Legal responses to religious diversity (or to cultural diversity?)

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Introduction

Today, we are in a position to tackle in much more interesting ways the question of religious diversity and how that relates to law. If we ‘naively’ formulate the title of the present chapter into a problem about how state laws and international laws approach and deal with the fact of religious diversity we would have to decide first what religious diversity is. Therefore we would have to deal with what precisely the ‘fact’ of religious diversity entails. This allows us to discuss the problem in at least two ways. The first way is the predominant and generally taken for granted idea that all cultures have religion. This is widely accepted at least within Western culture and among the Westernized intellectuals in non-Western cultures. This can be seen easily, for example, from anthropological reports, proclamations by states about the religious diversity within their jurisdictions, or by international actors such as the Special Rapporteur on Freedom of Religion or Belief. A long or short list of such religions existing across the world may be given. Official discussion tends to remain at the level of ‘world religions’ but more ‘refined’ accounts can be found in anthropological work. Then there is another less popular and more challenging account, provided by Balagangadhara, which problematizes the proposition that religion is a cultural universal, and which holds that some cultures have religion and others do not.\(^1\) This latter account also explains how the dominant position of religion as a cultural universal has come to be so widely accepted. In this chapter, I briefly explore the implications of this second account, by Balagangadhara, for the first, which is no longer tenable scientifically, even though it is widely subscribed to. Balagangadhara’s account allows us to think about cultural diversity, and the problem of religion within that diversity, in a more interesting way than the dominant account does. I then briefly deal with its implications for the study of cultural diversity and law through some case studies, which allow us to consider what happens when a religious culture like the West meets a pagan culture, such as the Indian culture. This can help us build a

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1 The key work is Balagangadhara 1994. More detail on the research programme developed by Balagangadhara can be found in Bloch, Keppens and Hegde 2010, Balagangadhara 2012, and in the videos on YouTube of the conferences on Rethinking Religion in India and on Dharma and Ethics.
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hypothesis of how Western law takes part in and promotes, in secularized form, the idea of Indian traditions as ‘false religions’.

Two theories of religion

As noted, we have two competing frames or theories for explaining what religion is and therefore what ‘religious diversity’ looks like. It should be noted that this is not a discussion about definitions of religion, since definitions will merely point to some or other phenomenon that we call this or that. A definition merely tells us what phenomenon one is referring to and discussions about it will not take us beyond that. However, it is the theory which tells us how religion functions. What makes the dominant account of religion we have interesting is that it is embedded in a theoretical framework. Part of the problem of the lack of clarity about this, and the consequent tendency for problems of religion to appear as if they are merely definitional or classificatory, is that the theoretical background of the dominant account is hidden away (Balagangadhara 1994: 255–63).

The dominant theory tells us that religion is a cultural universal; that all cultures have a sense of the divinity; that religions in that sense are variations of one another although there are better or worse religions; they are better or worse to the extent they allow greater or lesser access to God’s will; the feeling of relationship with God or a divine figure can be experienced through worship; there is a sphere of human experience which we refer to as ‘religious experience’; that ascertaining God’s will and the nature of his creation, which expresses his will, is a meaning-making activity, and so on. The theoretical framework that has this idea of religion is Christian theology, with all its internal variations.

The framework that tells us all these things about religion has been secularized over time and in various stages. Although seemingly self-contradictory, secularization works alongside proselytization to spread religion. Secularization is a process that takes place because of the dynamic of universalization of Christianity, which causes it to lose its specific reference to a religion, since it is the truth. In order to spread further, religion has to lose its specific Christian character. Used in this sense, secularization does not mean the lessening or the absence of religion, but occlusion of the specific religion that Christianity is, as part of the very universalizing dynamic of Christianity itself.2

More recent phases of secularization have been accompanied by the development of the human sciences: comparative religion, anthropology, sociology, psychology, law and so on. Each of these has taken some of the theological ideas of Christianity and re-presented them in secular terms, generalizing and universalizing them in the process. Christian anthropology, in other words, the Christian theological framework about what the human being is, has thus become secularized and embedded within the human sciences. Critical ideas about human beings today, including the fact that they have (human) rights, that humans are intentional creatures, that they need to find meaning in their lives, are based on this Christian anthropology.3

The theological notion that all cultures have religion has been incorporated by the human sciences. It has become a ‘fact’ assumed in the theories they produce. Variation among cultures leads to the claim that there are different kinds of religion, allowing the universality thesis to remain in place. The idea that all cultures have a religion native to them remains even when the criteria which are said to make the Semitic religions into religions – holy books, belief in God,

2 On this twin dynamic of proselytization and secularization, see Balagangadhara 1994: 389–92.
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etc. – have to be dropped in order to hold on to the claim that non-Semitic religions are religions too. The different-kinds-of-religion thesis does not help to address this problem and the conundrum remains (Balagangadhara 1994: 10–27). The claim also does not depend on empirical inquiries into cultures; rather, it is the foundation of empirical and theoretical inquiries into religion. The claim about the universality of religion or that each culture has a religion that is native to it does not require proving because it is presupposed: it is pre-theoretical (see, in particular, Balagangadhara 1994: 149–55, 267–70).

Part of the story of the spread of the dominant account of religion is to do with the historical contingency of colonialism and Western dominance in the world. We can bracket away the fact that Christianity also spread through proselytization in Europe and other parts of the world and continues to do so. Western intellectual domination has ensured that secularized knowledge about religion has become widely accepted even among non-Western intellectuals. The spread of the pre-theoretical idea of the universality of religion is only part of a wider acceptance of the Christian theological account of human beings in its secularized form. Although one may speak of wide ‘acceptance’ in non-Western contexts, there remains the question of whether and how non-Westerners are able to access the experiences which the concepts embedded in the account carry with them.

As the West expanded its influence, newer religions were found and documented in different parts of the world. Greater ‘religious diversity’ was thereby created. A few centuries ago, four main religions were believed to exist: Judaism, Christianity, Islam, and the heathen religion. As travel, exploration, missionary activity and colonialism broadened, unrelated phenomena were selectively brought together creating specific religions out of the general category of heathenism. The very process by which this occurred is interesting because it paid attention to practices, not as traditions grounded in ancestral practice, but as signifying beliefs requiring philosophical or doctrinal justification. In so doing, Westerners were re-enacting an older criticism directed by Christians against pagans in the Roman Empire. In India, for instance, Hinduism, Buddhism, and Jainism were identified. Elsewhere in Asia, Taoism, Confucianism and Shintoism were added to Buddhism. Since religion, and specifically showing that the heathens had false religions, required the identification of doctrines, which were assumed to be found in texts, texts were studied and doctrines found in them. Out of this activity were ‘created’ religions in Western universities. However, ideas about these manufactured ‘religions’ were then more widely dispersed and native populations in different parts of the world also began to talk as if they had religions as per the Western descriptions, suitably modified. Since such ‘constructions’ are part of a more general Orientalism, which can be understood as the expression and patterning of the Western experience of the Orient, these new heathen religions have an ‘ontological’ status only in the Western experience, but they cannot become part of the experience of people within non-Western cultures.

Current discussion and legal decision making regarding religious diversity in the world takes place on the terms that the Western ‘constructs’ have some ontological status. Theories in the human sciences assume their existence. Orientalism and the social sciences thus work hand in hand: the ‘facts’ of one are presupposed by the other. The formerly colonized, or in other ways

6 See, in particular, the discussion by Balagangadhara 2012: 48–55.
subject to Western dominance, repeat the Western accounts. Although details about their characteristics are often discussed and disputed, with non-Western intellectuals now making them more elaborate and adding fashionable ‘nuances’, the basic structures remain in place. Although newly furnished data may embellish the record of native ‘religions’, the terms of description are already established according to the experience of the West, not of the non-West. As Western countries further diversify through immigration and the establishment of non-Western populations, a similar dynamic is reproduced in these Western countries (Balagangadhara 2012: 228–43). The same questions about ‘religious diversity’ come up within Western legal systems, as they have to deal with non-Christians.

However, because it is starting to look as though religion is not a universal and cross-culturally neutral category through which one can refer to and explain phenomena in the world, one response to the challenges which the secularized-theological or the Christian-Orientalist account of religion faces is to say that the very notion of religion itself is less useful and should perhaps be dispensed with (see Fitzgerald 2000). The discursive turn is concerned with the use of the term ‘Hinduism’ by Indians, but it is impossible to say what ontological claims such studies can make about the status of Hinduism. If the term Hinduism is an experiential entity for the West but has no ‘existence’ beyond that except that Indians absurdly repeat it, to what end do we study the use by Indians of the term? Such responses avoid or sidestep having to grapple with the problem of religion as an actual phenomenon in the world.

Balagangadhara comes to his own theory of religion after his critique of the secularized-theological framework (see in detail in Balagangadhara 1994: 103–40). He deals with religion as a phenomenon in the world. He proposes that religion is an explanatory intelligible account of both the Cosmos and of itself. Its explanatory intelligibility consists of bringing together two types of explanation, the causal and the intentional. The cause of the Cosmos is the Will of God. All that was, is and will be is an expression of His Will. We can know God’s intentions by studying the Cosmos and His revelation. According to Balagangadhara’s theory, the Semitic religions – Judaism, Christianity and Islam – are thus religions. The theory explains the rivalry among these religions inter se and why they treated the heathen traditions as rivals on the same (doctrinal) terms. It also explains why the pagan Romans and Indians did not consider others as rivals.

Balagangadhara is also able to explain the necessity of faith, worship and truth within religions. These are not theory-neutral transcultural phenomena, as contemporary writing on ‘religiosity’ tends to assume. A religious person experiences the Cosmos as both a causally explainable and an intelligible entity, so that he experiences his life as a part of a bigger plan. To be religious means believing that human life and death have a meaning and a purpose. Although religion was not invented to answer questions about the meaning and purpose of life, these questions come into being within the framework of religion; religion generates them. The explanatory intelligible account which religion is means having faith that one is part of the intentions of God. Faith and intolerance are two faces of the same coin because (the one) truth is so important to religion. Religious truth, being God-given, is independent of human knowledge. For human societies, it is God whose purposes both the Cosmos and the account that religion is embody. God’s message is addressed to humanity, postulating a relation between humanity and God, telling humankind what God’s purpose is and, hence, what the purpose of humanity is. If faith involves accepting

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7 The aims of the network project ‘The Public Representation of a Religion called Hinduism’ (see http://www.arts.manchester.ac.uk/hinduism/projectdetails/index.htm) provide a clue of the confusing ontological claims of such discursively oriented research.
the explanatory intelligibility of the Cosmos and the account that says that that is so, worship affirms it and sustains faith.

Balagangadhara also addresses the frequent tendency to replace ‘religion’ with ‘worldview’. He shows that the best candidate for worldviews is also religion, and so the use of worldview as a universal indexes the secularization of the claim that religion is a universal. It does not hold up when faced with Asian traditions, which have no worldview to call their own. The multiplicity and inconsistency of stories of ‘creation’ in Asian cultures, and the lack of their claim to being ‘true’ in the way the Semitic creation story is, is testament to that (Balagangadhara 1994: 357–71). At a sociological level, they lack identifiable and standard worldviews, authorities for the resolution of interpretive conflicts, a source of excommunication, and organizations for the transmission and propagation of any worldview (Balagangadhara 1994: 371–9).

If we accept Balagangadhara’s scientific account of what religion is (and no better theory has yet been made available), it looks as though religious diversity consists of the three Semitic religions. Rather than speaking of religious diversity therefore it may be more advisable to speak of cultures that have religion: Judaism, Christianity or Islam. It means, conversely, that other cultures do not have religion. The so-called ‘religions’ that have been constructed through the generalization of the Western account over the last few hundred years should be dropped since they are intelligible only to Westerners. Starting with an assumption that a chapter on religious diversity can address cultures worldwide is therefore an impoverished strategy. It cannot, because not all cultures have religion.

**Western law, secularization, and false religion**

The hard work of rethinking all the taken-for-granted religious assumptions behind legal structures can begin from this point. So many things open up for investigation in a new way because of the debunking of the secularized theological account of religion. As a first task we can think anew about Western legal systems as being constituted by religion. This task of seeking a re-examination of the theological backdrop of legal ideas is not dealt with to any extent here. But it is evident that Western legal systems have in their deep structure assumptions and concepts that closely rely on Christian theological ideas for their intelligibility. Basic ideas, say, about family law or criminal law are based on generalized or reworked Christian theological concepts. The idea of human rights has already been mentioned as bearing the strong imprint of Christian anthropology. Expressed in a different way, these ideas, concepts, assumptions etc. make sense if their theological background is taken into consideration. They may also retain a wider cultural intelligibility within Western culture in that when Westerners discuss such topics, what they discuss makes some sense to them.

As a second task, we might consider what happens to the theological ideas when they meet non-Western cultures. Non-Western cultures have been experiencing an inflow of such ‘legal transplants’ from Western culture for several centuries and, as noted, there is now the interesting diasporic context within Western jurisdictions through which similar processes can be seen in their microcosmic dimensions. Third, a more specific job would be to analyse the functioning of those structures that are said to specifically deliver security, protection or accommodation.

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8 Although he does not make this precise point, Berman’s work discusses the close tie between Christianity and the Western legal tradition: Berman 1983; Berman 2003.

9 See, for instance, Whitman forthcoming 2014 on criminal law; Antokolskaia 2006.
of religious diversity within Western jurisdictions, through principles or ideas such as secularism and religious freedom. In the following sections, I briefly pursue the second and third of the tasks mentioned here, through a discussion of two case studies occurring in culturally diverse contexts, to illustrate the important and interesting issues which arise when the religious framework of the Western legal tradition interacts with non-Western cultures. In so doing, I take up the challenge of the second task outlined above, and illustrate it by using the case study of the legislation against caste discrimination in the UK. I take up the third task by introducing a court case from California where a decision had to be made about whether the teaching of yoga in state schools violates the non-establishment provisions of California and US laws. In particular, I make the case that these illustrations provide grounds for a hypothesis that Western law acts as an agent in the secularization of the key claim of Christianity about the falsity of pagan traditions, and in our specific cases, the Indian traditions. Far from the secular law and freedom of religion acting as mechanisms for the neutral management of cultural diversity, they incorporate key Christian claims to reproduce the psychic violence against Indian traditions.

**Caste discrimination law in Britain**

The latest action in the UK enacting a legal provision against caste discrimination became a reality in April 2013. The government accepted that ministers would be obliged to implement the provision inserted at the last minute in the Equality Act 2010, adding caste as another ‘protected characteristic’. The original 2010 Act had merely allowed the government to extend it to caste, while the 2013 amendment obliges the government to do so. The government, not wholly convinced of the need to extend a piece of legislation that it has some scepticism about already, bought some more time, pending a study commissioned by the Equality and Human Rights Commission. Yet the 2013 amendment to the Equality Act, which was provoked by a House of Lords anti-caste lobby who forced the government’s hand, had wide support among parliamentarians. The Lords voted in its favour twice and, in the end, the government did not resist, given ambivalence within its own coalition, while the opposition Labour Party adopted a blanket pro-equality stance, supporting the anti-caste provision.

The emotions stirred by the issue of caste, and a measure of self-righteousness, have a role to play in shaping the discussion but, more critically, there is confusion as between the Western ‘construction’ of caste and its intelligibility to Indians. Indeed, there is mutual unintelligibility when looking across from the Indian and Western cultural frames at the other. As noted, the Western culture is based on religion, which constitutes it, while Indian culture is a traditional culture. Although the two frames of Western and Indian cultures can be used when considering the question of caste and discrimination, the dominant frame is the Western in so far as it asymmetrically determines the shape of the contemporary discussion so much so that even arguments against the caste discrimination legislation have to take place within the Western normative framework.

The specific quality of the Western culture that most immediately concerns us here is that it works on the basis of norms, and legislation proceeds according to underlying normative commitments. For instance, it postulates that everybody is equal and so there ought not to be any discrimination on grounds of caste. This normative framework is, however, legally further circumscribed in as much as the Equality Act deals with discrimination in certain delimited

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10 For the Christian roots of the idea of equality, see Waldron 2002.
spheres. The Equality Act refers to certain areas of life including employment, professions, service provision, education and housing. But these are often fused with other concerns about caste specific preferences in marriages or entry to and control of temples. One may say, meanwhile, that Indian culture enables neither normative ethics nor equality as an ethical norm to be made sense of. Distortions inevitably occur and, given the anti-traditional nature of the Western ethical order, Indians can legitimately feel under threat, although they may not be able to pin down what that threat consists of and why they feel threatened.

The push to include caste in the 2010 Act came from lobby groups linked to Churches that have a campaigning agenda, which appears to relate more to the Indian situation than to Britain. Briefly put, the agenda appears to be that efforts made towards gaining recognition for Christians in jobs and education reservations in India could bear greater fruit if it could be shown that Dalits, a political term employed for ‘low caste’ people, enjoyed the support of the British legislature. The legislative move in Britain may also be meant to boost an international campaign within UN organs and the EU to have caste discrimination recognized in some form. Proponents of the legislation, however, appear to portray the Indian situation incorrectly, arguing for there to be ‘very firm legislation in place, as there is in India, prohibiting discrimination in the areas of employment, public education and public goods and services’. Indian legislation, which varies from state to state, applies reservations for jobs and in universities and otherwise criminalizes prohibitions on access to facilities such as water wells, but there is no general anti-discrimination law applying to the fields to which the British Equality Act does. The efforts of Churches to proselytize in India appear directed more intensely among Dalits with a reportedly large proportion of Christians said to be Dalits. So the campaign for legislation in Britain came not from any significant section of the Indian communities, but from select lobby organizations, which put up a case that caste discrimination exists in Britain.

Well before the caste discrimination legislation came onto the scene there was a pre-existing, tried and tested model of anti-discrimination law to which different grounds have been added successively over the years. In the case of discrimination on religious grounds, legislation in Britain was largely introduced as a result of a persistent campaign by Muslims. There was the European legislation – Council Directive 2000/78/EC – which obliged Member States to adopt laws against religious discrimination restricted to employment. That Directive was implemented, but Britain went further, making legal action possible for religious discrimination also in service

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12 Indeed, Westerners also do not see why Indians, or Hindus, should be insulted at the prospect of a law against caste discrimination. See e.g. Lord Deben, House of Lords Debates, 22 April 2013, col. 1309.
13 The term ‘untouchables’, also a political term, is used in place of Dalits by proponents of the legislation. See e.g. Lord Harries of Pentregarth, House of Lords Debates, 11 January 2010, col. 334 and 22 December 2010, col. 1099.
14 Lord Harries of Pentregarth, House of Lords Debates, 22 December 2010, col. 1099, italics added.
15 On the contrasts between India and Britain at a time when the caste discrimination was not yet made an issue in Britain, see the still-relevant essay, Menski 1992.
16 Among the indications of the spuriousness of the case, which were not lost on the various Hindu and Sikh organizations challenging the legislation, is the invocation of the size of the Dalit population affected by caste discrimination in Britain, with estimates ranging from anywhere between 50,000 and 200,000 (Lord Avebury, House of Lords Debates, 11 January 2010, col. 332, also citing the lack of detailed research), to 500,000 (Lord Harries of Pentregarth, House of Lords Debates, 11 January 2010, col. 335). Waughray (2009: 186) cites the figure from the Dalit Solidarity Network UK at 50,000–150,000.
17 Meer 2010. Legislation against religious discrimination had been introduced earlier in Northern Ireland.
provision, professions, housing, and education via the Equality Act 2006. This regime continues in the current Equality Act 2010. Different kinds of exceptions have also been made in the legislation for sex, disability, religion or sexuality, in order to limit the scope of actionable discrimination. So, in the past, legislators carefully considered the extent to which the public interest required the scope of legal provisions against discrimination on a particular ground to be reduced or enlarged. While there are differences of view as to propriety of exceptions or special applications to anti-discrimination law, it is important to notice the fact that they exist, tailored to the type of discrimination one is talking about. Religion, for example, enjoys very large exceptions that allow certain services to continue to be provided according to criteria that distinguish according to religion. This is understandable in a culture such as the United Kingdom or the West, which is constituted by a religion. Not to provide broad exceptions for religious conscience may create havoc in society because, suddenly, all types of highly disruptive claims may be coming forth.18

Not only had no debate taken place about the propriety of introducing caste as a ground for discrimination, still less had it been considered what the proper scope of any such legislation should be. The issue of legislative coverage, in so far as it is aimed at curbing any mischief is ambiguous. A government commissioned report published by the National Institute for Economic and Social Research (NIESR) showed no clear case for applying caste discrimination legislation. It cited temples and marriage as being among the concerns (Metcalf and Rolfe 2010), although a serious case cannot be made for extending anti-discrimination law to these areas if the current scope of the anti-discrimination law is to be used as a benchmark. Pro-legislation academics argue that existing evidence, including the reports issued by the pro-legislation lobby and the report by NIESR, provide conclusive evidence of the need for legislative action.19 Sometimes, the impression is given that the aim is to eradicate caste in general, not surprising, given the default intuition that caste is an inherently discriminatory and immoral institution.20 Many Hindu, Jain and Sikh organizations have said they were bypassed in consultations on the legislation. Some legislators showed great confidence in their ability to see the mischief and act upon it. Some said that a single case of caste discrimination was enough to act.21 That the NIESR study had not supported the case that caste discrimination was a problem was subverted by asserting the opposite.22 Another said research was

18 See, e.g. Equality Act 2010, Sch. 23, para. 2.
19 See Waughray 2012, who is vague about the types of discrimination which any legislation could work to correct.
20 For instance, Labour MP Kate Green, shadow spokesperson for Equalities, noted: ‘Everyone agrees that caste has absolutely no place in our society’ (House of Commons Debates, 23 April 2013, col. 791).
21 Labour MP Kate Green: ‘if there is even one case of such discrimination, proper action must be taken and there must be proper access to redress’ (House of Commons Debates, 23 April 2013, col. 791). To similar effect, see Lord Deben, House of Lords Debates, 22 April 2013, col. 1310.
22 Lord Avebury, House of Lords Debates, 22 December 2010, col. 1098, where his interpretation comes through in the following question: ‘My Lords, does the Minister agree that the research shows that discrimination based on caste does occur within the areas covered by the Act, and that it would be reduced if Section 9(5) of the Act was activated?’ Waughray (2012) chooses to explicitly affirm the NIESR report as having established a need for legislation. Lord Dholakia, the only Asian peer in the House of Lords to have maintained a stance against the legislation noted, ‘However, in essence, there is a lack of evidence on caste matters. The report produced by the national institute [NIESR] clearly acknowledges that there is no evidence to suggest the existence of large-scale discrimination in this country based on caste . . . having acknowledged that the available evidence did not indicate that caste discrimination was a significant problem in Britain in the areas covered by discrimination
not required. A member of parliament for a Leicester constituency revealed since the passing of the caste discrimination amendment in April 2013 that ‘I have never seen any evidence of caste discrimination in Leicester’.

The background framework to the Western understanding of caste means that evidence is not required for legislating against it because its immorality is clear. European travellers and missionaries from early on told stories of how the Brahmans in India prevented their followers from converting to Christianity (Gelders and Balagangadhara 2011; Balagangadhara 1994: 86–9). As such, they were the evil priests who kept their people languishing in idolatry. The European missionaries’ problem with Indian society was not with socio-economic equality, but with the religion the people followed. It fell upon the European Aryans with their superior religion, Christianity, to bring new civilizing light to the parlous moral state of the Indians. Orientalist writings depict the Brahmans and those who followed them because of the religion they espoused, the language they spoke, and institutions and laws they established, as one people, race or nation, the Aryans. Others, upon whom the ‘Brahmanical’ religion and laws were imposed, being a different people, were excluded from the laws and institutions of the Hindu Aryans. This was backed up by the Aryan intrusion theory and the idea that India’s population is composed of dominant and subordinate races. Secular theorizing of the caste system and the corruption of Indian culture and society accepts these Christian-Orientalist accounts as factual although they were established by Christian hatred of Indian idolatry and the inability to convert Indians in large numbers. Just as religions like Hinduism have a chimerical, fictional character so also the caste system has no ontological status in Indian culture. It is in that sense in which it is a ‘construction’ enabling Westerners to make sense of Indian culture (Balagangadhara 2012: 44–5).

Prior to the Second World War, the notion of an Aryan race was advocated widely in European intellectual circles and, although it suddenly disappeared from mainstream Western thought after the genocide during the Second World War, it is routinely invoked when India’s population and caste system are discussed. It is worth noticing how the framework of Indian corruption has been internalized by some Asian peers in the House of Lords. This is Lord Singh of Wimbledon:

Caste has a very precise meaning attached to practices associated with the Hindu faith. It has its origin in the desire of the Aryan conquerors of the subcontinent in pre-Vedic times to establish a hierarchy of importance, with priests at the top followed by warriors, those engaged in commerce and then those engaged in more menial tasks. The conquered indigenous people were considered lower than the lowest caste. Accident of birth alone

legislation, Parliament proceeded to accept an amendment to the Equality Bill to include caste as an aspect of race by a ministerial decision’ (House of Lords Debates, 22 April 2013, col. 1312).

Lord Lester of Herne Hill, who had then tabled an amendment to introduce descent into what was the Equality Bill noted: ‘I simply do not understand why research is needed. The Minister has agreed that, even if there were one case of the kind that I described, that should be unlawful because it is wrong in principle’ (House of Lords Debates, 11 January 2010, col. 344).

E-mail communication from Jon Ashworth, MP, 5 June 2013. The observation is significant given that the density of the combined Indian, Pakistani, and Bangladeshi population in Leicester is some six times the average in England and Wales.

This account relies substantially on a paper the author was provided by Marianne Keppens, Doctoral researcher at the Research CentreVergelijkende Cultuurwetenschap (Comparative Science of Cultures), Ghent University, Belgium.
determined a person’s caste. Sadly, thousands of years latter [sic], and despite legislation by the Indian Government, which has been referred to, this hierarchy of importance still lingers on.\textsuperscript{26}

Interrupting Lord Singh’s erudite address, Baroness Flather offered her insights:

The caste system was established very early in Hinduism. The Sanskrit for caste is ‘varna’, which is also the word for colour. The noble Lord mentioned the Aryan conquerors, who were supposed to be lighter skinned. They wanted a division not only on the basis of who would do what but on the basis of colour.\textsuperscript{27}

The link between an Aryan intrusion, the caste system, and different Indian races seems quite solidly in place even among those who are supposed to, in some special way, ‘represent’ and ‘speak for’ the British-Indians. A combination of Christian-Orientalism and ‘colonial consciousness’\textsuperscript{28} shows how any discussion on the caste system, even by Asians, presupposes the terms established in the Western culture, terms that inscribe immorality in the heart of all Indians (Balagangadhara 2012: 99–112).

**Yoga in Californian schools**

A case arose recently in the San Diego Superior Court challenging the teaching of yoga classes to school children. The Encinitas school board had reached an agreement with the Jois Foundation to receive a grant to fund the teaching of yoga at the district’s schools, and the programme was eventually rolled out to all of those schools. The Jois Foundation was set up by the descendants of Sri K. Pattabhi Jois to promote Ashtanga yoga practice and philosophy developed by him in Mysore, India in the early twentieth century. In *Sedlock v. Timothy Baird Superintendent*, some parents who claimed their children were being subjected to harassment, discrimination, and segregation based on their religious beliefs sued the Encinitas school board on various grounds.\textsuperscript{29} The lawsuit was supported by the National Center for Law and Policy, a legal defence organization that focuses on, inter alia, the protection and promotion of religious freedom.

The grounds of challenge to the school district’s actions boiled down to the argument that the district was acting in breach of California law in using state resources to prefer and endorse Ashtanga yoga, which promotes religious beliefs, while disfavouring and discriminating against other religions. The charge was that Ashtanga yoga is a very religious form of yoga that promotes and advances religion, including Hinduism, Buddhism, Taoism, and Western metaphysics. In fact, most of the petition, aided by the expert evidence of an Associate Professor of Religious Studies at Indiana University, Candy Gunther Brown, claimed that yoga practices were associated most closely with Hinduism. Judge John S. Meyer, who heard the case, ruled on 1 July 2013 that Brown’s evidence was biased, that the yoga classes had the secular purpose of promoting health

\textsuperscript{26} House of Lords Debates, 4 March 2013, col. 1304.
\textsuperscript{27} House of Lords Debates, 4 March 2013, col. 1305.
\textsuperscript{28} ‘Colonial consciousness’ in a term coined by Balagangadhara (2012: 95–120) to refer to the persistence among Indian intellectuals of the framework produced by Orientalism beyond formal decolonization despite its unsustainability on rational grounds.
\textsuperscript{29} Case No. 37-2013-00035910-CU-MC-CTL, 1 July 2013.
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and welfare, that an objective child would not perceive that religion was being promoted in the teaching of yoga, and that the school district had complete control over the classes and could take action if warranted.

The main legal instruments relied upon by the petitioners were parts of California law including its constitution and legislation on schooling. As Judge Meyer observed, the kernel of the dispute revolved around the First Amendment of the United States Constitution, which provides in the relevant part: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ’ Although the First Amendment was not directly relied upon by the petitioners, the judge’s reference to it might have been a shorthand way of pointing to a very similar provision within Article 1, § 4 of the California Constitution which reads in part: ‘Free exercise and enjoyment of religion without discrimination or preference are guaranteed . . . . The Legislature shall make no law respecting an establishment of religion . . . .’ Other provisions in California’s Constitution back these up. Thus, among the other provisions relied on were the constitutional prohibition on public money being spent on the teaching of any sectarian or any denominational doctrine being taught in state schools (Article 9, § 8), and the prohibition on any school board granting anything in aid of any religious sect, church, creed, or sectarian purpose (Article 16, § 5).

The relevant parts of US and California law summarized above evidently enable claims to be brought where there is state support for religious activity, specifically, in the state school system and where there is interference with the freedom of religion. In fact, these two strands are intimately connected. Although they are ostensibly premised on maintaining a separation between religion and state, the remarkable fact is that the very basis of this kind of law is of Protestant Christian, and thus religious, origin. In fact, the ideas of a wall of separation between church and state and the freedom of religion make no sense outside of that framework.

As is widely known, the Jeffersonian vision of the wall of separation and religious freedom was instrumental in the crafting of the first amendment to the US Constitution. De Roover and Balagangadhara have shown that these concepts referred back to the Protestant version of the Christian idea of the two spheres of human existence (De Roover and Balagangadhara 2008). The theology of Christian liberty spoke about the division of human life and society into spiritual and temporal realms, which corresponds to the understanding in Christian anthropology that each individual human being consists of a soul and a body. Government over the body is the sphere of political coercion, while government over the soul is the realm of religious liberty, to do with the individual and God alone. In fact, the same backdrop finds expression in Article 9 of the European Convention of Human Rights as the freedom of thought, conscience and religion. Europeans are, however, more ambiguous about this norm because the Protestant account has infiltrated into European legal systems in much more diverse forms, partly because the Reformation culminated in a more varied set of Church–state arrangements. While the claim in the Lautsi v. Italy case can be explained as part of the secularization of the accusation of idolatry by Protestants against Catholics, in its various stages of litigation, the case produced a diversity of responses illustrative of those prevailing in Europe today.30 US law meanwhile has a strong Protestant anti-establishmentarian underpinning.

The freedom of religion that this Protestant framework assumed was, as noted, underpinned by the necessity of preventing interference in the relationship between God and the individual

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30 Case of Lautsi and Others v. Italy, Application no. 30814/06, judgment of 18 March 2011, Grand Chamber of the European Court of Human Rights.
The Protestant critique of Catholicism had brought this problem out quite sharply because, argued Protestants, worship could not be true given the intercession of priests who gave human direction in a sphere that should concern only the individual soul. The complaining parents in Sedlock could therefore, consistently with this framework, invoke the applicable legal provisions and argue that the involvement of a secular, human authority in matters of conscience ipso facto interfered with their children’s freedom of religion. They argued that the Hindu beliefs, which were expressed by the yoga postures and practices being taught, were what created the interference in the freedom of religion of the children whose parents removed them from the classes. There is a lurking accusation here, not fully expressed, that the practices were objectionable because they were Hindu and therefore expressive of what, from a Christian perspective, is a false religion. In keeping with contemporary secularized discourse, this is never fully articulated as a problem although, if the parents were consistent in their avowed beliefs as Christians, they would consider Hindu practices as embodiments of false beliefs and yoga as a form of false worship. As Balagangadhara shows, this conforms to a pattern set in train within religious cultures whereby belief is attributed to practices, and practices are seen as enacting beliefs (Balagangadhara 1994: 31–53). As one of the objecting parents is quoted as having said, ‘There’s content even in the movement, just as with baptism there’s content in the movement’ (New York Times 2012). In fact, the parents need not even say as much because the legal framework that they invoke already caters to the problem of false worship.

The options for the judge were then to hold that the yoga classes violated the applicable legal framework or to hold, as he did, that the practices taught in the classes were secular. This brings into the frame the role that the secular has performed within the theological framework of Christianity. Many people have come to think the secular can be a neutral space for co-existence within a plural society. Such a construal overlooks the theological underpinning of the ‘secular’. Balagangadhara further shows how the distinction between the religious and secular is drawn by and within a religion (Balagangadhara 1994: 267–70, 444–5; see also De Roover 2011). Within such a theological framework, the secular is a zone where practices of a false religion, cleansed of its idolatrous practices, are assigned as an alternative to assigning to the place of true religion. Perhaps those enunciating ‘Christian yoga’ are engaged in doing the latter (Malhotra 2010). That is, they are engaged in purifying it for Christians to adopt as a religious practice. Judge Meyer in Sedlock appears to have done the former, ostensibly persuaded by the carefully calculated arguments submitted by the defendants that the yoga classes had had the cultural and religious elements removed from them, with the names for various asanas (postures) having been substituted with other terms, and Sanskrit terms and mantras having been dropped.

Bearing in mind that the framework of state–church separation and freedom of religion in the United States, and elsewhere, is underpinned by a Christian theological framework helps to sharpen our focus on how disputes on religion are being handled. The Sedlock case provides one example of what occurs when a Western framework is applied to read practices from the pagan world. Such practices appear to get altered in the process of their secularization because some marks of idolatry have to be removed to make them conform to the demands of

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31 The complaint by the petitioners often refers to ‘Hinduism’ and ‘Hindu religious goals’ being promoted by the yoga practices, and refers to ‘parents and children who had objections to Hindu religious beliefs and practices’.

32 For the argument that judges in the United States have to do a form of Protestant theology when deciding religious freedom cases Sullivan 2007.
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secular-religious law. Currently, we have no definite answers on how we can get beyond such conceptually and theoretically constricted legal structures. But questions are certainly begged about the propriety of the imposition of a Christian anthropological framework in light of the fact that multiple cultural groups inhabit Euro-American societies.

Conclusion

This chapter has discussed recent work, notably by Balagangadhara, that sets up a theory of religion that displaces the Christian theological account of religion. In secularized form that theological account had become so generalized that it was hardly possible to imagine what an alternative would look like. Part of the dissemination of that account has been done in the human sciences, which have proceeded on the assumption, a ‘fact’ within their theories, that religion is a cultural universal. Balagangadhara exposes that and introduces another theory, which says that religions are what the Semitic religions are. Religious diversity cannot be spoken of in the universalistic terms that the secularized-theological account would have compelled. One of the interesting things which Balagangadhara’s theory allows us to do is to discuss a kind of cultural diversity according to which some cultures have religion and others do not. It also allows us to further expose what happens when such different cultures come together. This chapter has shown some illustrations of such encounters where Western law is in a dominant position and can be seen to be executing the dynamic of secularization of Christianity. Western law encounters the Indian traditions by continuing, in secular guise, the idea that pagan traditions are false religions, and it subjects them to reform as such. Although this chapter has not dealt with cultural encounters of other kinds, it can be seen as step towards research that works to expose the religious background of legal systems and the consequences of their encounter with different cultures.

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