

## BOOK REVIEW SYMPOSIUM: INDIA'S COMMUNAL CONSTITUTION: LAW, RELIGION AND THE MAKING OF A PEOPLE BY MATHEW JOHN

### Review Essay

*Mathew John*, *India's Communal Constitution: Law, Religion and the Making of a People*, Cambridge University Press, Cambridge 2023, 147 pages, AUD\$179.95, ISBN: 9781009317757

By *Geetanjali Srikantan*\*

Can the Indian Constitution be understood as the product of liberal ideas and secular values or does it harbour darker cognitive possibilities? Mathew John's thought-provoking monograph argues that there is a structural tendency within the Indian Constitution to identify the Indian people along communal lines which he labels as the Communal Constitution. This structural orientation within the Indian Constitution could displace the liberal tradition enshrined within the Constitution. Such structural orientation can be traced back to the politics and history of colonial India involving constitutional continuities which are in variance with the framework of liberalism that underlies the Constitution.

John's argument is framed around understanding communal identities through the prism of religion. This necessarily involves understanding colonial governance of religious communities which is foregrounded through three main axes. These are the adoption of toleration as state practice, social reform movements in the nineteenth century and the conceptualisation of Indian participation in the British government—particularly representation for minorities. The adoption of religious toleration by the colonial government as a doctrine of state sought to bring about a model of governance that had been implemented in Europe as a solution to the wars of religion. This model was seen as the ideal way to resolve the problem of governing an extraordinarily diverse population which the colonisers perceived as being irreconcilably divided. This led to a search for the foundational truth behind religious practices to determine whether the state should stay neutral in respect to them. This form of truth seeking had a tremendous impact on Indian society leading to movements for

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social reform among religious communities. Political representation assumed importance and took shape within a “communally organised terrain” (p. 9).<sup>1</sup>

This argument is elaborated in four chapters. Chapter 1 focuses on the essential practices test used to adjudicate cases relating to religious freedom under Article 25 of the Indian Constitution through its connection to toleration and social reform in the colonial context. The concept of toleration led to truth seeking—which was the task of finding the true religious foundations of the laws of the Hindu and Muslim communities. This language of truth seeking had an impact on Indian nationalists who began to advocate social reform in the religious communities that they belonged to. They sought to weed out abhorrent practices with reference to finding doctrinal truths. Therefore, reform based on communal identities became the basis for Indians to organise themselves as a people. Through a discussion of the Ayodhya case which was about a place of worship disputed by both Hindus and Muslims, it is shown that the essential practices test manifests a communal imagination as religion had to be identified on the basis of its essential truths. The resolution of inter-religious conflict thus depended on the identification of axiomatically and doctrinally divided Hindu and Muslim communities.

Chapter 2 takes forward this argument in the context of the personal law system in India which provides for Hindus and Muslims to be governed by the laws of their communities in respect to marriage, divorce and succession. The colonial history of personal law is analysed in relation to the quandary faced by colonial administrators as to whether scriptural texts should be privileged over customary practices as the source of doctrinal truth. Certain strands in Indian constitutional practice have coopted the colonial understanding of personal law by holding that personal laws are immune from scrutiny for violations of fundamental rights due to them being scripture based and not enacted by the legislature. Although there have been challenges to this position as evidenced by the decision in the *Shayara Bano* case the idea of religious communities being organised in scriptural and doctrinal terms persists in Indian constitutional law.

Chapters 3 and 4 further take up the question of the communal conceptualisation of the Indian people. Chapter 3 provides us with an account of how the colonial idea of minority rights was the basis for participation in the British Government. Institutional mechanisms such as separate electorates were introduced to ensure that the interests of different communities who were called “minorities” were represented. This understanding of minority rights was transformed in the Indian Constitution wherein separate electorates were abolished and lower caste groups gained these privileges under the logic of ensuring social justice. Minority rights took on a new significance becoming a term used for religious and linguistic groups. Chapter 4 carries forward the impact of these distinctions in the context of caste identities showing the understanding of castes as social groups within a scripturally defined hierarchy in the Hindu religion is the dominant understanding in

1 *Mathew John, India's Communal Constitution: Law, Religion and the Making of a People*, Cambridge 2023.

Indian constitutional practice -although caste injustice is also present in other religious communities. Thus “the Hindu resolution of caste also nationalises and entrenches caste in explicitly communal terms” (p. 98).

The stimulating aspect of *India's Communal Constitution* is its stress on colonial inheritance more than institutional continuity. It emphasises that conceptual frameworks used by colonial administrators are inherent within the Constitution and play a role in deciding constitutional matters such as the guarantees provided by fundamental rights and the nature of constituent power. Colonial continuity is not as important as conceptual continuity. In this context, John's account offers us an alternative understanding of the Indian Constitution from other scholarly accounts such as that of Madhav Khosla and Sandipto Dasgupta who stress on the revolutionary break that the Indian Constitution makes with the colonial past.

However, the argument of conceptual continuity becomes less convincing in relation to developments in the contemporary context wherein a Hindu nationalist government seeks to shift the ground on political ideas. This shift is detailed by Hilal Ahmed who argues that the state under the current BJP government is seen as a sovereign entity that works on behalf of the people in the realm of politics and not economics. Citizens are expected to create employment for themselves and not see employment as a right—leading to a responsive government—responsive people formulation.<sup>2</sup> This is linked to what Ahmed calls Hindutva constitutionalism which among other features capitalises on the language of minority rights to portray Hindus as victims due to them being minorities in parts of India such as Kashmir and Manipur and due to India being surrounded by Muslim-majority states. The solution according to Hindutva groups is the abolition of the majority-minority distinction and the creation of a national political community<sup>3</sup>.

One may argue that this proposal is communal in nature and further entrenches Hindu majoritarianism due to the attitudes of Hindutva groups towards Muslims and other religious minorities. However, the question remains as to whether this form of constitutionalism can be seen as conceptually linked with colonial constitutionalism.

Another area which could have received more attention in relation to the question of conceptual continuity is the Uniform Civil Code which finds place in the Indian Constitution as a proposed code to do away with personal law by introducing a uniform regime of citizenship in relation to family law. Although it is featured in the book and is mentioned as being a “jurisprudence of exasperation” (p. 62) due to its overtly communal tones, it may have been interesting to reflect on recent calls for the recognition of same sex marriages and civil partnerships within Indian family law and whether that draws on a conception of equal citizenship or community. This could be a question that the author could address in future work.

2 Hilal Ahmed, *New India, Hindutva Constitutionalism and Muslim Political Attitudes*, *Studies in Indian Politics* 10 (2022) p. 65.

3 *Ibid.*, p. 68.

The novelty of *India's Communal Constitution* lies in its invitation to think constitutional history and constitutional doctrine afresh. The book's arguments will interest students, educators and others who are interested in Indian constitutionalism. Activists and policy makers will benefit from its cautionary approach towards constitutional liberalism.



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