Constitutional secularism: then, now and the future

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RELIGION AND THE LAW

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Tony Meacham[1]

Introduction: what is secularism?

The word 'secularism' in a constitutional context has many understandings by the state. As Dieter Grimm explains:[2]

> ''There is a militant secularism that denies religious beliefs any public role and insists on their belonging strictly to the private sphere. There is also a secularism that separates church and state: the state accepts the role religion plays in society, but is prohibited from promoting religious activities or giving material or immaterial subsidies to religious communities. There is finally a type of secularism that recognizes religion as an elementary human urge that seeks public expression, an urge that the state not only has to respect, but also must protect and maybe even promote - altogether the opposite of a secular fundamentalism.''

Particularly over the last half century, supreme courts in various jurisdictions have examined what *their* secular paradigms have meant in practice when examining the state's treatment of intersections between the state and religion in the public square. That period has given scholars an opportunity to look back and consider what trends have come out of those court decisions, and what public policy should be from now and reflect on what has been learned.

This article will consider four issues. The first will examine the views of those who, with the benefit of hindsight, have analysed secular constitutional states that have been secular for a significant period and consider that the purpose for which the state has been made secular has failed, and a revised model is needed. The second will consider the views that secular constitutions and liberal democracies have evolved to adapt to modern challenges and remains as a result an effective model of governance. The third part of this paper will look at how secularism may be improved, and perhaps be changed to address the critics' perceptions of irrelevancy. The last will look at issues that arise when the state becomes overzealous in its perception of how secular the state ought to be, particularly when the perceived paradigm is a strict separation of religion and state.

Contemporary secularism: did Holyoake's vision simply evolve into a new form?

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[2] Dieter Grimm, 'Conflicts between general laws and religious norms', in Susanna Mancini and Michel Rosenfeld (eds.) *Constitutional Secularism in an Age of Religious Revival* (2014, Oxford University Press), 6.

Modern secularism, at least in the Western sense, is usually attributed to George Jacob Holyoake[68] after his use of the term first in his 1871 book *The Principles of Secularism Illustrated,*[34] and in other writings.[5] Towards the end of his life, Holyoake published his memoirs, aptly titled *Sixty Years of an Agitator's Life*. In it, he put his last word on what he felt secularism to be. He said that[6]

> ''My argument was that a man could judge a house as to its suitability of situation, structure, surroundings, and general desirableness, without ever knowing who was the architect or landlord; and if as occupant he received no application for rent, he ought in gratitude to keep the place in good repair. So it is with this world. It is our dwelling place. We know the laws of sanitation, economy, and equity, upon which health, wealth, and security depend. All these things are quite independent of any knowledge of the *origin* of the universe or the *owner* of it. And as no demands are made upon us in consideration of our tenancy, the least we can do is to improve the estate as our acknowledgement of the advantage we enjoy. This is Secularism.''

The meaning of secularism has almost as many meanings as those whom one might ask for it.   Jawaharlal Nehru, the first Prime Minister of India,[72] once became particularly frustrated with the use and abuse of the term 'Secularism':[7]

> ''Another word is thrown up a good deal, this secular state business. May I beg with all humility those gentlemen who use this word often to consult some dictionary before they use it?''

Not much has changed since. Indeed, as the concept has travelled, its meaning has varied. As Bankim Chandra Chatterji noted in the nineteenth century, "You can translate a word by a word, but behind the word is an idea, the thing which the word denotes, and this idea you cannot translate if it does not exist among the people in whose language you are translating."[8]

So, where does the understanding of secularism currently stand, and is it still consistent with Holyoake's principles? In considering where secularism fits in the modern world, Robert Audi observed that "[t]he history of the Western world has progressed from a time when the state was taken to represent the church to an age in which most governments are committed to at least some degree of secularity."[9]

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[3] See T.N. Madan, 'Secularism in Its Place', (1987) 46 *Journal of Asian Studies* 747 and Nehaluddin Ahmad, 'The Modern Concept of Secularism and Islamic Jurisprudence: A Comparative Analysis', (2009) 15(1) *Annual Survey of International & Comparative Law* 75.

[4] George Jacob Holyoake, *The Principles of Secularism Illustrated* (London Book Store, London, 1871).

[5] George Jacob Holyoake, *Origin and Nature of Secularism* (London: Watts & Co, 1896), 50.

[6] George Jacob Holyoake, *Sixty Years of an Agitator's Life* (T. Fisher Unwin, 1896),294

[72] 15 August 1947 – 27 May 1964.

[7] Report 1967:401 *Constituent assembly debates official reports*, Vol. II.

[8] Quoted in T. N. Madan, 'Secularism in its Place', in Rajeev Bhargava (ed), *Secularism and its Critics* (Delhi: Oxford University Press, 1998), 308.

[9] Robert Audi, 'Religion, Politics and the Secular State' (2014) 64 (1) *The Philosopher's Magazine* 73, 73.

Trying to determine what secularism means to the world today is like Segal's law.[10] Look to one jurisdiction for definition, there is usually some consensus. Look at others and the answers are all different. Maclure and Taylor see it in broad terms as the management of moral and religious diversity in contemporary society. That diversity they note includes issues such as *Sharia* in family law and polygamous marriages in Canada, headscarves in France and Hindu nationalists in India. They see however that secularism is an essential part of any liberal democracy that adheres "to a plurality of conceptions of the world and of the good …"[11] Graeme Smith sees contemporary secularism as "the latest expression of the Christian religion…secularism is Christian ethics shorn of its doctrine. It is the ongoing commitment to do good, understood in traditional Christian terms, without a concern for the technicalities of the teachings of the Church."[12]

Secularism, however, has also touched the Eastern world, but has been adapted for local use. Priya Kumar explains that, in the Indian context, secularism has "expanded from its traditional concern with emancipation from religion or the privatization of religion to a far more wide-ranging and heterogeneous agenda in postcolonial India. It has been called upon to resolve a number of thorny social and political issues, including primarily (but not only) the possibility of multi-religious and multicultural coexistence within the nation and the complex question of the place of religious minorities in a liberal democratic state."[13] Unlike many constitutions, in India one cannot just point at one provision in which secularism is enshrined. In response to a suggestion to remove the word from the preamble of India's constitution, Suhrith Parthasarathy explains that "Our Constitution doesn't acquire its secular character merely from the words in the Preamble, but from a collective reading of many of its provisions, particularly the various fundamental rights that it guarantees."[14]

Many jurisdictions indeed have some degree of secularity, but more importantly, usually a different secularity, different often from their neighbours or their colonial predecessors. On this Madhu Purnima Kishwar asked recently,[15] "Do we want to create a world in which everyone thinks alike? A world in which there is no space for divergence of views or foolish people?" Kishwar wrote in the context of a Hindu Temple insisting on the religious freedom to determine who may enter a temple. She observed that translating an originally European concept into one that jurisdictions elsewhere can take on board as their own has proven to be difficult, but not impossible. However, the point she makes is that an overzealous 'secularism' carries

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[10] An old saying that states: "A man with a watch knows what time it is. A man with two watches is never sure." (Arthur Bloch, *Murphy's Law* (Perigee, New York, 2003)).

[11] Jocelyn Maclure and Charles Taylor (trans. Jane Marie Todd) *Secularism and Freedom of Conscience* (Harvard University Press, 2011), 1.

[12] Graeme Smith, *Short History of Secularism* (I.B.Taurus, London, 2007), 2.

[13] Priya Kumar, *Limiting Secularism* (University of Minnesota Press, 2008), 1.

[14] Suhrith Parthasarathy, 'Understanding secularism in the Indian context', The Hindu, January 2, 2018. https://www.thehindu.com/opinion/lead/the-secular-condition/article22347527.ece.

[15] "Don't like this temple? Choose another." *The Hindu*, January 17, 2013. http://www.thehindu.com/opinion/op-ed/dont-like-this-temple-choose-another/article4313507.ece .

with it intolerance for the unconventional and often an element of hypocrisy.[16] On this latter point I expand further in part IV of this paper.

Holyoake did not envision secularism to be a tool to be used by individuals, organisations or the state bluntly against those who dissent against orthodoxy. Rather, it was intended as a means for all participants in the public sphere to have their place. In particular it was not intended to be a political panacea for all ills nor an alternative orthodoxy used to supplant another. Holyoake spent much of his time related to Secularism defending it against accusations of hostility to religion in the public sphere, and in general. Accordingly, most of his speeches and writings are less polemical on his thoughts and more efforts to get across the idea that secularism is not anti-religious, or indeed seeking to limit religion. The thrust of his views is that secularism gives equal access to all players in the public sphere, but not all need equal access, and some may play a greater role in contributing to public policy, or none. A constitution is a mirror of a society and its values, and many such as those in this paper are looking to see if the values stand, or perhaps need tweaking. More than ever, when they discuss secularism, as seen in the views of the commentators considered, they go back to where their secular values originated, and many acknowledge the work and thoughts of George Holyoake as a man who could offer an alternative to the state or religion wresting control of the public space.

The oft-cited crisis of secularism: did Holyoake's vision fail?

There are often statements in academic writings, and even newspapers, suggesting that secularism has failed,[17] religiosity is on the ascendant,[18] and that we should all acknowledge that secularism had a good try at changing the world, but we must now accept that that model must now be discarded.[19][20] One such critic, William Connolly, has stated that "[t]he historical modus vivendi called secularism is coming apart at the seams."[21] Lorenzo Zucca agrees and says that "[t]he secular state is in a difficult position. It barely copes with diversity and the fact of pluralism."[87] He sees the role of the secular state as the management of diversity, ergo the more diverse it becomes the more unmanageable it is. Accordingly, he sees "the impossibility of satisfying

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[16] "Don't like this temple? Choose another." *The Hindu*, January 17, 2013.
http://www.thehindu.com/opinion/op-ed/dont-like-this-temple-choose-another/article4313507.ece
[17] Bruce Ledewitz, *Church, State and the Crisis in American Secularism* (Indiana University Press, 2011), 171.
[18] "The world we contemplate at the dawning of the twentieth-first century remains vibrantly, energetically, even at times maniacally religious, in ways large and small, good and bad, superficial and profound, now as much as ever". (Wilfred M. McClay, 'Two Concepts of Secularism', (2001) 13(1) *Journal of Policy History* 47, 48; Christian Joppke, *The secular state under siege: Religion and politics in Europe and America* (Polity Press, 2015).
[19] Jakob de Roover, *Europe, India, and the Limits of Secularism* (New Delhi: Oxford University Press,
[20]), 3; Bhanu Dhamija, 'Junk today's secularism: India needs a reinvented secularism 2.0 rooted in separation of religion and state', *The Times of India* (8 August, 2017); see generally H. Baker, *The End of Secularism* (Crossway, 2009).
[21] William E. Connolly, *Why I am not a Secularist* (University of Minnesota Press, 1999), 19. [87] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press, 2012), 30.

[the demands of religion] only increases the gap between different segments of society, which is thus more and more polarised." [22]

Tariq Modood[23] cited publications in this vein in the context of European secularism such as those by Olivier Roy, "The Crisis of the Secular State,"[24] and Rajeev Bhargava writing on the "crisis of secular states in Europe."[25] Modood felt that the stream of such articles intimating such a crisis in Secularism is misleading. He notes that in Europe that it is more a challenge for political secularism or multiculturalism to adjust to post-immigration multiculturalism, to adjust to significant numbers of migrants who challenge the status quo of residual privilege to the majority religion, such as tax concessions and grants, or simply a voice recognised and respected in the public sphere. His view of secularism is that it comes in two forms: the first is that exemplified by French *Laïcité,* and the other what he terms "organized religion as a potential public good or national resource (not just a private benefit)".[26] Rajeev Bhargava, in his response article to Modood, tended to agree, arguing that "we need not an alternative to but an alternative conception of secularism, one that is different from mainstream conceptions shaped by French *Laïcité* and the American wall of separation variant." [27] He sees that contemporary secularism is inflexible, as are the politics and law associated with it. Moderate, or accommodative, secularism in his view is not succeeding. Bhargava sees a future for secularism in Europe only "[o]nce we have shifted away from these and start to focus on the normative, informal practices of a broader range of Western and non-Western states, we shall see that better forms of secular states and much more defensible versions of secularisms are available." [28]

Adding to the distrust of secularism by some, on occasions there has been a conflation of the term "secularization" with "secularism".[29] The arguments made by such

[22] Lorenzo Zucca, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press, 2012), 30.

[23] Tariq Modood, 'Is there a crisis of secularism in Western Europe?', *The Immanent Frame: Secularism, Religion and the Public Sphere*, 24 August 2011. <http://blogs.ssrc.org/tif/2011/08/24/isthere-a-crisis-of-secularism-in-western-europe/ >.

[24] In Olivier Roy, *Secularism confronts Islam*, Columbia University Press (2007).

[25] In Rajeev Bhargava, 'States, Religious Diversity, and the Crisis of Secularism', (2010) 12(3) *The Hedgehog Review* 8.

[26] Tariq Modood, 'Is there a crisis of secularism in Western Europe?', *The Immanent Frame: Secularism, Religion and the Public Sphere*, 24 August 2011. <http://blogs.ssrc.org/tif/2011/08/24/isthere-a-crisis-of-secularism-in-western-europe/ >.

[27] Rajeev Bhargava, "Beyond moderate secularism", *The Immanent Frame: Secularism, Religion and the Public Sphere*, 16 September 2011. <http://blogs.ssrc.org/tif/2011/09/16/beyond-moderatesecularism/.>

[28] Rajeev Bhargava, "Beyond moderate secularism", *The Immanent Frame: Secularism, Religion and the Public Sphere*, 16 September 2011. <http://blogs.ssrc.org/tif/2011/09/16/beyond-moderatesecularism/.>

[29] A popular anti-secular stance is propounded by Jean Bethke Elshtain who, associating secularism with anti-religious views, explains: "During the past few years, we have been treated to a spate of work blaming religion for every evil under the sun while conveniently ignoring that the greatest horrors of the twentieth century—the bloodiest of all centuries—were fueled by two antireligious totalitarian regimes,
Nazi Germany and the officially atheistic Soviet empire." (Jean Bethke Elshtain, 'Religion and

individuals have therefore muddied the waters of discourse in this area and inflamed the views of those who see the first and create antipathy for the second. One such is Jean Bethke Elshtain who argues that the "secularization hypothesis has failed, and failed spectacularly. We must now find a new paradigm that will help us to understand the complexities of the relationship between religion and democracy."[30] Another is T.N. Madan, whose writings are very assertively against secularism as a model of democratic government and sees secularism as a Western concept imposing colonial values inappropriate for the Indian context.[31] He does however admit that he is

"bedevilled by terminological confusion, ethnographic diversity and ideological dissension." [32]

Madan illustrates his position with the views of the sociologist David Martin. He notes Martin's dissatisfaction with secularization in general, with what is believed to have a "counter religious impulse".[33] Madan argues that:

> ''Conservatives see secularization as a threat to their conceptions of the good, moral, life, robbing it of its ideas of sacredness and ultimate value, the secularists look upon it as an anti-religious emancipator process. The latter consider urbanization, industrialization and modernization as the causes and symptoms of the 'secularizing fever' that grips our societies today.''

Arguments such as Madan's are typical of commentators[34] who tend to see the process of secularization as an active process promoted and propelled by 'secularists' characterised as 'the other' to be opposed and countered by those who disagree with it. He does not define 'secularists' as any particular group, but they appear to be personified and identified with the secularization process. They and secularism are therefore seen as being aligned as a counter societal process without respect for local and traditional processes and practices.

Madan's conflation is articulated in a discussion on George Jacob Holyoake who "inherited from the Owenite and Utilitarian movements of England a naturalistic, ethical and social utopian rationalism. From the French Revolution he derived republicanism, anticlericalism and an aversion to theology."[35] From this reasoning, Madan considers secularism to be "an anti-religious ideology" and indeed almost conflates it with the notion of a civil religion when he argues that:

> ''Secularism as the state ideology of India seeks to provide the moral basis of public life just as Islam supposedly does in Pakistan; the state in India is

Democracy', (2009) 20(2) *Journal of Democracy* 5, 8.)

[30] Jean Bethke Elshtain, 'Religion and Democracy', (2009) 20(2) *Journal of Democracy* 5, 8.

[31] T.N. Madan, 'Whither Indian Secularism?' (1993) 27(3) *Modern Asian Studies* 667, 668-9.

[32] T.N. Madan, 'Whither Indian Secularism?' (1993) 27(3) *Modern Asian Studies* 667, 668.

[33] Citing David Martin, 'Towards Eliminating the Concept of Secularization' in J. Gould (ed.), *Penguin Survey of the Social Sciences* (Penguin, 1965).

[34] Such as Partha Chatterjee and Ashis Nandy.

[35] T.N. Madan, 'Whither Indian Secularism?' (1993) 27(3) *Modern Asian Studies* 667, 670.

expected to protect and promote secularism in more or less the same manner in which the Sri Lankan state is expected to protect and promote Buddhism.''

This promotion of secularism as a state religion that must be pushed and defended by the state as if it were a religious establishment is a concerning argument. It appeals to those who think in terms of formal religion and its 'opponents' and couches the argument in terms of an ideology that must be displaced as soon as those who advocate it may be identified and removed. Secularism as advocated by Holyoake was no such thing. His secularism did not offer an alternative moral fabric for society nor did Holyoake seek to replace religious traditions with another as some form of established 'religion'. However, such arguments by such as Madan and Nandy, couched in those terms, allow secularism to be perceived as the enemy of tradition and religion, to be a modernity to be denied.

Secularism is more often now being widely seen as being in strife. Samuel F. Huntington said in 1998 that:[36]

> ''The increasing political power of religious fundamentalists is not confined to the Middle East. Rather, it is a virtually worldwide phenomenon. … Throughout the World, religious identities are increasing. The power and salience of religion has increased. There is more questioning of the secular state. This could be called secularism or the revenge of God…Since the collapse of communism and the end of the Cold War, the identities of many nations have been increasingly based on religion, with governments using faith to define their legitimacy. … The rise of religious consciousness has generated an increase of conflict based on religion and on persecution.''

Historically, moderate secular thought as proposed by Holyoake has been consistently criticised as being associated with atheism, or those who are anti-religious. This has naturally engendered a feeling of persecution by those who therefore see secularism as harmful to the religious institutions to which they hold allegiance. Like the squeaky wheel that makes the most noise, the 'hard' secular paradigms of the US and France have been those that have received the greatest attention, and have been seen as the face of modern secularism. A cursory look at the breadth of scholarship on secularism will show that most of the writings on this topic have related to controversies in respect of these two states. Those states which have secular principles consistent with Holyoake, such as Australia, Canada and much of Europe, have had few debates on this issue. Without the hard edges to rub against, there have been few sparks. Those who feel that secularism is a faulty paradigm have been saying so for some time, and most not recently. It will be instructive now to consider the current state of secular government in liberal democracies.

Future secularism: a need for more than tolerance

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[36] Samuel F Huntington, "The Revenge of God: Secularism Retreats" *The Washington Report on Middle East Affairs,* May-June1998, 68.

A modern definition of secularism cannot be made in terms of what secularism is not. Rather, we should move forward. Some such as Simone Chambers see that we are already doing so.[37]

Much of the jurisprudence relating to secularism has accepted a domestic norm of mainstream conceptions such as that found in France or the United States, and has not explored what secularism could be, and is slow to consider alternatives. Secularism in the modern world is now a much more complicated concept. Most liberal democracies have a secular state peculiarly their own. In times past Secularism in

Europe was a simple distinction between the state and a religion, the latter common to most if not all of the citizens of the state. Now, the religion that attempts to share the public sphere with the state is not one but many, so now religion is now also seeking identity, to have its unique voice heard and respected distinct from the others. The public sphere is now much more complex, an increasingly pluralistic polity, shared now not only with the religious, but now also with the actively non-religious and even the anti-religious. It may or may not be in crisis, but it needs a review.

There are views varying from secularism being the only solution to a divided modern world, to secularism being liberalism gone amok and likely to tear modern society apart. The philosopher John Rawls[38] in his book *Political Liberalism* expounded his ideal of public reason in which "citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that others can reasonably be expected to endorse". These latter views have caused some controversy,[39] together with the similar views of others such as Kent Greenawalt and Robert Audi. Greenawalt[40] for example considers that religious arguments are acceptable in supporting political positions whenever secular arguments cannot resolve issues, such as abortion and animal rights issues. Audi[41] argues that religious convictions should largely or completely be excluded from politics. Jürgen Habermas has asked in respect of Rawls views regarding public reason:

> ''How does the constitutional separation of state and church influence the role which religious traditions, communities and organizations are allowed to play in civil society and the political public sphere, above all in the political opinion and will formation of citizens themselves? Where should the dividing

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[37] "I see a growing number of open secularists and liberal theists converging on a centre position. The core ... is an invitation to all religious citizens, indeed all citizens, complete with their deepest convictions, to participate in public life and debate within certain liberal/moral constraints governing appropriateness of public justifications." (Simone Chambers, 'Secularism Minus Exclusion: Developing a Religious–Friendly Idea of Public Reason' (2010) 19(2) *The Good Society* 16, 16.

[38] James P. Sterba, 'Rawls and Religion' in Victoria Davion and Clark Wolf (Eds.), *The Idea of Political Liberalism: Essays on Rawls* (2000), 34.

[39] Jürgen Habermas, "Religion in the Public Sphere", (2006) 14(1) *European Journal of Philosophy* 1, 3.

[40] Kent Greenawalt, 'Religious Convictions and Political Choice: Some Further Thoughts' (1990) 38 *DePaul Law Review* 1019, 1022.

[41] Robert Audi, 'The Place of Religious Argument in a Free and Democratic Society' (1993) 30 *San Diego Law Review* 677.

line be in the opinion of the revisionists? Are the opponents who are currently out on the warpath against the liberal standard version of an ethics of citizenship actually only championing the pro-religious meaning of a secular state held to be neutral, versus a narrow secularist notion of a pluralist society? Or are they more or less inconspicuously changing the liberal agenda from the bottom up—and thus already arguing from the background of a different selfunderstanding of Modernity?''

Habermas explains Rawls' public reason argument as "'natural' reason, in other words solely on public arguments to which supposedly all persons have equal access. The assumption of a common human reason forms the basis of justification for a secular state that no longer depends on religious legitimation. And this in turn makes the separation of state and church possible at the institutional level in the first place." He feels that constitutional religious freedom is the solution to religious pluralism.[42] So, what must be done with secularism to make it less contentious and palatable to as many as possible? William Connolly argues that "I certainly do not suggest that a common religion needs to be reinstated in public life or that separation of church and state in some sense of that phrase needs to be reversed. Such attempts would intensify cultural wars already in motion. Secularism needs refashioning, not elimination".[43] Michael Rosenfeld feels that the public sphere must be shrunk to a minimum so as best to "achieve objectives over which there is unanimous consensus throughout the polity."[110] The difficulty with Rosenfeld's view is that in order to find a public square small enough to find a space where all players agree, that space is likely to be miniscule or non-existent. It is impossible to find a space where so many diverse interests may contribute, and still make those contributions meaningful. The answer is likely to be that the public square is no smaller, and accessible to all, but that all players must accept that they must make concessions, find common ground and work with what they have. Also, he discusses variants within each broad model such as France and Turkey, but does not consider any concept of secularism that may have taken seed elsewhere, particularly in jurisdictions where the constitution is secular but the majority of the population is non-European.[44]

Regarding models outlining the relations between the state and religion, Charles Taylor[45] argues that:

> ''[o]ne of our basic difficulties in dealing with these problems is that we have the wrong model, which has a continuing hold on our minds. We think that secularism (or *laïcité*) has to do with the relation of the state and religion, whereas in fact it has to do with the (correct) response of the democratic state to diversity. … There is no reason to single out religious (as against

[42] Jürgen Habermas, "Religion in the Public Sphere" (2006) 14(1) *European Journal of Philosophy* 1, 4.

[43] William E. Connolly, *Why I am not a Secularist* (University of Minnesota Press, 1999), 19.

[110] Michael Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* (Cambridge University Press, 2011), 158.

[44] Michael Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account* (Cambridge University Press, 2011), 155.

[45] Charles Taylor, 'The Meaning of Secularism' *The Hedgehog Review* (Vol. 12 no. 3, 2010) 23, 25.

nonreligious), "secular" (in another widely used sense), or atheist viewpoints. Indeed, the point of state neutrality is precisely to avoid favoring or disfavoring not just religious positions, but any basic position, religious or nonreligious. We can't favor Christianity over Islam, but also we can't favor religion over against nonbelief in religion, or vice versa.

The late-Rawlsian formulation for a secular state cleaves very strongly to certain political principles: human rights, equality, the rule of law, democracy. These are the very basis of the state, which must support them. But this political ethic can be and is shared by people of very different basic outlooks (what Rawls calls "comprehensive views of the good"). A Kantian will justify the rights to life and freedom by pointing to the dignity of rational agency; a Utilitarian will speak of the necessity to treat beings who can experience joy and suffering in such a way as to maximize the first and minimize the second.''

In a case relating to same-sex marriage, the South African Constitutional Court in their judgment, made a clear statement of the place for all non-majoritarian positions in the public sphere. Views need not be merely tolerated, but rather should be valued as equal parts of the polity:

''As was said by this Court in *Christian Education*[46] there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society. … Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the "right to be different". In each case, space has been found for members of communities to depart from a majoritarian norm. The point was made in *Christian Education* that these provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern. … The strength of the nation envisaged by the Constitution comes from its capacity to embrace all its members with dignity and respect.''[47]

Similarly the Supreme Court of Canada has held in *Chamberlain v Surrey School District No. 36*[48] that:
''In my view, Saunders J. [the trial judge] below erred in her assumption that "secular" effectively meant "non-religious". This is incorrect since nothing in the *Charter*, political or democratic theory, or a proper understanding of

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[46] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) 1051 (CC), [24].
[47] *Minister of Home Affairs v Fourie*; *Lesbian & Gay Equality Project & Others v Minister for Home Affairs* 2006(1) SA 524 (CC) (South Africa Constitutional Court) Case CCT 60/04 (2005), [61-2] (Sachs J).
[48] [2002] 4 S.C.R. 710, 2002 SCC 86.

pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. … To construe the "secular" as the realm of the "unbelief" is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.''[49]

The Court in *Chamberlain v Surrey* made clear that the public sphere in a secular democracy must not be deemed to exclude religion, and must include opinions based in religion as well as those based in other considerations.[50]
Considering the issue from an opposing perspective, the Indian anti-secularist Ashis Nandy said that:

''It is time to recognize that, instead of trying to build religious tolerance on the good faith or the conscience of a small group of de-ethnicized, middleclass politicians, bureaucrats, and intellectuals, a far more serious venture would be to explore the philosophy, the symbolism, and the theology of tolerance in the faiths of the citizens and hope that the state systems in South Asia may learn something about religious tolerance from everyday Hinduism, Islam, Buddhism, or Sikhism rather than wish that ordinary Hindus, Muslims, Buddhists and Sikhs will learn tolerance from the various fashionable secular theories of statecraft.''

John Gray, the author of *The Two Faces of Liberalism*, contends that

''The liberal view of toleration contains an internal contradiction: on the one hand, liberalism tries to reach a rational consensus on the best way of life; yet on the other hand, liberalism believes that human beings can flourish through many different ways of life.''[118]

Gray considers that the current view of toleration is internally contradictory as it tries to achieve a consensus on the best way to live, yet believes that people will flourish through many ways of life. He contends that the homogeneity of contemporary society means that a consensus on values impossible.

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[49] [2002] 4 S.C.R. 710, 2002 SCC 86 [137] (Gonthier J for himself and Bastarache J (who would have upheld the British Columbia Court of Appeal's decision on all points, and therefore wrote in dissent on part of the decision).

[50] It is notable that Iain T. Benson has said on this case, based on a mischaracterisation of Holyoake's principles (drawing a definition of secularism from the *Encyclopedia Britannica*) , that "While it was necessary to examine the term "secular," it was not necessary to discuss "secularism," and the definition of the latter was not argued before the court. … In equating "secular" with "secularism" the majority judges overlooked the fact that, at its historic origins, the intention of secularism was precisely to exclude religion from all public aspects of society - the very thing the court itself refused to do. Simply

In the US in recent years the efforts of secular governments no longer to accommodate strong religious positions in public policy is being seen not as a neutral position of government, but rather a battle between religion and secular government for the public sphere, sometimes titled a 'culture war'. The late US Supreme Court Justice Antonin Scalia said that the Court "has taken sides in the culture war",[119] the *Kulturkampf* as the Germans have styled it. The debate, the culture war, continues nonetheless in contemporary US society.

Michael Hernandez maintains that contemporary law and government in the US are currently still affected by religious principles in the form of "civil religion", which while he argues is "not grounded in the tenets of any particular faith" is then not sectarian, but is clearly Christian in nature. He cites Alexis de Toqueville in 1835 saying "[t]here is no country in the whole world in which the Christian religion retains a greater influence over the souls of men than in America …", and notes how far the court in is removed from the early Christian era in rejecting Judeo-Christian principles

put: the Supreme Court of Canada failed to recognize that the term "secularism" describes an ideology that is, and has been since its inception, anti-religious. As such, the ideology of secularism cannot be one of the principles upon which Canada, as a free and democratic country, is based."
(Iain T. Benson, 'Considering Secularism' in Douglas Farrow (ed.), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (McGill Queens Press, 2004), 85)
[118] David M. Brown, 'Reconciling Equality and Other Rights: Paradigm Lost?' (2004) 15 *National Journal of Constitutional Law* 1, 3.
[119] *Lawrence v Texas*, 539 U.S. 558 (2003).

in its interpretations, but is himself of the view that Christianity is losing its influence on the development of contemporary American law. [51]

Then again, Jeremy Rabkin is more pragmatic, commenting on the so-called culture war:

> ''Having agitated and distracted our politics for more than a quarter of a century ... it still shows no signs of slackening. It continues to rattle, like some Victorian ghost, haunting most of all those robed judicial worthies who are most intent on laying it to rest.''[52]

The reasons for so many perceptions on modern secular governance and secularism's future have many bases. Maclure and Taylor[122] put it down to "the relationship between religious and nonreligious people [being] often characterized by incomprehension, distrust, and sometimes even mutual intolerance." They see that modern atheists and agnostics have difficulty in understanding individuals whose truth cannot be evaluated with the scientific approach. The religious cannot

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[51] Michael V. Hernandez, "A Flawed Foundation: Christianity's Loss of Pre-eminent Influence on American Law" (2004) 56 *Rutgers Law Review* 625, 626.
[52] Jeremy Rabkin, "The Supreme Court in the culture wars" (1996) 125 *Public Interest* 3, 25.
[122] Jocelyn Maclure and Charles Taylor (trans. Jane Marie Todd) *Secularism and Freedom of Conscience* (Harvard University Press, 2011), 106.

understand why the non-religious cannot move beyond the material. Their solution is that "contemporary societies must develop the ethical and political knowledge that will allow them to fairly and consistently manage the moral, spiritual, and cultural diversity at their heart."[53]

The downside when a state is too secular: non-neutral neutrality

Utilitarians such as Jeremy Bentham and John Stuart Mill advocated social change and the removal of harm such that society altogether gained. George Holyoake, building on their work, had advocated that secularism intended that society should find a role for both religion and the state in the public sphere.

If one considers that secularism is a neutrality of the state towards religion, can the wish of the state to appear neutral actually be counterproductive to secular ideals? There are some strong views on how secular a state need be in order to effectively meet the obligations of the state to the people and of religion to contribute to public discourse in matters that are of importance to it. Veit Bader[54] has observed in the US context that:

> ''Most American liberal philosophers, among them Dworkin, Ackerman, Galston, Rawls, Macedo, and Audi, "believe that ... values of freedom, equality and toleration are best preserved if religion is removed from public affairs." They are virtually unanimous in their staunch advocacy of the "wall of separation." They believe that "both religious practice and pluralistic democracy are best preserved" by precluding religious argumentation within the public realm and by putting "the moral ideals that divide us off the conversational agenda of the liberal state.''

This interpretation of secularism, according to some interpretations, is the complete absence of religion in the public sphere, in what is termed in the US 'strict secularism'. The presumption, as has been explored earlier, is that if the state is not seen through actions of its institutions, policies or agents to be favouring religion in any way, then the general population will not believe that they are acting contrary to the constitutional paradigm that supports this model.

It has been suggested that the apparent strict neutrality of the US Supreme Court is actually working contrary to the best interests of religious minorities. Shivakumar[55] asks the question of whether the strict neutrality practice adds to the power and influence of mainstream religions, whilst minimising the rights of religious minorities because of their lesser political influence. In the last thirty years the impact of the Supreme Court on the privileged treatment of religion in the public sphere

[53] Jocelyn Maclure and Charles Taylor (trans. Jane Marie Todd) Secularism and Freedom of Conscience (Harvard University Press, 2011), 110.

[54] Veit Bader, 'Religious Pluralism: Secularism or Priority for Democracy?' (1999) 27(5) *Political Theory* 597, 598.

[55] Dhananjai Shivakumar, "Neutrality and the Religion Clauses", 33 *Harvard Civil Rights-Civil Liberties Law Review* 505, 507.

remains profound. Academic commentators such as Frederick Gedicks[56] have since argued that religious exemptions cannot be supported because they violate legal commitments to equality. Eisgruber and Sager[57] have noted that the only the Free Speech element of the First Amendment to the US Constitution should remain privileged; religion like race should be protected only from discrimination.

Ultimately, it may be impossible to maintain an objectively neutral stance in such cases. Michael McConnell, recently a circuit judge on the US Court of Appeals for the Tenth Circuit,[128] argues that in some contexts "departures from religious neutrality are either permissible or constitutionally required." McConnell goes on to note that no genuinely neutral governmental approach may be available.[58] Gedicks has made the interesting observation that "[r]eligious neutrality presupposes that the purpose of the Free Exercise Clause is to prevent religious discrimination, rather than to protect freedom of action in a domain of religious liberty." Different responses on both sides of the Atlantic between the US and France have resulted in a lack of understanding of the positions of the other in relation to issues created in the contexts of freedom of speech, freedom of religion, and the treatment of religious minorities. This has resulted in what Jeremy Ghez calls an "uneasiness" in political and academic circles where the interaction of religious interests with the state are seen as pretexts for struggles which "may have far less to do with theology than with political governance and values." He describes the current French approach to be "means that the French society would rather ban all signs of religious faith in public schools for instance – including the Islamic veil – and thus limit the extent to which an individual can publicly affirm his or her faith, than allow any religious belief to influence a political debate."[59]

In the UK, Russell Sandberg has characterised these debates in the UK as a tension between the old and the new. The old laws are those that give Christianity and Christians a special degree of protection whilst tolerating other religions, where the legislature and judiciary had a stance of passive accommodation rather than proscriptive regulation. The new are laws that consider individual rights of religious freedom need be balanced against other rights.[60] However, there can be a place for reasonable accommodation of religion in the public sphere where such accommodation aids in public discourse and does not detract from the state's ideals of maintaining communal harmony and community safety and security. So, what is

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[56] Frederick Mark Gedicks, 'An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions' (1998) 20 *University of Arkansas at Little Rock Law Review* 555, 560-66 cited in Angela C. Carmella, 'Exemptions and the Establishment Clause' (2011) 32 *Cardozo Law Review* 1731.

[57] Christopher L. Eisgruber & Lawrence G. Sager, 'The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct' (1997) 61 *University of Chicago Law Review* 1245, 1251-52, 1282 cited in Angela C. Carmella, *Exemptions and the Establishment Clause* (2011) 32 *Cardozo Law Review* 1731. [128] 2002-2009.

[58] Michael W. McConnell, 'Neutrality under the Religion Clauses' (1986) 81 *Northwestern University Law Review* 146, 149, 151, 164.

[59] Jeremy Ghez, 'Debate: On secularism in the 21st century', *The Conversation* (February 21, 2018). http://theconversation.com/debate-on-secularism-in-the-21st-century-91669.

[60] Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011), 36, 202.

[132] R.F. Thiemann, *Religion in public life* (Georgetown University Press, 1996), 53.

'reasonable'? A series of apt questions was put by Robert Thiemann some years ago regarding accommodation of religious precepts in the public sphere:[132]

> ''What are the appropriate limits of governmental accommodation of majority religious belief and practice within a pluralistic democracy? At what point does proper accommodation of religion become improper aid or assistance to religion? When does accommodation of the majority religion become discriminatory toward religious minorities?''

This is of course an ongoing debate regarding whether in modern pluralistic societies all viewpoints can reasonably be accommodated.

Conclusion

Societies have become more pluralistic over the last half century or more. States are now more accepting of those who bring different views and values, but those values need to be added to the pool of experience of existing populations in order to create new constitutional identities that are inclusive, rather than the old being tolerant of the new. Holyoake's principles continue to serve. Ideals such as the accepting all viewpoints in the public sphere, including the religious, and to not seek to replace those views with another remain the most popular model for liberal democracies in increasingly pluralistic societies. This paper is a two-part study exploring the nature of modern constitutional secularism. The discussion in this paper illustrates a wide institutional and academic diversity of understanding of what constitutional secularism is in modern application, sometimes quite unlike the position Holyoake once outlined.

On modern secularism Rajeev Bhargava argued that:[61]

> ''Western states need to improve the understanding of their own secular practices just as Western secularism needs a better theoretical selfunderstanding. Rather than get stuck on a model they developed at a particular time in their history, they would do well to more carefully examine the normative potential in their own political practices.''

And, more recently,[62] that:

> ''While secularism continues to be a value everywhere in Europe, its transgression is not seen as a threat to it because the meaning of secularism has not shifted from the one developed in the nineteenth century to another more suited to conditions of deep religious diversity.''

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[61] Rajeev Bhargava, 'Multiple Secularisms and Multiple Secular States' in Anders Berg-Sørensen, *Contesting Secularism: Comparative Perspectives* (Routledge, 2016), 39-40.
[62] Rajeev Bhargava, 'Is European Secularism Secular Enough?'(2014) 16 (3) *European Societies*, 329336.

In the next edition of this journal I will examine how the courts have interpreted nineteenth century ideals to twenty-first century realities.