

Review Essay

By *Moiz Tundawala*^{*}

A. What Happens to the National and Secular in ‘India’s Communal Constitution’?

After the suppression of the Indian rebellion of 1857 and the British takeover of Delhi, the well-known irreverent mystical poet Mirza Ghalib was reportedly asked by a military official whether he was a Muslim. Ghalib is said to have quipped, “Only half Muslim; I drink wine but refrain from swine.” Since Muslims were initially blamed for the insurrection within the British Indian army, colonial authorities may have sought to ascertain Ghalib’s religious identity to determine if he posed any further threat. However, in later years, as the British regime’s suspicion of the community eased, Muslims were recognized as a minority and entitled to special safeguards in the political sphere. This recognition, though, came at the cost of preventing them from uniting with the Hindu majority to challenge colonial rule as a secular national solidarity.

The extension of such colonial practices into the postcolonial state is the focus of Mathew John’s significant new contribution to the field of Indian constitutional studies. For nearly two centuries, the British governed India by apprehending and classifying its vast and heterogeneous population into different segments based on religion, caste, and other similar criteria privileged by colonial forms of knowledge. To manage this diversity and render it amenable to effective governance, a previously fuzzy and contextual sense of selfhood rooted in India’s vibrant non-modern traditions was systematically diminished and transformed into fixed and enumerated group identities legible to an alien modern administration.¹ Far from restoring the richness of indigenous social life, John argues that the postcolonial constitution and its associated institutional practices exhibit a deep affinity with the governing rationale of the colonial state. Despite adopting the language of individual rights and popular sovereignty, he demonstrates—through a wide-ranging engagement with the juridical treatment of themes such as religious freedom, personal law, minority status and ex-untouchable Dalits—that the constitutional text and its interpretation continue to frame the Indian people essentially in terms of their communal identities.

B. The Constitution of Unity In Diversity

While the book provides a compelling descriptive and analytical account of the “Communal Constitution”, its diagnosis of this structural orientation of Indian constitutionalism as a

* Leverhulme Early Career Fellow, University of Oxford, England and Associate Professor (on leave), Jindal Global Law School, Delhi NCR, India. Email: moiz.tundawala@law.ox.ac.uk.

1 Sudipta Kaviraj, *On State, Society and Discourse in India*, in: Sudipta Kaviraj (ed.), *The Imaginary Institution of India*, New York 2010.

“constitutional failure” and a “pathological expression of constituent power” is unconvincing.² John critiques India’s constitutional project through the lens of the global ideology of liberal constitutionalism, the normative assumptions of which it neither fully subscribes to, nor sets for itself as an aspirational standard. India, rather bears fidelity to the democratic, if not revolutionary, impulse of the modern world, where liberalism is both supplemented with, and at times, supplanted by the constituent power of the people giving themselves their own constitution. The “people”, however, is not merely an abstract idea or a concrete fact; it is simultaneously a symbolic unity of free and equal citizens who authorize the government, and also in reality, a diverse plurality of groups and communities which are in turn governed by it.³ Therefore, more than a binary opposition between liberal individualism and parochial communalism, there is within the modern constitution, an internal division between the people as one and the people as many.

In India, this double sense of the people has, officially at least, taken the form of a constitutional duality that separates yet brings together the political domain of national unity and the cultural domain of communal diversity. At its founding moment, which was accompanied by partition and the creation of Pakistan, additional political rights for Muslims and other religious minorities were, in fact, discontinued, as separate electorates and weighted representation gave way to the institution of adult suffrage democracy with a single electoral roll in every territorial constituency. Affirmative action was made available to oppressed castes not on the grounds of community identity, but for historical and sociological reasons related to untouchability and backwardness. Even though secularism was not formally stipulated as a constitutional value, there was an implicit prohibition on the establishment of a Hindu state or nation. What minority groups lost politically in the name of the people as a singular collective was compensated for by granting them distinct cultural, linguistic, and educational rights, alongside the right to freedom of religion, which they could exercise at par with other majority communities.⁴ India’s original Constitution was thus not communal in the way John portrays it, but instead a distinct explication of the new state-making idea of “unity in diversity”.

C. Theological and Secular Entwinement

It is true that over the years, the constitutional scheme of distinguishing between the political and the cultural has proven unsustainable. However, the inseparability of these two categories, and more broadly that of state and religion, has long been anticipated and theorized globally, both on the political left and the political right. While in the mid-nineteenth century, the young Karl Marx intriguingly described a secular state as

2 *Mathew John*, India’s Communal Constitution: Law, Religion, and the Making of a People, Cambridge 2023, pp. 1-3.

3 *Martin Loughlin*, The Concept of Constituent Power, *European Journal of Political Theory* 13 (2014), pp. 218-237.

4 *Rochana Bajpai*, Debating Difference: Group Rights and Liberal Democracy in India, Oxford 2011.

“the perfect Christian state”,⁵ the first half of the twentieth century saw Carl Schmitt develop his influential thesis about the significant concepts of modern state theory being “secularized theological concepts”.⁶ Eschewing strict separationism, the normative theorist Cecile Laborde has recently made a case for “minimal secularism”, which engages with religion by disaggregating it into the liberal democratic values of public justification, equal inclusion, and personal liberty.⁷ This entwinement of the secular with the theological remains an inherent feature of political life in many parts of the world to the present day, and constitutional design and practice cannot wish it away, even if deemed problematic from the perspective of old-fashioned liberal constitutionalism.

Rather than denying it, constitutional actors in India have openly engaged with the entangled relationship between the religious and the secular, the best illustration of which is the judicial enunciation of the essential practices doctrine, alongside the community-based system of personal law, that governs family matters of marriage, divorce, succession and guardianship. When religious freedom is regulated for the sake of social reform, the Supreme Court determines the scope of this right not in liberal, secular or non-communal terms, but by ascertaining whether the practice under scrutiny is essential to the religion with which it is associated. Such a hermeneutical approach, John suggests, is entirely continuous with colonial governmentality, where complex customary faith traditions were reduced to simpler religions grasped through scripturally defined axiomatic truths.⁸

However, instead of asking where the essential practices doctrine originates or whether it is a sound technique for the constitutional adjudication of religion, we need to explain why judges keep relying on it even seventy-five years after the inception of the republic. The book attributes the persistent hold of the doctrine to the internalization of the colonial attitude towards religion by Indian reformers and nationalist leaders, a mindset subsequently perpetuated by the courts in later years.⁹ By reducing the interpretive work of the judiciary into a somewhat straightforward narrative on the casting of the people in a “communal image”, it misses the opportunity to utilize these materials for a fresh theorization of the place of religion in India’s political modernity.

At the risk of a broad generalization, in Western liberal democracies, where religious freedom is largely a private affair and, at most a cultural phenomenon, courts can afford to provide secular and public justifications for its curtailment in the interest of other social goods and values. By contrast, religion remains integral to the public sphere in India, and the state has not succeeded in displacing it as the exclusive site of political sovereignty.

5 Karl Marx, On the Jewish Question, Marxists Internet Archive (2000/1844), <https://www.marxists.org/archive/marx/works/1844/jewish-question> (last accessed on 28 December 2024).

6 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Chicago 2005.

7 Cécile Laborde, Minimal Secularism: Lessons for, and from, India, *American Political Science Review* 115 (2021), pp. 1–13.

8 John, note 2, p. 6.

9 Ibid., pp. 26–30.

Consequently, the judiciary often finds it expedient to assume a theological position, providing internal justifications drawn from religious traditions themselves to garner support for the secular reform of community practices. On a wider note, following its sacralization of the constitution in the 1970s, a religious logic has also shaped the story of the Supreme Court's rise to political prominence—depending less on the authority of law and more on the power of persuasion to capture the imagination of the people.¹⁰

D. Hindu, Muslim, Dalit

The obvious difficulty with religion entering and occupying the constitutional field, in John's view, is the fear of a “lurking majoritarianism”—a concern that has materialized with the political triumph of Hindutva, or Hindu nationalism, in the last decade.¹¹ What has contributed to this moment, he suggests, is the use of minority and caste in constitutional discourse for the construction and consolidation of an entrenched Hindu identity. While religious minorities are invariably defined in contrast to a Hindu majority, Scheduled Caste Dalits are deemed to have an intrinsic connection with the Hindu religion. To decenter Hinduism from constitutional practice, he advocates for a plural, rather than majoritarian, conception of minority which can accommodate heterodox Hindu groups, as well as a sociological, rather than theological, conception of caste to include Muslim and Christian Dalits.¹²

John's view is commendable in our polarized times, but the syncretic language of cultural pluralism is not robust enough as a political response to the challenge of Hindutva. Hindu nationalists are not as averse to the idea of India as a unity in diversity as they are to secularism and minority rights. We have seen earlier that the constitutional desire of the founding generation was to establish a secular national unity within the social context of enormous religious and cultural diversity. Under Hindutva, this imagination is reinterpreted to produce a highly charged ethno-cultural unity, amid a tamed sectarian and caste-based diversity. It can absorb and even celebrate the plurality of India's indigenous traditions, without relinquishing the political primacy of Hindu culture. The real hostility is directed at Muslims as a religious minority, recast by proponents of Hindutva as foreign invaders and cultural outsiders, despite their profound intimacy with India for over a millennium.¹³ Thus, because its ideology is both capacious and exclusive at the same time, pluralism alone cannot counter the hegemony of Hindu nationalism, unless supported by some form of political and constitutional secularism.

10 *Moiz Tundawala*, In the Shadow of Swaraj: Constituent Power and the Indian Political, PhD Thesis, London School of Economics and Political Science (2018)

11 *John*, note 2, p. 71.

12 *Ibid.*, pp. 71-97.

13 *Vinayak Damodar Savarkar*, Hindutva: Who Is a Hindu?, Bombay 1969/1923.

Complicating matters further is the triangulation of the Hindu-Muslim relationship by the caste question throughout India's modern history. The book accurately depicts how Dalits have come to be identified with Hinduism in official understanding, even though caste is a pervasive social institution that cuts across religious divides in the South Asian region. However, differing from John's narrative, there is more to this problem than the constitutional preference for a sacral model of caste over its sectarian and associational variations.

Dalits belonging to the Muslim community and other religious minorities have not yet been recognized as Scheduled Castes for reasons which are not theological but political. Despite their common historical struggle against Hindu majoritarianism, Dalit and Muslim politics have pursued divergent paths to freedom and sovereignty. In late colonial India, Dalit untouchables modelled themselves after the more influential Muslim minority to seek greater political rights in respect of upper caste Hindus. With partition however, the space left vacant after the migration of Muslim politics to Pakistan was filled in India by Dalits and other lower castes, as minority status was displaced by untouchability and backwardness as the new categories of political mobilization under the Constitution.¹⁴ Although Muslim groups have been included in the Other Backward Classes list, the Scheduled Caste list remains elusive, possibly because the structural position they once occupied before independence is now held by the Dalits in postcolonial India. Curiously, in recent years, the Hindu nationalist government has begun courting Dalit Muslims with a view to isolate upper caste Muslims and target them with exclusionary policies. But if Dalit Muslims do eventually get recognition as Scheduled Castes in the process, where would this leave the sacral model of caste in particular, and the "Communal Constitution" thesis more generally?

E. What is Communalism Against?

As an integral part of India's political vocabulary, albeit in a negative light, the term "communal" has served as the pejorative "other" to the "national" and the "secular". While the nation is itself an "imagined community", during the anticolonial movement and extending into India's founding, the unifying force of nationalism was employed to forge a collective solidarity, in contrast to the divisive force of communalism, which was perceived as a corrupting element for the body politic. This, undoubtedly, resulted in the depoliticization of the minority question, limiting it to the narrow guarantee of religious and cultural rights. Nevertheless, tied to nationalism was the promise of secularism, which did not oppose religion in public life, but rather the communalism of a Hindu supremacist worldview.

In the contemporary moment, a secular nationalist might construe Hindutva's success as a victory of regressive communal politics over the progressive ideals of the Constitution. However, even Hindutva rejects the communal label for self-identification, while managing

14 *Faisal Devji, Muslim Zion: Pakistan as a Political Idea*, Cambridge MA 2013, pp. 163–200.

to undo the founding compact by privileging nationalism over secularism, and linking it to an ethno-cultural imagination of political unity. The Muslim minority, for its part, is shifting away from a cultural defence of personal law to a political struggle for equal citizenship by invoking the secular preamble of the Constitution, as witnessed in the unprecedented public protests following the introduction of a discriminatory religious criteria for the determination of national membership in 2019.

With all sides distancing themselves from the use of the term, what explanatory purchase does communalism have in making sense of the primary political clash between secular nationalism and Hindu nationalism in India today? John's work is mostly silent on this crucial question, as he opts to position the "Communal Constitution" against an unappealing version of liberal constitutionalism centred around the individual. Had he framed the project in the backdrop of the richer Indian and global debates on nationalism and secularism, the outcome of his theoretical reflections might have been very different.



© Moiz Tundawala