuated by judicial activism or a kind of narrative absurdity which exposes the arbitrary norms and structural violence that underlie all conceptions of the law.[84] Yet there is room for hope. Following Miyazaki and Riles, the moment of contradiction that is represented by epochs of constitutional formation and transformation are bellwethers of a collaborative, democratic process, in which possibilities for the future are articulated, and the potentiality of the law to address social problems seems realizable. It is a moment when the production of law ceases to be about the application of universalistic rules to particular situations and becomes a metaphysical discussion about the role of law itself. There is, of course, a palpable danger of idealizing these moments of change, and certainly Ambedkar's chagrin at the lack of progress in enforcing caste protections is an example of the perilous nature of moments of reorientation. Nevertheless, reorientation provides a fruitful template for an analysis of the productive value of constitutional law.

84. *See* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 90 (2013); Schlag, *Clerks in the Maze*, *supra* note 1; at 2053; DERRIDA, *supra* note 40.