In the conclusion to this thesis, I seek to understand the questions that theologisation raises as an explanation for the problem of the legal regulation of religion. In order to do so, let us readdress the issues raised in the introduction.

We have seen that the narrative of secularisation and the eventual fading away of religion is a process that has been characterised as being universal across all societies. This claim underlies all Western cultural thought and has not been questioned by Indian thinkers such as Rajeev Bhargava (1998). However in a recent essay, Bhargava (2010) attempts to show that he is conscious about this narrative by elaborating on the specific nature of Indian secularism and its conceptual vocabulary as being different from the West. He develops this argument by suggesting that “Modern Indian Constitutional Secularism” (MICS)\(^1\) rejects the separation of religion from politics, and is based on “principled distance” where a state may connect or disconnect with religion based on whether they undermine relations between communities. He says:

\[
\text{MICS developed in response not only to the threat of the domination by the religious of the nonreligious and various forms of intrareligious domination, but also to the domination of the religious by the nonreligious and to interreligious domination (162).}
\]

Bhargava thus seeks to relate Indian secularism to the history of India, providing us detailed descriptions of conflicts between various sects in the Vedic period, the rise of the Bhakti movement against the oppression of the caste system and the spread of Sufism in rebellion against the established Islamic order and the sharia. He argues that the various conflicts and modes of resolution in Indian history is the conceptual vocabulary of Indian secularism. He

\[^{1}\text{It is unclear why Bhargava seeks to use the word “constitutional” when he tries to base his argument on a pre-colonial past instead of a modern legal framework.}\]
however acknowledges that such an account is guilty of an “indefensible progressivism (175)” and that he operates with concepts that come from Western Christendom and modernity. Therefore much work needs to be done to uncover the concepts behind Indian secularism.

Bhargava’s defence of Indian secularism as being distinctive (Bhargava 2007) does not directly deal with the problems surrounding the legal regulation of religion or the success of secularism in its legal context. His recent claims about the conceptual vocabulary of secularism in India as reflecting claims between communities in the context of the oppression caused by the caste system and the encounter between Hinduism and Islam, reflect colonial descriptions about Indian society and tells us more about the conceptual vocabulary of the West.

In such a case it is conceptual incoherence which becomes the issue. Therefore, (as we have earlier mentioned in the introduction) the failure of the legal regulation of religion cannot be reduced to the ineffectiveness of Indian secularism and the inadequacy of law. This thesis has demonstrated that the legal category of religion is a product of the process of theologisation and that such theologisation causes conceptual dissonances. In this context it becomes important to trace the nature of these dissonances as the productivity of theologisation as a

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2 Bhargava does not address scholarship relating to the construction of caste as a category in the context of colonial descriptions (Dirks 2001) or more recent work on the ambiguous roles of Sufis in India (Aquil 2010).

3 De Roover, Claerhout and Balagangadhar (2011) show in a recent article that the claim that secularism has different meanings fails to take note of the conceptual framework which is behind secularism. They argue that the migration of Western political ideas without the conceptual background fails to render these ideas intelligible in a different cultural setting. The absence of interpretative limits shows the limitations of liberal political theory and its failure to take root rather than the universal significance of secularism. They further show that there are conceptual distortions in the manner in which these ideas spread and are accepted. The meanings of terms change and they are related to each other in unexpected ways.
hypothesis lies in its ability to provide us a greater understanding of these conceptual distortions and formulate questions to address them. Our argument is that theologisation has been responsible for the emergence of the legal category of religion. This process seeks to establish “doctrines” through a basic structure consisting of a source, its interpretation and the availability of such interpretation. The formation of specific legal categories is dependent on the conceptual clusters and themes that emerge through this argument. The distortions that emerge from these themes and frameworks raise certain questions on the notion of practice, the role of the state and the idea of the public. The recognition of these questions is important for formulating answers to the present impasse surrounding the legal regulation of religion.

In asking why the legal regulation of religion has been a failure we begin by analysing the emergence of religion within legal discourse. We discover that such emergence is necessarily linked to the narrative of secularisation which allows a certain framework to emerge in the history of law. This involves the fading away of religion and the emergence of the secular which is embodied in the claim that law in India has progressed from pre-modern customary law to scientific codification. The study of the cultural history behind such assumptions reveals that this description is religious in nature being based on the Christian ideal of the Mosaic Law. Such an ideal produces certain cultural descriptions including Brahmins being the interlocutors for the law. Such a description has been contested in the nineteenth century by British judges (Nelson 1877) and it has been shown conclusively today (Bhattacharyya-Panda 2008; Menski 2003) that there is no dominant legal order (in the form of the Dharmasastras, the Manu Smrithi etc.) that requires submission by all individuals.

However, our findings show that it is not merely a dominant legal order that does not exist; it is the description of various separate orders suggesting that each “caste” or community has its
own law which governs itself which is incorrect. Such conceptions are fundamental to Indian law today such as Hindu marriage legislation\(^4\) which allows for customs and usages of any specific community to be recognised in the context of the solemnisation of marriage over statutory requirements on essential rituals. This leads to an idea of custom that has not been recognised previously in India\(^5\) and provides rigidity to the legal framework. Since such a framework is sanctioned by the state, the process of change becomes difficult. Therefore questions arise as to the role of the state and the place of Western theories of law and politics within India. The ideas behind these theories were absent which led to the colonisers’ efforts to create conditions for their transplantation. This can be seen in the project of colonial legal reform itself which emphasised the acceptance of law by society and the creation of conditions that would enable a social contract\(^6\). This process was motivated by a certain idea of the state which did not exist in India.

Dominant theories of legal pluralism have understood law in India as being a set of competing or integrative legal orders that consist of state and non-state laws wherein the resort to non state law is unhindered by the usual obstacles faced in the West\(^7\). However as we see in Chapter Two, the reasoning of the pundits escaped the rationality of the colonial state. This was not because their legal reasoning resisted the logic of codification due to them being based on custom but because the nature of such reasoning was completely different.

\(^4\) Refer to Section 3 of the Hindu Marriage Act, 1955 which is analysed in detail by Menski (2003, 298). The Act mentions that certain rituals such as the saptapadi or seven steps around the fire are an essential requirement for the validity of the Hindu marriage. Section 3 provides an exception to these requirements.

\(^5\) Menski mentions that the rigid conception of custom based on consistency and longevity is not found in traditional Hindu law.

\(^6\) The logic behind this is elaborated in Chapter Two “Phantom of the Brain: Colonialism, Theologisation and the Making of Hindu Law” wherein I analyse the process of codification and show why categories of knowledge were reorganised so that the colonised could recognise a “scientific law” based on the Mosaic ideal.

\(^7\) This commonly held description can be found in Menski (2006)
This can be seen in Radha Kishen’s case\(^8\) wherein the appointment of a *prohit* or priest is subject to a set of multiple statements by the pundits. The colonisers have taken the statements of these pundits as being derived and reflective of particular doctrines stated by authorities which represent the Law of God. The nature of the answers provided by the pundits stating that the priest must be looked upon as a mother or a father and should be treated as such a manner indicates that they are based on reflections on social practices and their consequences, and not on other conceptions such as consistency, longevity or as descending from an authority. Therefore “state” and “non state” and other forms of authority may not be relevant concepts in understanding law in India and other concepts that can characterise this notion of practice should be developed.

Chapter Three elaborates on this question by showing how Western forms of authority were transposed over multiple forms of authority in the pre-colonial Islamic world, and the consequent demise of Islamic reasoning and procedure. The idea of the public, as imported by colonialism also emerges, and brings up questions in respect to the capacity of the state to intervene in certain social spheres.\(^9\)

These questions (the notion of practice, the role of the state and the idea of the public) emerge again in the analysis of the legal category of the place of worship. Chapter Five shows how dedication to God, an authority to interpret God’s purposes and the idea of the public are the conceptual conditions that have brought the legal category of the place of worship into being. Chapter Four shows how certain theological principles such as charity have implanted themselves in secular legal frameworks such as the law of property.

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\(^8\) Supra n.58.

\(^9\) This is reflected in my analysis of the pre-colonial Islamic legal system wherein many spheres of life (which would be deemed to be in public in nature) were left to the individual or community unlike the Western state.
In present day disputes around places of worship these conceptual frameworks create a dissonance and the state is expected to resolve these disputes. The state cannot maintain neutrality when faced with two different kinds of phenomena such as Hinduism and Islam and is forced to come up with solutions to these disputes which are based on existing conceptual frameworks. These existing conceptual frameworks which revolve around theological notions of God, idolatry and authority prolong these disputes due to the dissonance that they create. In certain cases such as that of the Bababdangiri dispute, the category of religion is superimposed over a tradition with its own beliefs and practices. Theologisation not only creates the dispute but also prolongs it and causes more conflict by applying the framework of religious freedom to resolve the dispute.

Understanding the conceptual dissonance behind these disputes gives us the potential to resolve them. Such conceptual frameworks need to be dismantled and alternatives found. This can only be done by investigating the questions that the conceptual distortions raise. If practice is rethought and disputes settled on this basis, one can decide what kind of role the

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10 This can be seen in the Ayodhya dispute wherein suggesting that the birthplace of Ram is a true fact, Justice Sharma transforms the beliefs and traditions of people in India into an erring variant of the Semitic religions. He merely tries to respond to the Semitic charge that the myths of the pagans are inconsistent by asserting that they are in fact true. This transformation of tradition into “religion” is demonstrated by another finding of the court declaring that the deity has resided at the birth place since time immemorial and its possession cannot be disturbed. A deeper interrogation into the legal categories generated such as the wakf and the Hindu endowment through their conceptual components such as dedication to God, the authority to interpret God’s purposes and the public and the private would allow a better explanation of how such findings have been derived.

11 The Bababdangiri dargah in Karnataka has been considered as an example of Hindu-Muslim syncretism being the site of the tomb of a Sufi saint Dada Hayat Khalandar (Sikand 2003) who is also perceived as the Hindu God Dattathreya. There have been attempts to take over the shrine by the Wakf Board and Hindu political groups who alleged that the site was originally the abode of a Hindu God Dattathreya and was the site of a Hindu temple prior to it coming under Islamic influence and governance under the Muslim king Hyder Ali. The judicial decisions on this issue (Karnataka Board of Wakfs v B.C. Nagaraja Rao and Others AIR 1991 Kant 400) have held that that the place of worship was a unique institution where both Hindus and Mohammedans offered their prayers to a common deity, but in different names. This was due to the syncretic nature of the site which possessed a lamp and a paduka (slippers of gold that belonged to Dattathreya) and the rituals which included practices such as offering flowers and coconuts. The Pirana shrine is also another example of such a prolonged conflict due to the superimposition of religion as a category.
state, community, or other authorities in dispute resolution may play. One can also decide the relevant actors in such a dispute instead of relying on the idea of the public which makes such a dispute accessible to everyone (including the state) based on a certain capacity or status.\textsuperscript{12}

The unintelligibility of religion within legal discourse has created certain problems with respect to the legal regulation of religion. Theologisation is the explanation that I have generated in this thesis for these problems. Such an explanation has shown that the conceptual frameworks behind the legal regulation of religion have caused dissonance. I have indicated through the questions posed that that the underlying social practice does not reflect the legal culture that has been imposed on it. Judicial decision making by reflecting in the direction of the questions needs to make an attempt to remove the conceptual distortions. However this raises a larger problem of the legal framework that regulates religion which can be found in our constitutional provisions on religious freedom as our ability to resolve these disputes is dependent on this overarching framework.\textsuperscript{13} Therefore one needs to analyse the problem of how one can regulate a tradition vis-a-vis a religion and whether the concept of “religious freedom” has actually been responsible for these disputes. Such a problem calls for not only for research on a conceptual understanding of how a tradition functions but a wider debate on the best legal mode to regulate such conflicts.

\textsuperscript{12} The consequences and the logic of the ideal of the public is shown in Chapter Five wherein anyone can intervene in the affairs of a Hindu or Muslim institution based merely on their status of being Hindu or Muslim. These consequences can be seen directly in the case of the Ayodhya dispute wherein certain Hindu political parties have become litigants. This has assumed more secular dimensions in the Bababudangiri dispute wherein the Sufi manager of the shrine has been removed on the ground of corruption which was a ground for the state to intervene in the affairs of the shrine.

\textsuperscript{13} For instance the idea of the public necessarily involves engagement with the question of temple entry which has constitutional implications in the context of rights against discrimination.