LEGITIMACY GAP

SECULARISM, RELIGION, AND CULTURE
IN COMPARATIVE CONSTITUTIONAL LAW

VINCENT DEPAIGNE

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Preface

The relationship between religion and secularism is generally characterized in academic publications by the opposition or at least the tension between the two concepts.* There is clearly a historical tension between the secular state and religion, as the state has asserted its power against that of religion. While the issue of boundaries and interactions between the secular and the religious are of relevance and need to be looked at again in particular in the light of growing religious demands, it is suggested here that secular and religious principles do not operate on the same level—at least when it comes to (constitutional) law.

Contemporary legal and political institutions are largely secular and operate according to secular principles; religion is a more operative factor not only when it comes to the boundaries of the legal system, but also, more importantly, when it comes to its sources of legitimacy and to the cultural background in which legal systems operate.

To the opposition between the secular and the religious, one can respond that the 'secular' may be best seen in relation with religion, rather than in opposition. What is suggested here is that the 'secular' is best seen as a process through which a meaningful role for religion can be found and which is about cultural (and religious) reform rather than a process of separation from culture (and religion).

The 'secular' in all its manifestations is very much linked to the historical rise of the nation-state. If the state can be conceived without secularism, secularism cannot be conceived without the state. The argument of the present book is that the withdrawal of religion as a source of legitimacy raises the issue of the foundations of the secular state and how the secular state has responded to this 'legitimacy gap'. The idea developed here is that the 'secular' should not be seen as separating culture (including religion) and politics, but rather in terms of how these two dimensions can be linked. Max Weber's theory of legitimacy and social contract theories are based on a move from traditional forms of authority towards modern forms of legitimacy, but I suggest that these theories do not provide a complete answer to the 'legitimacy gap'.

I also suggest that secularism does not provide a fully satisfactory answer to the 'legitimacy gap'. If one considers that the ethos of secularism is essentially based on political liberalism, we are left with a modern constitutional law that has moved away from a 'substantive' legitimacy, based in particular on natural law, towards a

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* Jean L Cohen and Cécile Laborde (eds) *Religion, Secularism, and Constitutional Democracy* (Columbia University Press 2016); Susanna Mancini and Michel Rosenfeld (eds) *Constitutional Secularism in an Age of Religious Revival* (Oxford University Press 2014); Lorenzo Zucca and Camil Ungureanu (eds) *Law, State and Religion in the New Europe: Debates and Dilemmas* (Cambridge University Press 2012); Linell E Cady and Elizabeth Shakman Hurd (eds) *Comparative Secularisms in a Global Age* (Springer 2010).

'procedural' legitimacy—based on popular sovereignty and human rights—which leaves unanswered the issue of the nature of legitimacy in a secular/modern state.

The aim of the present work is to address this issue from a constitutional law angle and through a comparative approach. Rather than 'secularism' in the singular, one may best talk of 'multiple secularisms',** based on the common assumption that the secular is defined first of all as 'differentiation' between religious and political functions, between state and religious institutions. Comparing the approaches taken in Asia and Europe can help in providing a better understanding of the nature of secularization as a pluralist and differentiated process. The exploration of these models through three case studies taken from Europe and South and South-East Asia—France, India, and Malaysia—shows how secularism has moved either towards 'nationalization', being linked to a particular national identity (as in France and, to some extent, in India), or towards 'de-secularization', under pressure from religious or cultural identities (as in the case of Malaysia).

** Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton University Press 2015) 10.

Acknowledgements

The present book is based on a PhD in law undertaken at the School of Oriental and African Studies (SOAS) at the University of London. Initially, the research I undertook at SOAS was concerned with the cultural dimension of human rights or how the universality of human rights could be squared with cultural differences, in particular in view of the evidence of increasingly assertive particular cultural identities. I was especially concerned with the way in which human rights could constitute (or not) a unifying element for a political community.

My aim was to look at how international law was addressing this potential divergence between human rights protection and cultural assertion. From the beginning, I sought to develop a comparative approach as a way to capture the various issues and dilemmas resulting from the tension between rights and culture. We have learnt with Max Weber about the uses and abuses of 'ideal-types', but I still find to this day that developing typologies is a very useful way to address complex issues—and as artificial as these models may be, they can at least help in clarifying the issues we are facing.

As my research progressed, it became obvious to me that the international law angle—while useful—provided only a limited answer to the question I was trying to address. Moving from the international legal field to national constitutional law made it obvious to me that the underlying concern of my PhD was about the legal foundations of the modern state and how culture and human rights were tied up with the idea of the nation-state. And when discussing the nature of the state, I encountered (again) Max Weber and his insistence on the legitimacy of legal rule and it became clearer to me that one way to address this was through the notion of secularism and the evolving role of religion in the modern state—and the role played by these in the foundation of constitutional rule. I believe that the issue of secularism was and remains closely tied to the issues and dilemmas facing the contemporary state.

Finally, I would like to thank all those who helped me during this endeavour. I cannot mention all the names so I would like to mention a few. First of all, my thanks go to my PhD supervisor, Professor Matthew Craven, for his support and his precise, pertinent, and clever comments. There are many others who contributed in one way or another to my research, but I would like to thank in particular Professor Andrew Harding for his useful comments, as well as Jo Mulkens, Nimer Sultany, and Christophe Jaffrelot for their help and comments. I would also like to thank the staff in SOAS for their support, in particular the staff at the SOAS library. Last but not least, I would like to acknowledge the support received from my employer, the European Commission, in particular at the beginning, but also throughout the process. My thanks also go to all those around me who have been supportive and have been prepared to bear with me. I would like to thank in particular my wife,

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The Secular State and Its Legitimacy

Jesus said, 'My kingdom is not of this world'.

<div align="right">John 18:36</div>

I am my brother's keeper. I am my sister's keeper.
That's a value.

<div align="right">

President Obama
Speech at the University of Vermont
30 March 2012

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1. The European 'Legitimacy Gap'

In his 'legacy speech', a former president of the European Commission talked of the 'legitimacy gap' affecting the European Union.[1] The 'legitimacy gap' he saw was characterized by a lack of ownership in European politics, due to the distance between the decisions taken in Brussels and those at the national level. Another issue he referred to was that the legitimacy of the European Union depended on the delivery of concrete results. His proposed response was essentially to reinforce democracy: democratic legitimacy was the answer to the perceived 'legitimacy gap'.

The present book will develop the idea that the 'legitimacy gap' runs deeper than this. It is not a feature of the European Union only. The 'legitimacy gap' is a feature of the contemporary secular state. It is part of the very construction of the contemporary secular approach to politics.

The evolution of the European Union illustrates some aspects of a wider legitimacy crisis affecting the national state. Since its origin, the European Union has evolved from an 'economic', result-oriented legitimacy towards a legitimacy built

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[1] José Manuel Durão Barroso, 'On Europe—considerations on the present and the future of the European Union' (speech, Humboldt University of Berlin, 8 May 2014), <http://europa.eu/rapid/press-release_SPEECH-14-355_en.htm> accessed 30 October 2016.

on values based on a particular cultural and religious heritage. Weiler outlines three forms of legitimacy for the European Union: first, an output legitimacy (result-based), which depends on the ability to provide a given (economic) result; second, an input legitimacy (process-based), which is essentially democratic legitimacy; and third, a 'telos' legitimacy or 'political messianism', which is aspirational and refers to general ideas such as peace, fundamental rights, or social development.[2]

The European 'legitimacy gap' can be found in the contradiction between the result-based approach and the aspirational ideals of the European Union, as the reliance on the economy to advance a political project makes the legitimacy of the whole construction hostage to its concrete economic results. An output-oriented legitimacy tends to be fragile as it is based on results, on the ability of the political institutions to respond to immediate needs, while at the same time failing to provide the foundations which would enable these institutions to respond to such needs.

The first goal for Europe was to establish 'world peace', as stated in the 1951 Schuman declaration. Weiler cites the Schuman declaration as an example of 'political messianism', with its insistence on general humanistic and civilizational ideals. At the same time, the Schuman declaration linked this general aspiration to a concrete economic programme based on the development of common steel and coal production. The 1957 Treaty of Rome confirmed this 'outcome'-oriented approach: in its preamble, it referred to the goal of peace, but its focus was on an 'economic legitimacy' based on economic and social progress and with the essential objective of improving living and working conditions.

The draft constitution for the European Union, adopted in 2004, had a much more 'civilizational' tone, underlining in its preamble the particular characteristics of European civilization as the basis for the European Union (prompting a discussion around the Christian nature of the Union) and the importance of values such as fundamental rights. The draft constitution referred to the inspiration provided by 'the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'.

The draft constitution was eventually rejected, underlining not only the gap between Europe's noble aspirations and its ability to translate these aspirations on the ground, but also, more deeply, the inability of the European Union to evoke a sense of belonging among its citizens—which is precisely what the 'legitimacy gap' is about. Europe is seen as a delivery mechanism rather than a community to which one belongs—and this is increasingly true for national states.

The discussion around 'Christian values' in the context of the European constitution illustrates what the 'legitimacy gap' is about. Weiler talks of a 'Christian deficit' in the European Union, arguing that Christianity is a central part of European

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[2] Joseph Weiler, 'In the face of crisis: input legitimacy, output legitimacy and the political messianism of European integration' (2012) 34 *Journal of European Integration* 825.

culture and should be recognized as such.[3] The proponents of Christian references in a European constitution argue that the European project can be deepened only if it asserts more strongly its own identity, part of which is based on Christianity. This claim is based on a view of legitimacy as substantive, as requiring the assertion of specific cultural elements as the basis of the political community. It does not mean that there is no room for other cultures or identities within the political community, but these minority identities are recognized as part of a wider framework based on a majority culture. What this view recognizes is that the European Union cannot be based solely on technical expertise, on achieving results, but needs a deeper commitment: former Commission President Delors talked of giving a 'soul', a 'spirituality', to Europe.[4]

The 'legitimacy gap' is—I suggest—directly linked with the role of religion and culture in the secular state, in particular in its contemporary form in Europe. The withdrawal of religion as a source of legitimacy questions the foundations underpinning the values on which the secular state is based and how the secular state might respond to the 'legitimacy gap' created by the withdrawal of religion.

Legitimacy represents a particular problem for the secular state. The legitimacy gap is about the failure of the secular state to produce a distinct source of legitimacy which could replace religion. Secular legitimacy, I argue, is essentially procedural in nature: it is based on rights granted to members of a political group and on specific modalities to ensure democratic expression. These elements are mainly functional and do not provide for a substantive form of legitimacy, and cannot, as such, legitimize the existence of a particular state or political community. The European example shows that the 'legitimacy gap' lies between the procedural and the substantive dimensions of legitimacy.

As a result, the secular state is ill equipped to respond to claims by groups which found their existence on substantive forms of legitimacy, in particular (but not only) where these groups are religious. One could argue that it is precisely the tolerance and openness of the secular state which allows such questioning. However, failure to win the adhesion and support of its citizens is a source of weakness for the state. For many states, using or referring to traditional forms of legitimacy, based on religion or more generally on cultural traditions, has been a way to respond to this challenge, the reference to religion or culture being seen as essential to legitimize the state.

In its now famous *Lautsi* judgment concerning the display of crucifixes in public classrooms in Italy,[5] the European Court of Human Rights (ECtHR) held that the reference to religion in the state did not in itself contravene the secular nature

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[3] Joseph Weiler, 'A Christian Europe? Europe and Christianity: rules of commitment' (2007) 6 *European View* 143, 145.

[4] Cited in Ronan McCrea, 'The recognition of religion within the constitutional and political order of the European Union', *LSE 'Europe in Question' Discussion Paper Series (LEQS)*, LEQS Paper No 10/2009, September 2009, <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper10.pdf> accessed 30 October 2016.

[5] European Court of Human Rights, *Lautsi and others v Italy*, App no 30814/06, 18 March 2011 (hereafter *Lautsi and others v Italy*).

of the state. For the Italian judge, Christian teachings confirmed the autonomy of the temporal power vis-à-vis the spiritual power, rather than their opposition: the idea that religious symbols should be completely excluded from public places is only a particular ideological interpretation of secularism, and not the one retained in the Italian Constitution. The Italian judge also made a distinction between the cultural and symbolic dimensions of the crucifix as opposed to its narrowly defined religious dimension: while the crucifix is clearly a religious symbol, it also evokes a history and values not limited to the believers of a particular religion.[6] The Italian government added that keeping crucifixes in schools was a matter of preserving a centuries-old tradition.[7]

The ECtHR recognized that while the presence of crucifixes in state-school classrooms conferred preponderant visibility on the country's majority religion, this was not in itself sufficient to denote indoctrination.[8] The ECtHR also held that the reference to a particular tradition within the state was in itself legitimate, as long as it did not infringe rights and freedoms enshrined in the Convention.[9] Furthermore, the ECtHR noted that this asymmetry in favour of one religion was compensated by the fact that the school environment in Italy is also open to other religions.[10]

For a concurring judge, 'a court of human rights cannot allow itself to suffer from historical Alzheimer's. It has no right to disregard the cultural continuum of a nation's flow through time, or to ignore what, over the centuries, has served to mould and define the profile of a people'.[11] In their observations, a number of state parties considered that states should not have to divest themselves of part of their cultural identity simply because that identity was of religious origin.[12]

The persistent influence of religion can be found in a number of other countries with secular constitutions. In the United States, religion is a common facet of political life, not only through the use of explicit religious themes in political speech, but more generally to underpin and reinforce a secular political discourse, an example of which can be seen in President Obama's use of biblical or faith-based arguments and references.[13] The Turkish Prime Minister has rejected the idea that his party is made of 'Muslim democrats', but claims to represent the values of a 'conservative democracy' which reflects the traditional values of Turkish society. In his view, his political programme is not religious, it is democratic, meant to reflect

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[6] Ibid., para 16.   [7] Ibid., para 36.   [8] Ibid., para 71.   [9] Ibid., para 68.
[10] Ibid., para 74.   [11] Ibid., concurring opinion of Judge Bonello.
[12] Ibid., para 47.
[13] For an analysis of the religious dimension in Obama's discourse, see Henri De Vries, 'Simple dreams, small miracles': the Obama phenomenon' in Philip S Gorski, David Kyuman Kim, John Torpey, and Jonathan VanAntwerpen (eds), *The Post-Secular in Question: Religion in Contemporary Society* (New York University Press 2012) 105; see also 'The gospel according to Obama' and 'In Obama's first term, an evolving Christian faith and a more evangelical style', *CNN*, 21 and 27 October 2012, <http://religion.blogs.cnn.com/2012/10/21/to-some-obama-is-the-wrong-kind-of-christian/>; <http://religion.blogs.cnn.com/2012/10/27/in-obamas-first-term-an-evolving-christian-faith-and-a-more-evangelical-style/> accessed 30 October 2016.

the ethos of the people, and its religious or cultural dimension is mediated through the democratic process.[14]

The above shows the difficulties one faces when discussing the nature of values in a secular state. Are such values to be found solely outside religion, as secularists would maintain? Or can secular values have religious foundations? But then what is the meaning of the 'secular' in this context? Does it mean that any reference to religion is removed from the public sphere, or can 'secular' have other meanings?

2. Secularization and Legitimacy

Two broad responses to the 'legitimacy gap' can be outlined. The first response has been to expand the idea of the 'secular' by developing a view of secularism for which the basis for politics is the removal of religious references. The second has been to attempt to find a secular cultural basis (be it ethnic, cultural, or linguistic) which would serve as a non-religious source of legitimacy, political rule thus being based on a reference to a particular cultural or ethnic community.

These two approaches point in two opposite directions, both of which are inherently contradictory. The first approach is 'universalist' in its ambition; it aims to find a new basis for the state which would be independent from any affiliation— religious, ethnic, or cultural—the state being defined precisely by its ability to overcome social divisions, as the source of its legitimacy. However, such an approach is ultimately based on a purely procedural view of secularism, essentially based on the protection of human rights. This 'thin' view of secularism leaves the issue of the particular identity of the state unanswered. The second approach is self-defeating, as its appeal to a particular cultural identity re-inserts the issue of religion in the public debate, in particular as it raises the issue of the status of minorities (and of their religion). The issue of culture (and religion) is thus bound to re-surface in the secular state.

The hypothesis developed here is that the 'secular' should not be seen as (necessarily) separating culture (including religion) and politics, but rather in terms of how meaningful links between these two dimensions can be built. A number of authors have developed a contextual and reformist approach to the notion of the secular which will be further discussed in this work.[15] The resurgence of religion in

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[14] Cited in Nur Bilge Criss, 'Dismantling Turkey: the will of the people?' (2010) 11 *Turkish Studies* 45, 46.

[15] See in particular Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford University Press 2003); Etienne Balibar, 'Cosmopolitanism and secularism: controversial legacies and prospective interrogations' (2011) 44 *Grey Room* 6; José Casanova, *Public Religions in the Modern World* (University of Chicago Press 1994); Simon Critchley, *The Faith of the Faithless—Experiments in Political Theology* (Verso 2012); Jean-Claude Monod, *La querelle de la secularisation, de Hegel à Blumenberg* (Librairie philosophique J. Vrin 2002); Olivier Roy, *La laïcité face à l'islam* (Editions Stock 2005) [English translation: *Secularism Confronts Islam* (Columbia University Press 2007)]. There are also a number of recent collective works which revisit the notions of the 'secular' and of (public) religion in a more contextual and pluralist sense: Anders Berg-Sørensen (ed) *Contesting Secularism: Comparative Perspectives* (Ashgate 2013); Craig Calhoun, Mark Juergensmeyer, and Jonathan VanAntwerpen (eds)

largely secularized societies is considered by some as evidence of a new 'post-secular' era: what I suggest is that the 'post-secular' is essentially a new reading of what 'secular' means.[16] In the views developed by many of these authors, secularism does not mean that any reference to religion should be rejected. Cultural identity may be religious in origin, but it may also be 'de-religionized':[17] religious symbols or holidays are 'secularized', religion being thus not entirely absent, but invested with new cultural meaning. For Parekh, in Europe, 'religion survives as culture' with the continuing cultural influence of Christianity in largely secularized societies.[18]

2.1 The 'secular' as worldly politics

For Taylor, three meanings of the 'secular' can be found: first, as a withdrawal of religion from the public space; second, as a decline in religious belief; third (and this is the definition he retains), as freedom, the possibility to retain or not retain a given belief.[19] I propose here to follow Taylor and his view of the 'secular' as freedom, rather than as a separation (from religion), and to explore what the implications that may have in legal terms.

Secularization is generally seen as opposed to religion, but the secular state is not necessarily or solely based on neutrality vis-à-vis religion. Not only is the break with religion incomplete, in the sense that states often remain engaged with religion and retain a religious basis (which may often be symbolic), but one can question whether an absolute neutrality, attained by divesting the state entirely from any religious matters, is actually required to respect the secular nature of the state.

Secularization is better defined as a process of secularization *of* religion, rather than as a process of religious withdrawal. The notion of the 'secular' need not be framed in purely negative terms as opposition to religion. It can also be defined in terms of engagement with religion, implying a positive (and reformist) approach to religion. The original, religious definition of the 'secular' was in opposition to

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Rethinking Secularism (Oxford University Press 2011); Rafael Domingo, *God and the Secular Legal System* (Cambridge University Press 2016); Barry A Kosmin and Ariela Keysar (eds) *Secularism & Secularity: Contemporary International Perspectives* (Institute for the Study of Secularism in Society and Culture 2007); Eduardo Mendieta and Jonathan VanAntwerpen (eds) *The Power of Religion in the Public Sphere* (Columbia University Press 2011); Winnifred Sullivan, Robert Yelle, and Mateo Taussig-Rubbo (eds) *After Secular Law* (Stanford University Press 2011).

[16] The 'post-secular' concept has been developed in particular by Jurgen Habermas: see Habermas, 'A 'post-secular' society—what does that mean?', *Reset Dialogues on Civilizations* (16 September 2008), <http://www.resetdoc.org/story/00000000926> accessed 30 October 2016; see also Henri De Vries and Lawrence Eugene Sullivan (eds) *Political Theologies: Public Religions in a Post-Secular World* (Fordham University Press 2006); Philip S Gorski, David Kyuman Kim, John Torpey, and Jonathan VanAntwerpen (eds) *The Post-Secular in Question: Religion in Contemporary Society* (New York University Press 2012).

[17] Dominic McGoldrick, 'Religion in the European public square and in European public life—crucifixes in the classroom?' (2011) 11 *Human Rights Law Review* 451, 480.

[18] Bhikhu Parekh, 'Europe, liberalism and the "Muslim question"' in Tariq Modood, Anna Triandafyllidou, and Ricard Zapata-Barrero (eds) *Multiculturalism, Muslims and Citizenship: A European Approach* (Routledge 2006) 189.

[19] Charles Taylor, *A Secular Age* (Harvard University Press 2007) 2–3.

the 'regular', the 'secular' clergy being 'in-the-world', in contact with the general population, whereas the 'regular' clergy remained 'out-of-the-world', in monasteries solely dedicated to religious life. The secular means the entry of religion 'in-the-world' rather than an exclusion of religion from worldly politics.[20]

Secularization does not mean the disappearance of religion so much as a transformation of its social role.[21] Max Weber underlines the role of religion in transforming the 'world', how an 'out-of-the-world' religion becomes a source of change 'in-the-world'. In his *Protestant Ethic*, Weber refers to this positive or reformist posture as one of a 'secularized' asceticism, in which religious rules and practices are deemed to extend beyond the sphere of a religious order, into the 'world'. This idea is also to be found in Bader's work, in which he speaks of 'protestantization' to describe a similar process in other religions, based in particular on the individualization of religious belief.[22] A parallel has been drawn between Buddhism and Protestantism to describe efforts to reform Buddhism since the nineteenth century: 'Protestant Buddhism' is defined as a compromise between strict monastic life and worldly life.[23] In these contexts, 'secular' means—as in its original version—religion entering 'into the world', rather than a strict dichotomy between religion and other social spheres.

This view of the 'secular' provides a better account of the co-existence of secular and religious spheres of activity—for example, how a social service (hospital or school) can be run by a religious group while fulfilling a secular purpose. Conversely, a non-religious institution may accommodate religious elements (religious teaching or holidays such as Christmas). The fact that there might be an opposition between secular and religious views (for example, on abortion or religious teaching) does not in itself undermine the secular character of a political community. In a secular community, different views may be expressed and potentially clash. What is required is some form of regulation of pluralism to ensure that differing political—and more general—world-views can be expressed. The issue is how religion can be part of 'this-world', of secular worldly politics.

2.2 The nature of secular legitimacy

Referring in particular to Max Weber and his account of modern law, I suggest that the 'secular' suffers from an inherent problem of legitimacy. In his account

[20] Iain T Benson, 'Notes towards a (re)definition of the "secular"' (2000) 33 *University of British Columbia Law Review* 519, 520, 537–8; see also Veit Bader, 'Religion and the myths of secularization and separation', *RELIGARE Working Paper*, No 8, March 2011, 8–9, <http://www.religareproject.eu/content/religion-and-myths-secularization-and-separation> accessed 30 October 2016. Louis Dumont also makes a distinction between 'in-the-world' individualism and 'out-of-the-world' individualism, between a secular–modern individualism and a traditional–religious individualism: Louis Dumont, *Essai sur l'individualisme* (Editions du Seuil 1983) [English translation: *Essays on Individualism: Modern Ideology in Anthropological Perspective* (University of Chicago Press 1992)].

[21] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Routledge 1992) 105, 117.

[22] Bader, 'Religion and the myths of secularization and separation' (n 20).

[23] Richard Francis Gombrich and Gananath Obeyesekere, *Buddhism Transformed: Religious Change in Sri Lanka* (Princeton University Press 1988).

of legitimacy, based on three forms of legitimacy ('traditional', 'charismatic', and 'rational–legal'), Weber delineates a move from a traditional form of authority based in particular (if not solely) on religion towards a modern rational form of authority.[24] Weber's account of legitimacy is one of a transition from a 'substantive' form of (traditional) legitimacy to a 'procedural' (rational–legal) one—the charismatic form of legitimacy offering only temporary, transitional form of legitimacy (not one that can form a permanent basis for a legal order).

More importantly, however, Weber's account leaves a 'legitimacy gap'. Weber does not solve the issue of the basis of rational–legal legitimacy, which thus appears as an incomplete form of legitimacy: it defines an internally coherent, yet partial, form of legitimacy. The rational–legal form of legitimacy means that the law is valid because it follows a number of procedural steps, but it does not provide a basis for the law outside the legal process. In the Weberian account, secular legitimacy is confronted with the problem of its own foundation.

In Western legal and political thought, the problem of secular legitimacy has been the concern of a number of thinkers who have responded with the idea of a 'social contract', in particular as developed by Hobbes and Rousseau, who were largely concerned with finding a legitimate basis for sovereign political power. In doing so, social contract theories had to solve 'the intriguing tension between order and consent'.[25] Social contract theories were based on the simultaneous existence of consent by the people and an agreement on an order forming the basis of the political community. Faced with the issue of legitimacy, social contract theories were based both on the sovereign power of the people and on the idea of natural law as providing the ultimate basis on which the whole theory would rest.[26]

Social contract theories offer only a partial response to the question of the 'legitimacy gap', which finds echoes in the contemporary debates concerning the reconciliation between democratic rule and the protection of rights. These theories leave open the problem of ensuring that the deliberation of the sovereign (people) always results in respect for rights, and more generally that this deliberation necessarily results in building a viable political order. Social contract theories leave open the following question: on what basis can 'the people' be represented by the state? The issue for the secular state is to provide a positive definition of 'the people', to define the identity of a group which is not bound by any particular, prior link—a group for whom religion is no longer the sole or main reference point.

[24] Max Weber, *Economy and Society* (University of California Press 1978) 215—this issue will be discussed in detail in Chapter 1 of this book.

[25] Johan Tralau, 'Thomas Hobbes, Carl Schmitt, and three conceptions of politics' (2010) 13 *Critical Review of International Social and Political Philosophy* 261, 264.

[26] Michael Freeman talks of a 'hidden god' in human rights to describe the link made by theorists of the social contract (here Locke) between natural law and religion and sees human rights as a secularization of the idea of natural rights, which initially had a religious dimension: Michael Freeman, 'The problem of secularism in human rights theory' (2004) 26 *Human Rights Quarterly* 375.