**Introduction**

Today it has become impossible to speak of the regulation of religion in India without assuming the neutrality and effectiveness of the Indian legal system and the conceptual apparatus that it deploys in such regulation. Despite the inability of legal discourse to determine what exactly constitutes religion (practically every human activity involving matters of diet, dress and dance being considered religious), or how religion can be demarcated from the secular, one does not question the conceptual apparatus behind such a framework but merely assumes that the problem is internal to the regulatory framework and thus can be addressed through better laws and legal reform.

This understanding carries with it other implicit assumptions namely the history and nature of law in India. Indian law is seen as divorced from its colonial inheritances. Further the making of modern law in India is also seen as part of a narrative of progress and modernity, involving the receding of religion and the coming into being of the secular. This is particularly seen in reflections in the field of law and religion in India. Baird (2005a) suggests that the distinction between law and religion is a very recent one and has emerged only in modern India. In ancient India, no distinction was made between law and religion, the term dharma being used to refer to both concepts. Current legal dilemmas on the regulation of religion by law must be understood in the context of this pre colonial tradition as the question of the conflict of religious traditions with law did not arise in this period.

For Baird, the problem of the legal regulation of religion has to be seen in a historical narrative. According to him the Constitution in independent India began a process of secularisation of law so that the conditions for a modern Indian state where all citizens were equal before the law was created. Baird mentions that this resulted in a process wherein certain religious practices such as the use of temples being barred to particular social groups
identified as scheduled castes were held unlawful on the principle of equality enshrined in the Constitution. This process of secularisation was incomplete as laws relating to marriage, inheritance and succession were left in the sphere of religion being governed by the religious communities themselves. However leaving a sphere of civil life under religion was not considered appropriate for the modern Indian state which espoused equality. Therefore it was envisaged in the Directive Principles of the Constitution that the state would seek to promulgate a uniform civil code governing all citizens. Baird then comments that with the Constitution, the category of the religious and the secular emerged in India as a mechanism of dealing with religious conflict. However there were considerable problems in coherently applying these categories, the Supreme Court suggesting that “practices, religious and secular are inextricably mixed up” (Baird 2005a, 18).

This narrative has certain features. It assumes that in a linear fashion religion eventually fades away due to the secularisation of human life and society. In creating such a historical narrative Baird clearly relies on a theoretical framework developed in the West to describe Western society and culture. This framework assumes that the transition from the religious to the secular reflects various stages of social and economic development that a society goes through. This is reflected in the work of many European thinkers such as Marx and Weber who have developed theories on capitalism and the modern state based on such a transition. Such a framework forms the basis for discussions on western society, politics and religion as evinced in contemporary works on secularisation such as that of Charles Taylor.

What are the elements of such a framework? Max Weber’s (1930; 1978) formulation of terms such as “rationalisation” and “disenchantment” allow us to understand how such a framework is deployed. Weber identifies social modernisation as a manifestation of such rationalisation, law being the means of organising the capitalist economy and the modern state, these elements being constitutive of the rationalisation of society. His enquiry however follows a
specific line of investigation which is the path of Western rationalism, its distinct nature not being found in any other society in the world. An example of such rationalism\(^1\) is the stage of development of science in the West which has occurred alongside capitalism. Rationalisation is also used to designate the autonomy of law and morality. Weber explains rationalisation as the institutionalisation of purposive-rational action, seeing it as a process and not as an end. Rationalisation begins with the overcoming of magical beliefs and the setting in of disenchantment. Such rationalisation is achieved to the extent that belief in such magical thinking is overcome. Such a process arises from the Judaeo-Christian world where the pagan enchanted world had to be overcome and faith had to be reposed in God as the maker and sustainer of the world. In ethical rationalisation disenchantment was to be observed in the interaction between believer and God, the relationship being a purely communicative one. Such a relationship however had the effect of giving extra-religious relations a new meaning. Such a process of disenchantment freed modern structures of consciousness, reason no longer being universal but split into a number of value spheres. Therefore rationality was something left to the individual to pursue and not to existing social orders.

Weber’s thesis has been highly influential provoking assertions that the program of the Enlightenment was the disenchantment of the world (Horkheimer and Adorno 1944). Its influence today can be seen in recent work on secularisation by Charles Taylor (2007). Taylor suggests that religion is usually defined in terms of the transcendent and it is the decline of faith that has been tracked. However it needs to be understood in the context of a relation to a “beyond” in the sense of a good beyond human flourishing. An understanding of secularity needs to proceed by understanding the beliefs that shape experience and the context in which research and questioning about the moral and the spiritual must proceed. In a move to exclusive humanism, the reference to God is removed. The goal of order is no

\(^1\) Weber identifies different kinds of rationalization but relates all of them to the emergence of capitalism.
longer a matter of human flourishing, its pursuit is not a way of following God, and the power to pursue it is no longer something that we receive from God but is a purely human capacity. Therefore in pursuit of this immanence a new concept of human flourishing is born. God’s relation with humanity comes to be seen as mediated by an impersonal immanent order. The significance of such an immanent order is explained as follows:

As an immanent order, it is self-contained; that is, apart from the issue of how it arose, its workings can be understood in its own terms. On one level we have the natural order, the universe, purged of enchantment, and freed from miraculous interventions and special providences from God, operating by universal, unresponsive causal laws. On another level, we have a social order, designed for us, which we have to come to discern by reason, and establish by constructive activity and discipline. Finally the Law which defines this order, whether as political/constitutional law, or ethical norms, can be expressed in rational codes, which can be grasped quite independent of any special relationship we might establish with God...(290).

In Taylor’s account it appears that there is a transformation of religious belief, the social order being identified with the Plan of God but envisaged without reference to God. One can also see Nature as identifiable with God but then as independent of God. He suggests that the process of civilisation and enlightenment is a step in sharing the plan that God has conceived and extends to all human beings. Such an account whereas it appears to follow the narrative of Max Weber significantly goes beyond addressing the origins of capitalism and emphasises the connections of the secular with the religious.

The thesis of secularisation has faced challenges in the West, particularly over the visibility of religion in the public sphere. However Taylor (1998) is of the view that secularism as a model can be exported to other non-Christian parts of the world despite its Christian origins. The independent ethic model with its division of private practice of religion recognised by the sovereign state and a sphere with publicly established forms and ceremonies faces difficulties when such shared religious grounds and forms of belief are unavailable outside the Western
world. It is the common ground model which is based on state neutrality that can be modified to derive a purely political ethic not based on religious grounds.

The view that there can be different kinds of secularism finds widespread support particularly in the writings of Talal Asad (2003) who argues that the religious and the secular are not fixed categories and facilitate different practices according to the historical formations which they occur. However the most significant votary of secularism in the Indian context has been Rajeev Bhargava (1998) who subscribes to political secularism, i.e. secularism of a purely political ethic as espoused by Charles Taylor. Such secularism can be re-characterised as contextual secularism and has room for ultimate ideals that are based on what is required to prevent conflict between communities.

In the espousal of secularism it appears clear that Bhargava’s model takes for granted that there is a transition between the religious and the secular which takes place in all societies. Although there may be an assumption that a modern democratic state is a desirable feature of our societies and is an end to be achieved, this assumption proceeds on the ground that societies evolve into such democratic states. It does not therefore come as a surprise that the concept of the Indian secular state has come in for much criticism. Nandy (2003) points out that for many academics the ideology of secularism comes prior to the goals it is supposed to serve. He suggests that current forms of religion have emerged due to secularisation and Hindu nationalist political parties such as the Bharatiya Janata Party should be understood as a secular phenomenon. He further suggests that the concept of secularism helps identify and set up the modernised Indian as a principle of rationality in an otherwise irrational society. The secularist project is an expression of dissatisfaction at the lack of internalisation of such values by Indians which are essential for the success of the modern democratic state. Such a secularist project assumes that religion is easily identifiable and cannot be confused with caste, sect, family traditions, rituals and culture.
Nandy has rightly pointed out that the failure of secularism in India has been seen as Indian society’s failure to develop the conceptual content required for secularism to take hold. Therefore if the legal regulation of religion in India is viewed through this prism, it appears that the secularist position is that law in India has not sufficiently developed as an institution to effectively resolve the question of religion. This is apparent in the analysis by commentators such as Rajeev Dhawan who view the judicial tests such as the essential practices test as being insufficiently developed\(^2\), such inadequacies being the reason for the failure of the legal regulation of religion.

I would like to suggest that the problem of the legal regulation of religion must be resolved differently and this can only be done by radically rethinking current narratives of secularisation. The Indian secularist argument which claims that there has been an ineffective transition from the religious to the secular is based on the assumption that such a transition from the religious to the secular occurs not just in the West but also in India. It is necessary to interrogate this assumption and the narratives provided by Western thinkers about religion in the West. Is it the case (as Taylor has suggested) that religion transforms itself into new forms of belief, or has the death of religion (Adorno and Horkheimer, 1944) brought about secular forms of reason which have brought predicaments in Western society i.e. the advent of capitalism and mass culture? Or is it that forms of reason having their roots in religion remain present in the secular leading to autonomous forms of law as suggested by Weber?

What characterises all these narratives is the absence of a theory of religion which lets us conceptualise the secular. These narratives lack coherence as they assume that religion is a cultural universal leading one to presume that such a transition occurs in all societies. S. N. Balagangadhara (1994) challenges the assumption that religion is a cultural universal and

\(^2\) This is analysed in Chapter One “The Impossibility of Regulating Religion in India”.
offers a theory of religion wherein he demonstrates that Christianity is what religion is, and that religion is absent in India. If the properties of Christianity cannot be found in India, one has to come up with different explanations with respect to the emergence of secularisation and the secular. Therefore the failure of the legal regulation of religion cannot be seen as the result of the inadequacy of law and the ineffectiveness of Indian secularism and another explanation will have to be provided. More importantly secularisation at a conceptual level needs to be rethought. Such rethinking needs to interrogate the nature of law in India and its roots in colonialism.

This dissertation offers a different explanation in respect to the failure of legal regulation of religion by challenging the conceptualisation of secularisation as a universally acceptable narrative across cultures and societies. It seeks to show that there is a process of “theologisation” due to the compulsion to see religion in all societies. Therefore theologisation is the process by which law tries to make religion intelligible within legal discourse. The failure of the legal regulation of religion due to the unintelligibility of religion within law is due to such theologisation. It also shows that that the processes of secularisation in the West are responsible for such theologisation.

In the first chapter it outlines the problem of the legal regulation of religion and suggests a way of resolving the problem through an understanding of how a Western epistemic framework is used to study both law and religion. In order to demonstrate the nature and the operative effects of theologisation, it shows how a specific legal category which is the place of worship is suitable for such analysis.

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3 Balagangadhara’s argument extends to the Semitic religions although his book mainly deals with Christianity. The implications of S N Balagangadhara’s theory of religion and its various aspects including his argument that religion is an explanatorily intelligible account and the double dynamic of religion is analysed and explained in different chapters of the dissertation in the context of its potential in resolving problems.
In the second chapter it looks at the legal processes behind the making of Hindu law by British colonialism and suggests that it is the product of the “theologisation of custom”, departing from the present understanding that codification is the process by which Hindu law has been made. It shows how the mechanism of secularisation in the West is structurally similar to the process of theologisation in India. In the third chapter it shows that the mechanism of secularisation also exists in Islam and shows how theologisation leads to a process of “Islamicisation” in the colonial period. It also shows that Islamicisation is the product of the rival truth claims of the Semitic religions.

In the fourth chapter it seeks to demonstrate through a specific legal category which is the place of worship, how processes of secularisation emerge from religion (in this particular instance, the theological principle of charity) leading to secular legal structures.

In the fifth chapter it shows how various secular legal structures in the West have been transplanted in India to create the legal category of the place of worship. It also shows how the process of theologisation operates in the context of the legal category of the place of worship.

The conclusion shows how the process of theologisation can be an adequate explanation for the failure of the legal regulation of religion.