

## Author Response to Book Symposium

By *Mathew John*\*

This essay responds to the critical scrutiny I have received from Roux, Srikantan and Tundawala in their reviews of my book *India's Communal Constitution*.<sup>1</sup> Sharply spotlighting key issues and questions that arise from my efforts to identify a “communal tendency” in Indian constitutional imagination, they offer me the opportunity to revisit and reflect on the central themes of my book for which I am extremely grateful.

To start, it is useful to draw on Srikantan and Roux to emphasise that my book is organised to make apparent the landscape of conceptual themes and that have been put to use in Indian constitutional practice to inflect the identity of the Indian people in communal or ethno-national terms.<sup>2</sup> To quote Roux to clarify this part of my argument, “as pure text, the Communal Constitution is an almost non-existent document, with no single provision pointing conclusively to that conception of national identity.”<sup>3</sup> This quote is important to note as the book has also mentioned on many occasions that the dominant orientation of the constitutional text was to establish something akin to a liberal constitutional identity where the people were to be understood as a community of free and equal citizens. Against that broadly liberal background, the case for the Communal Constitution and its foregrounding of religious identity was always going to be a counterintuitive form of characterising Indian constitutional imagination. Even so, it is against this liberal background that I have tried to demonstrate a colonially inspired religious or communal identification of the people in the Indian Constitution’s interpretation and practice of religious freedom, personal law, minority rights and caste identification.

The characterisation of Indian constitutionalism as displaying a communal tendency is an important concern of all three essays. For Tundawala, the very presentation of the Communal Constitution as a pathological expression of the constituent power of the people was unconvincing.<sup>4</sup> As he argues, the Indian Constitution embodied the best of the democratic and revolutionary traditions of the modern world where liberalism was to be supplemented if not supplanted by a people giving themselves a constitution. That is, the people in the Indian Constitution were best understood not merely as the “symbolic unity of free and equal citizens [...] but [...] also in reality a diverse plurality of groups and

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

2 *Geetanjali Srikantan*, Review Essay, *World Comparative Law* 58 (2025), see also *Theunis Roux*, Review Essay, *World Comparative Law* 58 (2025), in this issue.

3 *Roux*, note 2.

4 *Moiz Tundawala*, Review Essay, *World Comparative Law* 58 (2025), in this issue.

communities [...]” governed by that very unity of the people.<sup>5</sup> To rephrase, the people in modern constitutionalism, and especially in the Indian Constitution, is to be understood as an entity capacious enough to absorb even communal tendencies as a dimension of social plurality from which the polity as a whole sought to fashion political and constitutional unity.

I do not contest the spirit of deep and even revolutionary democratic change that animated the Independence Constitution. The Constitution did envision bringing together the social and cultural diversity of India under the banner of the political unity of the Indian people. However, as a form of imagining the state, any route towards “national” unity would only be one among other contenders. Among these contenders for national solidarity, I might mention the colonial-national model of the Indian people, the federal model of the people, the Gandhian model of the people and so on in addition to the dominant liberal vision of the people as a community of free and equal citizens. Of these my book has emphasised the colonial-national model of the people which foregrounded religious identity and goes on to show that it is a model that continues to resonate in contemporary constitutional practice. Thus, even if the Constitution was designed to surpass the communal vision of the people by foregrounding a liberal vision of the people, it was less than successful in enveloping and absorbing within itself rival claims that identified the Indian people through the axes of communal identity.

A related conceptual criticism arises from Srikantan’s distinction of the Communal Constitution from what she calls the Hindutva Constitution.<sup>6</sup> Drawing on the work of Hilal Ahmed she identifies the Hindutva Constitution as one that fully accepts the Constitution adopted at independence but is disposed to playing up technical discussions in disputes such as Article 370 in a manner that accentuates Hindu grievance about asymmetric federal rights only to resolve this sense of hurt through the assertion of a national political community over its recalcitrant parts. Significantly, since the underlying constitutional issue in relation to disputes like Article 370 is resolved entirely through the facially neutral technical detail of legal doctrine, Srikantan thinks that Hindutva inflected conception of a national political community does not accord with what I identify as the Communal Constitution. To draw from my book, the Hindutva Constitution problem would be akin to the discussions over personal law and the uniform civil code (UCC). The demand for the UCC is undoubtedly a secular political demand that seeks to decentre or sweep away the communal identities foregrounded by personal law. However, driven by an animus against “Muslim” minorities, the UCC decisions of the Indian Supreme Court were tied to a nationalist constitutional imagination in which the people understood as broadly and implicitly Hindu were unable to bring themselves into dialogue with the anxieties of various Muslims groups for personal law practices. Thus, the problems of the UCC or Article 370, even if facially neutral and secular, are framed in colonially derived communal conceptions of India as a

5 Ibid.

6 *Srikantan*, note 2.

people identified by a Hindu majority against which other religious regional or particular identities and their constitutional recognition and demands are deemed illegitimate. Once the problem is framed in this manner, the identities recognised by the Constitution are given the go by for an implicit communal majority with whom the Indian people as a whole are identified. That is, facial neutrality of these debates does not decisively distance them from what I identify as the communal tendency in Indian constitutional practice.

Beyond questions that pertain to conceptual framing there are other downstream and specific questions that were raised by these reviews. For instance, Tundawala argues that my treatment of the Supreme Court devised “essential practices test” on religious freedom missed a chance to theorise the place of religion in Indian public law.<sup>7</sup> His line of questioning centres around the need to explain why judges rely on this test that demands that religions produce their essential truths (which truths alone are protected as their right to religious freedom in the Indian Constitution). At this level, the book does indeed provide an answer which ties the essential practices test to colonial attitudes and conceptualisation of religion in India which were internalised first by social reform processes and more recently by courts as custodians of social reform in the Constitution. However, this answer is insufficient for Tundawala as he points out that religion occupies a special place in Indian public life and that unlike western liberal democracies where religion has been socially privatised for centuries, religion remains a central part of the Indian public sphere.<sup>8</sup> As a result, he argues that an internal form of justifying secular intrusions and reform of religious practice, like the essential practices test, was inevitable. While Tundawala’s assertion may be true, it is also true that of the numerous ways of characterising Indian religiosity, legal and constitutional practice have more often than not reinforced what I have called axiomatic religious truths that identify religious truths or axioms with a people as a whole. This form of identifying religion and its bond to a people or politics is a choice made at the expense of other and more readily available forms of Indian religiosity characterised by the plurality of diverse practices. Thus, even if justifying intervention through internal arguments is deemed to be necessary for constitutional practice, the book notes that such forms of internal justification do not often employ forms of justification appropriate to the tradition being reformed. But more importantly, such forms of interventions reinforce a communal conceptualisation of the Indian people.

Tundawala’s also objects to the manner in which pluralism (in the context of the book’s discussion on minority rights and caste identity) is drawn on to decentre the communal imagination of the Indian people.<sup>9</sup> His principal concern with plural forms of social identification is that it is not robust enough to counter Hindutva/communal majoritarianism which has shown itself as being able to provide a capacious cover to all forms of plural identities as long those identities could be mobilised under a Hindutva banner. In turn, this

7 Tundawala, note 4.

8 Ibid.

9 Ibid.

broader Hindutva identity is organised through its hostility to minority identities, primarily Muslims. This is of course an entirely legitimate line of criticism to take against the manner in which Hindutva nationalist ambition has operated, but this precisely what the book has sought to demonstrate. That is, the book (chapters 3 and 4) presents its efforts as a diagnosis of the manner in which minority identities, be they religious or caste groups, (and not just prominent minorities like Muslims) are pushed to the margins by communal constitutional imagination and practice. Thus, as the book demonstrates, constitutional practice prevented minorities from self-identifying as minorities and were identified instead against the background of a deemed Hindu majority. That is, even when social groups commonly understood as Hindu tried to cast themselves as minorities against an understanding of the entirety of the Indian people as a collection of minorities, constitutional practice actively intervened to scuttle their attempts to self-identify. Similarly, caste was identified primarily as a Hindu problem even when it was clear that some version of caste was ubiquitous to all religious groups in India.

This form of analysis that the book presents is of course a diagnosis of the working of a communal constitutional practice as it mobilised its version of the (Hindu) people who author the constitutional community. However, as a diagnostic account of the Communal Constitution it is one that draws on the way in which the body politic is carved up by preferring the communal over plural conceptualisations of the people. That is, the book's diagnosis is, perforce, implicit critique of communal constitutional practice, but more importantly, critique that draws on and foregrounds Indian social pluralism as the ground that communal constitutionalism has to redraw to defend its account of the communal people. It is in this manner that Tundawala comes to his critique of the book on grounds of its reliance on Indian pluralism.

Tundawala, and even Roux, are therefore right to examine and evaluate social pluralism as the potential ground on which the Indian people might pull together in their diversity.<sup>10</sup> They are also right to go one step further to argue that pluralism could not anchor political unity without offering some version of political and constitutional secularism or principled ground for holding together social diversity. However, my book's principal purpose was to demonstrate the possibility that the communal as "the pejorative other" to the "national" and "secular" (Tundawala) threatens the very vitals of the constitutional project adopted at Indian independence. And to this end, even as intuitive experience suggests to me that the possibilities of pluralism towards pulling together political unity are worth exploring, the book does not outline an intellectual path from pluralism that clearly cuts through the dangers of communal constitutionalism.

Therefore, as I understand it, pluralism is a promissory note towards future research. It is a curious aspect of Indian constitutional theory that social pluralism has not been the self-standing ground on which constitutional imagination has been anchored. Tundawala is of course sceptical of the possibilities that pluralism offers while Srikantan goes so far to

10 Tundawala, note 4, Roux, note 2.

suggest exploring emerging and contentious legal debates around the regulation of family and same sex relationships as forms of taking forward the book's discussion of pluralism.<sup>11</sup> The prospects of this work on pluralism therefore awaits further inquiry. However, all three reviews have foregrounded with considerable clarity what I believe to be the challenge arising from a communal constitutional imagination and have offered me a chance to engage their questions while presenting my central ideas. Equally their reviews have also allowed me the opportunity to retrospectively and prospectively reflect on my work for which I once again express my thanks.



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11 *Tundawala*, note 4, *Srikantan*, note 2.