

## Review Essay

By *Theunis Roux*\*

If the central thesis of Mathew John's important new book, *India's Communal Constitution*, is correct, it has profound implications for the future of Indian constitutionalism.<sup>1</sup> The fact that these implications are mostly consequential on his argument, rather than explicitly stated, does not detract from the significance of his achievement.

For the bulk of its 147 pages, John provides us with a richly observed, but not obviously actionable account, of the colonial construction of the categories "Hindu" and "Muslim" and their ongoing influence on contemporary constitutional practice in India. The emphasis in this part of the book falls on the stubborn persistence of these identity markers in a polity whose founders had desired a very different outcome—a transformation away from communalism towards a more liberal-secular basis for citizenship and belonging. To this extent, as John himself puts it, his book is "primarily descriptive diagnostic and explanatory" (p. 130). Its point is not to critique but simply to lay bare the respects in which the 1950 Indian Constitution has failed to live up to its much-vaunted ambitions. At the very end of his book, however, John briefly gestures towards a more normative dimension to his argument, viz. that if liberal constitutionalism is to be rehabilitated, India needs to address the respects in which the Constitution failed to make a clean (enough) break from its colonial past. The future of liberal constitutionalism in India, John implies, lies not in a return to some idealised past, but in more fully embracing the idea of India as a complex society of intersecting, fluid and plural identities (pp. 127-131).

At the start of Chapter 1, John vacillates slightly between two different versions of his central thesis. He writes, first, that his book as a whole "makes salient the forms in which colonial state practice communally inflects contemporary constitutional design and practice" (p. 17). In the very next sentence, however, he introduces the aim of this particular chapter, on religious freedom, as being to reveal "the form in which the government of religion by the Indian Constitution communally inflects the identity of the Indian people" (p. 17). Those are two slightly different ways of articulating his project (even though one of them is meant to be the general aim and the other its particularisation in Chapter 1). In the first, the endurance of communalism is attributed to "colonial state practice" in so far as colonial habits of mind continued to influence, after 1950, the interpretation and implementation of what was, textually, a document with numerous liberal features. In the second, it is the Constitution qua institutional and political project that is doing the

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

communal inflecting. As we read on, however, it becomes clear that it is the former version of his thesis that John really wants us to be persuaded by. As pure text, the Communal Constitution is an almost non-existent document, with no single provision pointing conclusively to that conception of national identity. As an enduring ideational construct, on the other hand, the Communal Constitution comprises all the myriad ways in which the colonial view of the Indian people as composed of distinct religious communities made its way into post-colonial constitutional practice.

Chapter 1 supports this preferred version of John's thesis by showing how the Indian Supreme Court's (in)famous "essential practices" test can be traced back to approaches to the regulation of religious freedom that first emerged under colonial rule. Just as the colonial state's decision whether to tolerate practices sanctioned by Hindu and Muslim religious communities (such as the practice of Sati) was based on a determination as to whether the practice was essential to the community concerned, so too, the Supreme Court, in *Shirur Mutt*,<sup>2</sup> made essentialness the litmus test for whether a particular religious practice should enjoy immunity from governmental regulation. In this way, John argues, post-colonial constitutional-law doctrine perpetuated the distorted colonial idea of Hinduism as a coherent religion with authoritative written sources rather than a highly regionalised and varied set of religious-cum-cultural practices. Compounding the error, from the 1960s, the Supreme Court arrogated to itself the power to identify what these essential practices were (as opposed to leaving them to determination by the community concerned).<sup>3</sup> It thereby stepped into the shoes of the colonial administrator, and in so doing gave a communal inflection to a Constitution that, textually at least, espoused a classic liberal conception of religious freedom.

In similar vein, Chapters 2, 3 and 4 describe the enduring influence of colonial state practice on the post-colonial regulation of religious personal laws, minority rights and caste inequality respectively. In all three of these domains, John argues, the full realisation of India's liberal-secular constitutional project has been hindered by the lag effect of colonial-era thinking. As far as religious personal laws are concerned, this is evidenced by the ongoing deferral of the Constitution's commitment to the enactment of a uniform civil code (Chapter 2). In relation to minority rights, communalism has been expressed in the form of an artificially coherent conception of the majority Hindu community against which the minority status of other groups has been assessed (Chapter 3). And with respect to caste, communalism consists in the "sacralisation" of social markers that in their original form transcended differences in religion (Chapter 4). In all these ways, John argues, the Communal Constitution exerts a drag on the liberal-secular constitutional project, inhibiting its realisation and, worse, providing the basis for contemporary ethno-nationalist politics.

2 Commissioner, Hindu Religious Endowments, Madras v Sri Laxmindra Thirtha Swamiar of Sri Shirur Mutt 1954 AIR 282.

3 Sastri Yagnapurushadji And Others vs Muldas Brudardas Vaishya And Another 1966 AIR 1119, 1966 SCR (3) 242.

In arguing thus, John's book makes an important contribution to the emerging revisionist literature on the liberal character of Indian constitutionalism. In reaction to what are said to be Madhav Khosla's and Gautam Bhatia's overly idealistic accounts,<sup>4</sup> scholars like Anuj Bhunia, Arghya Sengupta and Sandipto Dasgupta have in the last few years pointed to the illiberal features of the original Indian constitutional design. Thus, Bhunia has shown how the Indian Constitution has never completely conformed to its global reputation as a rights-friendly document.<sup>5</sup> Sengupta, for his part, has pointed to the well-known textual overlap between the 1935 Government of India Act and the text of the 1950 Constitution.<sup>6</sup> In the most recent contribution to this literature, Dasgupta has demonstrated how the Congress party's conception of itself as a government in waiting gave a decidedly administrative cast to the Constitution that it later drafted.<sup>7</sup>

Of these three, the closest analogue to John's book might appear to be Sengupta's *The Colonial Constitution*.<sup>8</sup> That book's title, too, seeks to capture, in a single adjective, the continuities between India's colonial past and its post-colonial present. But John's book is altogether more sophisticated than Sengupta's descriptively truncated and normatively ambiguous offering.<sup>9</sup> Whereas the latter leaves both its diagnosis of the causes of India's current slide into illiberalism and its prognosis of what to do about it unspecified, John offers us a powerful explanation for the endurance of colonial ideational constructs. Unlike Sengupta, John is also not content to leave it to others to draw their own inferences about the constitutional-reform implications of his argument.<sup>10</sup> Rather, in his short but significant conclusion, John clearly commits himself to the full realisation of the Indian Constitution's liberal-secular ideals, albeit with a greater awareness of the broader social and political 'force-field' in which these ideals are being promoted and defended (p. 131).

4 *Madhav Khosla*, *India's Founding Moment: The Constitution of a Most Surprising Democracy*, Harvard 2020; *Gautam Bhatia*, *The Transformative Constitution: A Radical Biography in Nine Acts*, Gurgaon 2019.

5 *Anuj Bhunia*, *Judicial review and India's statist transformative constitutionalism* in: Aparna Chandra / Gautam Bhatia / Niraja Gopal Jayal (eds), *Cambridge Companion to the Indian Constitution*, Cambridge (forthcoming).

6 *Arghya Sengupta*, *The Colonial Constitution*, Juggernaut 2023.

7 *Sandipto Dasgupta*, *Legalizing the Revolution: India & the Constitution of the Postcolony*, Cambridge 2024.

8 *Sengupta*, note 6.

9 These limitations were exposed in a devastating interview by Karan Thapar on the Wire, *Karan Thapar, Watch Does India Have a Colonial Constitution Or is That a Mistaken View?*, The Wire, 29 September 2023, <https://thewire.in/video/watch-does-india-have-a-colonial-constitution-or-is-that-a-mistaken-view> (last accessed on 15 September 2025).

10 In a curious passage in *The Colonial Constitution* Sengupta pulls back from advocating the repeal of the current Indian Constitution on the basis that, in "polarized times", any substitute Constitution would not be "long-lasting", *Sengupta*, note 6, p. 172,

Though less ambitious in scope, John's book is somewhat similar in style and sentiment to Dasgupta's *Legalizing the Revolution*.<sup>11</sup> Like John, Dasgupta frames the 1946-49 constitution-making process against the background of the early twentieth-century anti-colonial movement. In Dasgupta's more detailed treatment of this issue, there were three main "forms of anticolonial resistance" corresponding to "three distinct images of postcolonial freedom: liberal, popular and administrative".<sup>12</sup> Rather than a sequential ordering, Dasgupta argues that all three of these "images" were notionally available to the Constituent Assembly as it began its work in December 1946. From this vantage point, it is possible to analyse the Constitution adopted as a function of the possibilities it closed down as much as those it opened up.<sup>13</sup> While different in emphasis, John's account supplements Dasgupta's in showing how the liberal-secular ambitions of the Constitution were from the very beginning frustrated by a contending communal conception of the Indian people.

In summary, *The Communal Constitution* is essential reading for anyone interested in the long-run trajectory of constitutionalist thought and governance in India. In skilfully refracting contemporary doctrinal debates through the prism of colonial and post-colonial state practices, John illustrates the interpenetration of law, society and politics in the development of Indian constitutionalism. In so doing, he provides a more realistic account of the possibilities and limits of the liberal variant of that ideal.



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11 Dasgupta, note 7.

12 Ibid., p. 49.

13 Ibid.