
Protecting Suprarationality

Protección de la supraracionalidad

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Abstract: In this paper, I address religion from a legal perspective. I argue that religion should be settled outside the secular legal system; otherwise, the secular legal system would not be truly secular. However, religion demands special protection as a public good and social value, as it constitutes an extrinsic constitutional limit of the legal. For a secular legal system, protecting religion ultimately means protecting human beings' pursuit of the suprarational. Protecting suprarationality has three important legal consequences: (a) suprarational acts in the strictest sense should never be validated as legal acts; (b) democratic communities should not use suprarational arguments in legal discourse; and (c) the secular legal system cannot regulate suprarationality or the essentials of the religious community. The protection of religion demands both a dualistic structure that distinguishes the political community from the religious community and the treatment of religion as a right: the *right to religion*.

Keywords: religion; suprarationality; political community; religious community; right to religion; secular legal system

Resumen: En este artículo, analizo la religión desde una perspectiva jurídica. Argumento que la religión debería ser mantenida fuera del sistema jurídico secular; de otro modo, este no sería propiamente secular. No obstante, la religión exige una protección especial por tratarse de un bien público y un valor social, al tiempo que constituye un límite extrínseco constitucional del derecho. Para un sistema jurídico secular, proteger la religión implica en último término proteger la búsqueda de lo supraracional por parte de los seres humanos. Y esa protección tiene tres importantes consecuencias jurídicas. (a) los actos supraracionales en el sentido más estricto nunca deberían ser validados como actos jurídicos (b) las comunidades democráticas no deberían utilizar argumentos supraracionales en el discurso jurídico y (c) el sistema jurídico secular no puede regular la supraracionalidad o la esencia de la comunidad religiosa. La protección de la religión exige una estructura dualística que distingue la comunidad política de la religiosa y al mismo tiempo el tratamiento de la religión como un derecho: el derecho a la religión.

Palabras clave: religión; supraracionalidad; comunidad política; comunidad religiosa; derecho a la religión; sistema jurídico secular.

In a multifactor constitutional approach to religion, there need be no single justification for protecting religion; there can be many rationales for such protection.¹ However, we can attempt to find the ultimate justification as

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¹ In the same vein, GREENAWALT, K., *Religion and the Constitution I. Fairness and Free Exercise* (Princeton University Press, Princeton and Oxford, 2006) pg. 137. For different rationales, see among others: WITTE J. and NICHOLS, J. A., *Religion and the American Constitutional Experiment* (3rd ed., Westview Press, Boulder CO, 2011) pgs. 21-40; KOPPELMAN, A., *Defending American*

a good starting point for analyzing other aspects of the relationship between religion and the secular legal system. The ultimate justification searches for a legal rationale to legitimize the secular legal system's protecting religion as such. In my opinion, the ultimate justification of legally protecting religion lies in the protection of suprarationality. Suprarationality can be understood both in a subjective and objective sense. In a subjective sense, suprarationality refers to the capacity of each person to (a) freely overcome his or her own materiality, individually or collectively, in the search for the fundamental and most profound truths about the origin, meaning, and purpose of human life and the universe; and (b) freely follow and share these truths as he or she understands them.² In this subjective sense, suprarationality is an experiential capacity—of experiencing conversion, regeneration, and purification; developing spirituality; receiving grace; gaining assurance; developing cosmic consciousness; and so on. According to this subjective sense, suprarational understandings, beliefs, and commitments come together and can be manifested in a single act (e.g., of worship).

In an objective sense, suprarationality is the unseen order of everything that is beyond or above the range of a normal or merely rational human experience. The objective approach refers to suprarationality as a potential source of religious knowledge, transcendent justice, spiritual happiness, and love as a result of harmony with that suprarational order through adjustment of our lives in harmony with transcendence. Since objective suprarationality can be pursued by different people in concert, its pursuit can be organized and institutionalized; however, an objective suprarational dimension has private as well as public dimensions.

Suprarationality cannot be explained from rationality; the higher cannot be explained by or derived from the lower. Suprarationality does not imply the progressive obliteration of the rational, but its progressive expansion. The rational is not completely separated from the suprarational, for the latter still

Religious Neutrality Harvard University Press, Cambridge MA, London 2013) pgs. 120-165; LEITER, B., *Why Tolerate Religion* (Princeton University Press, Princeton, Oxford, 2013); and BRADY, K. A., *The Distinctiveness of Religion in American Law* (Cambridge University Press, New York, Cambridge, 2015) pgs. 285-299.

² On the human capacity of achieving transcendent truth, Ratzinger, J., *Truth and Tolerance* (trans. Henry Taylor, Ignatius Press, San Francisco 2003) pgs. 138-161. See also PANNIKAR, R., *Opera Omnia II. Religion and Religions* (ed. Milena Carrara Pavan, Orbis Book, 2015) pg. 260: «rationality is not the only criterion for truth.»

must cohere with the former; divine reason is also reason.³ What distinguishes suprarationality is that it cannot be expressed according to the requirements of scientific or secular philosophic discourse. The language of suprarationality is fully understood only within the life of a religious community.

1. THE EXCLUSION OF SUPRARATIONAL ACTS FROM THE SECULAR LEGAL SYSTEM

For legal purposes, I will call suprarational acts those religious acts that, though legally protected, should be constitutionally excluded from secular legal systems in all circumstances (e.g.: obligation to make profession of faith; to go to the synagogue, the church or the mosque; or to take a religious oath). Excluding suprarational acts from secular legal systems does not present an obstacle for their legal protection; it is their exclusion that justifies their protection. Excluding the secular legal system is simply recognizing its lack of competence in suprarational matters.

Following classical analyses of moral acts, we can consider an act to be suprarational when both the subject matter and the main purpose or intention of the act are strictly suprarational. The subject matter of an act is suprarational when suprarationality is the main good toward which the act is directed. Acts of faith and worship constitute two paradigmatic suprarational subject matters of pivotal importance to most religious faiths; thus, they are crucial to a legal understanding of religion in both the national and the international realms.⁴

I understand an act of faith in the general sense as a free response of an individual to the suprarational. It involves an ascent of the intellect and will to a transcendent truth, specifically to God. It is probably the first religious experience, as it opens the door to suprarationality. I understand worship as offering praise and adoration to a Supreme Being, acting in reverence to other gods or

³ See VICO, G., *New Science* (trans. David Marsh, Penguin Books, New York, reprint 2013) pg. 409: «Now, since God is pure reason, divine reason and authority are the same thing: and good theology places divine authority on a level with reason.»

⁴ This is the reason that in some European countries, some acts against worship and faith were criminalized (and some are even now). For an overview on the protection on worship and religious doctrine in Europe, see DOE, N., *Law and Religion in Europe. A Comparative Introduction* (Oxford University Press, Oxford, New York, 2011) pgs. 139-163.

transcendent beings, and participating in individual and collective religious rituals of both theistic and nontheistic religions. Worship is a consequence of faith.

Religious education, however, would not involve in this strictest sense suprarational subject matter, as it is directed chiefly toward education, and indirectly toward suprarationality. It affects suprarationality just insofar as and because suprarationality is a subject matter of education. Religious indoctrination, in the value-neutral sense of a process of imparting doctrine in an authoritative way (e.g., as in catechism), will be a suprarational act according to the subject matter, since the act is mainly directed to suprarationality through education, and not to education through suprarationality. A similar point applies to proselytizing in the sense of an act of attempting to convert people to another religion. It is a suprarational act because the object is deliberately directed toward suprarationality; therefore, it should be allowed in the public sphere as a manifestation of religion, but excluded for political authorities. Any type of coercion or threat is completely opposed to true proselytism; it transforms proselytism into a criminal offense;⁵ however, promoting religion in general is not necessarily a suprarational subject matter, just as promoting marriage is not a marital act, but a political one that is beneficial to marriage.

By promoting religion, a legal system is not necessarily acting suprarationally in the strictest sense. For this reason, establishing religion is not properly a suprarational act, but both a religious and political act in the broadest senses. Therefore, establishment, or at least some types of non-coercive establishments, could be in accordance with a secular legal system.⁶ A different question is whether the establishment of a religion is the best framework to protect religious freedom. In my opinion, nonestablishment is the best way to fully protect religious freedom; indeed, it is the best way to protect religion. History has confirmed this statement many times.

The intention, end or main purpose (*finis operis*) of the action is one with the subject matter of the suprarational act.⁷ In order to have a suprarational

⁵ For an overview of the regulation of proselytism, see WITTE, J. JR. and MARTIN, R. C., *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism* (Orbis Books, Maryknoll, New York, 1999).

⁶ In the same vein, Human Rights Committee, General Comment 22, Article 18 paragraph 9 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

⁷ The intention as such cannot be recognized by the legal system. However, legal systems are able to recognize the external expressions and manifestations of a concrete internal intention.

act, both the subject matter and main purpose or end of the act (*finis operis*) should be suprarational. Reading the Koran is an act whose objective subject matter is suprarational, but the act overall can be non-suprarational if the reading intention is historical, cultural, or comparative rather than spiritual or religious. The same goes, of course, for reading any other religious text. If the purpose of reading the Bible in a public school is cultural (i.e., to read one of the most influential books in the history of humanity), for example, the act would not be suprarational, as it would be if the Bible were presented as the Word of God and a source of suprarational knowledge.⁸

A suprarational intention or purpose of the acting person (*finis operantis*) cannot convert a non-suprarational act into a strictly suprarational act if the subject matter is not mainly or exclusively suprarational. Giving alms is basically a moral act of generosity and solidarity; it could have a suprarational purpose for some people but not others. Therefore, giving alms could be considered a suprarational act for legal purposes or subjectively for those persons giving alms for religious reasons. But because the subject matter (and the *finis operis*) are not exclusively suprarational, almsgiving cannot be excluded from the legal system. A similar situation occurs with marriage. For many religious people, marriage is a suprarational act—a religious covenant or even a sacrament—however, because the subject matter (and the *finis operis*) of marriage is not exclusively suprarational, but also rational, marriage cannot be excluded from the legal realm. A secular legal system should not refrain from regulating marriage because of its suprarational character, but it should refrain from regulating suprarational aspects of marriage (e.g., imposing the religious ceremony as the only way to marry). An act should be beyond the legal system's regulation only if it is strictly suprarational. And even though a suprarational intention of the acting person with or without suprarational subject matter can make a particular act suprarational overall, it cannot make all acts of that type strictly suprarational (and therefore beyond the state's proper control).

Circumstances by themselves cannot change the quality or nature of an act's subject matter, to make it either religious or non-religious if it is the

⁸ In *Abington School District v. Schempp*, 374 U.S. 203 (1963) the U.S. Supreme Court treated Bible-reading as it had prayer: The Bible readings in *Abington* were clearly «religious exercises», the Court concluded. However, Justice Tom C. Clark, who delivered the opinion of the Court, opened the door to the objective value of religious instruction for non-spiritual purposes.

opposite by nature. Circumstances can change the main purpose or intention of an act, however, by shifting from a chiefly or even exclusive religious purpose to a chiefly nonreligious purpose or vice versa. For example, based on historical grounds (i.e., on circumstances), the U.S. Supreme Court upheld the hiring of chaplains to open legislative sessions with prayers.⁹ Chief Justice Burger's opinion appealed to the «unique history»¹⁰ of the legislative chaplains in the United States since the Continental Congress in 1774. Prayer is a religious subject matter. The intention or purpose to pray at the beginning of the session was chiefly religious. But historical circumstances converted these chiefly religious purposes into a cultural purpose so that the act of praying at the beginning of the legislative session was deemed, from a legal perspective, more cultural than religious.

This is similar to what has occurred in Spain. Based on cultural and historical traditions, the Spanish Constitutional Court held that the national police, as members of a religious fraternity, could participate in a religious procession during the celebration of the Catholic Holy Week.¹¹ In 2011, the Spanish Constitutional Court also held that it was not unconstitutional for the statutes of the Bar Association in Seville to proclaim as its honorary patron the Virgin Mary, in her avocation as the Immaculate Conception.¹² Participating in a religious procession and appointing the Virgin Mary as patron of a secular institution are acts whose objective subject matter is religious; however, the main purpose of a religious act can change. For example, what is mainly non-suprarational in Spain based on certain historical circumstances could be suprarational in the United States under other circumstances.

In sum, the only suprarational acts that must be avoided in all circumstances by political authorities are those whose subject matter and main purpose are strictly suprarational, where circumstances have not changed to change their (primary) purpose. When a legal system fails to exclude suprarational acts in this strict sense, it abandons its secular character.

⁹ See *Marsh v. Chambers* 463 U.S. 783 (1983). The argument that military and prison chaplains are required for protection of the free exercise clause is not relevant here since free exercise does not demand religious practices in legislative sessions. See GREENAWALT, K., *Religion and the Constitution II. Establishment and Fairness* (Princeton University Press, Princeton, Oxford, 2008) pg. 94 nt. 1.

¹⁰ See *Marsh v. Chambers* 463 U.S. 783, 791 (1983).

¹¹ Spanish Constitutional Court (STC) 101/2004.

¹² Spanish Constitutional Court (STC) 34/2011.

2. THE SUPRARATIONAL ARGUMENT AS AN IRRELEVANT LEGAL ARGUMENT

Suprarational arguments are those arguments whose premises (typically in the form of propositions, statements, or sentences) in support of a claim, the conclusion, are beyond the reach of reason unaided by revelation. «Since God redeemed humankind, human beings should love each other», is an example of a suprarational conclusion drawn from a suprarational premise. «Homosexual acts should be legally banned because the Bible rejects them» is also based on a suprarational premise. Suprarational arguments are chiefly based on premises derived from pronouncements of religious authorities and books, traditional religious practices, or mystical or revelatory experiences.¹³ Suprarational arguments should not be used in the legal discourse of democratic communities because secular legal systems should operate always within the rational realm. Reason is the only language that secular legal systems can understand; therefore, suprarational arguments should receive the same treatment as suprarational acts. Suprarational arguments should be placed outside the secular legal system. This exclusion is exactly what makes a legal system secular in the first place.

This hallmark of the secular legal system does not necessarily put religion as a whole outside the domain of public reason, as Rawls suggested,¹⁴ nor does it expel religion from political deliberation. The realm of political deliberation is larger than the realm of strictly legal deliberation. And what is placed outside the legal system is only suprarational argumentation, which is only a part of any religion. The reason is that the suprarational argument is essentially unintelligible by secular legal systems. Suprarational argument should be outside of the legal realm for the further reason that it cannot properly be imposed: suprarationality requires free adherence. A coercive suprarationality is a contradiction in terms. Since legal systems are, by definition, coercive, they cannot use suprarational arguments. This is not a matter of discrimination by exclusion; it is a matter of the nature of the system and types of argumentation in question.

¹³ For a more detailed approach of the religious argument, see MARCH, A. F., «Rethinking Religious Reason in Public Justification», in *American Political Science Review* 107 (2013) 523-539.

¹⁴ See, RAWLS, J., *Political Liberalism* (expanded edition, Columbia University Press, New York, reprint 2005) pgs. 224-225.

Secular legal systems should protect the suprarational, but they cannot deploy it. They protect it for a legal reason as well, which is itself by definition secular. In this sense, I do not agree with Eberle when he argued that «each citizen should feel free to support coercive laws on the basis of her religious convictions—even on the basis of her religious convictions alone—so long as she conscientiously regards her religious convictions as providing a sufficient basis for those laws.»¹⁵ Behind this statement there is a category error—the use of legal coercion for suprarational reasons. Legal coercion can be used only for legal purposes and must be reduced to the realm of the legal. In order to legitimize the use of legal coercion to protect religious convictions, religious convictions must be supported by a legal rationale. There are, for instance, both religious and legal arguments for using legal coercion to avoid political corruption, but there is no legal argument for supporting some expressions of so-called blue laws in the United States (e.g., restricting or banning the sale of alcoholic beverages on Sundays for religious purposes).¹⁶

But let us not mistake a part for a whole. Suprarational arguments cannot be converted into rational arguments by changing the premise, as the result would be a different argument; however, religious ideas and values, not suprarational arguments, can be used in political deliberations, and many of them can be converted into legal rationales for public policy. It is not possible to erect a barrier between culture, including religious culture, and public deliberation. Since religion operates in the public sphere and religious communities are inescapably a part of the political community, religion cannot be ostracized.

As McConnell has shown, Americans owe much to Calvinist and Baptist preaching in support of independence; the Protestant ministers were the ideological commissars of the American Revolution, and the principal arguments for religious freedom and against establishments were religious in content.¹⁷ Something similar is true of the birth of the European Union, in which the Christian idea of forgiveness after the Second World War played a decisive

¹⁵ EBERLE, Ch. J., *Religious Conviction in Liberal Politics* (Cambridge University Press, Cambridge, New York, 2002) pg. 333.

¹⁶ For an historical overview of Blue Laws in the United States, see RAUCHER, A., «Sunday Business and the Decline of Sunday Closing Laws», in *Journal of Church and State* 36 (1994) 13-33.

¹⁷ MCCONNELL, M. W., «Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation», in *Journal of Law, Philosophy and Culture* 1 (2007) 162-164.

role;¹⁸ and of the Civil Rights Movement, led by Martin Luther King, Jr. Religious ideas, however, require transformation in order to become legal. This transformation is possible because the suprarational presupposes the rational. It is beyond the rational, but not against the rational. Behind the American Constitution, the Human Rights Movement, or the birth of the European Union, many wonderful and beautiful religious ideas, ideals, and aspirations exist. But the final *legal* result (e.g., the American Constitution, the Civil Rights Act of 1964, or the Treaty of Lisbon) does not include suprarational arguments. Each is secular by nature.

In other words, the secular can be founded on both secular and religious origins. In the latter case, the secular will follow a process of transformation (appropriate secularization). To fail to recognize this second source of genuine secularity is to forget the source of legality itself. The very idea of law was originally a religious idea before being developed into a secular idea.¹⁹ Moreover, in modern society, there are deeper arguments for avoiding the death penalty, for example, based on religion than there are based on strict secularity.²⁰ Religious arguments can and should be used in political deliberation to urge against the death penalty or torture, but the final legal ban of the death penalty or torture should be based on a secular argument. This is the only type of argument that can be recognized by a legal system.

The idea that legal systems cannot use suprarational argumentation is consistent with the ideals of democratic equality that a secular legal system ostensibly seeks to protect.²¹ Politicians can use religious argument in their political campaigns if they want to use it, but religious arguments should be excluded from legal reasoning as a matter of principle. It is also a matter of

¹⁸ See WEILER, J., *Un'Europa cristiana. Un saggio esplorativo* (Rizzoli, Milan, 2003).

¹⁹ See BRAGUE, R., *The Law of God. The Philosophical History of an Idea* (trans. Lydia G. Cochrane, The University of Chicago Press, Chicago, London, 2007)

²⁰ In this vein, on torture, see WALDRON, J., «Two-Way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation», in *Mercer Law Review* 63 (2012) 845-868.

²¹ MCCONNELL, M. W., «Secular Reason and the Misguided Attempt to Exclude Religious Argument from Democratic Deliberation», in *Journal of Law, Philosophy and Culture* 1 (2007) 159-174, at 174 offers a good argument for the internal inconsistency of the prohibition of the religious argumentation in democratic deliberation. However, his argument is not in tension with mine. What I argue is that suprarationality does not cohere with legal coercion, but does that not mean that the religious argumentation in general must be excluded from democratic deliberation. It just means that the suprarational argumentation must be excluded from legal deliberation.

language, as the language of the secular legal system is not religious.²² Again, legal coercion and religious suprarationality are incompatible, but religion and politics are compatible.

I basically agree with Audi's formulation of what we might call a principle of secularity, meant to moderate legal appeals to religious reasons. His formulation is in positive terms (in terms of having an adequate secular reason, not in terms of *not also* having *non*-secular reasons) and has a sociopolitical character: «Citizens in a democracy have a prima facie obligation not to advocate or support any law or public policy that restricts human conduct unless they have, and are willing to offer, adequate secular reason for this advocacy or support.»²³ My formulation, however, is legal and put in negative terms, since I see the suprarational as an extrinsic constitutional limit of the secular. Inspired by Audi's formulation, I would say that the secular legal system of democratic societies should not contain any law or public policy that restricts human conduct based exclusively on suprarational considerations.

Because it is positive, Audi's principle is more restrictive than my formulation. Audi incorporates a judgment about the adequacy of the secular reason. This element makes sense when dealing with the secular legal system from within, but not when dealing with the secular legal system from without. From a legal perspective, the most important feature of Audi's principle of secular reason is that it is not exclusive; therefore, it is not antireligious. It does not put away religious reason. It just demands a secular rationale to supplement religious reasons, based on the idea that «freedom is the default position in a liberal democracy.»²⁴

My formulation does not imply that religion should be privatized in liberal democracies, let alone that citizens have the civil obligation to vote according to secular arguments. A Muslim can defend legalizing polygamy for religious reasons, but a law allowing polygamy should be based on a secular argument (e.g., sexual freedom and free private partnership). On the other hand, a Catholic can defend banning polygamy for religious reasons, but a law

²² See ZUCCA, L., *A Secular Europe* (Oxford University Press, Oxford, New York, 2012) pg. 196. However, may legal terms have a religious origin. On the relation between language and law, see BERMAN, H., *Law and Language: Effective Symbols of Community* (ed. John Witte, Jr., Cambridge University Press, New York, Cambridge, 2013).

²³ AUDI, R., *Democratic Authority and the Separation of Church and State* (Oxford University Press, Oxford, New York, 2011) pgs. 65-66.

²⁴ *Ibid.*, pg. 69.

banning polygamy should be based on a secular argument (e.g., sexual equality, tradition, education of children, etc.). In a referendum on polygamy, both parties can vote based on religious premises. However, a passed bill without a rational argument supporting it would go against the constitutional nature of the secular legal system.

In sum, suprarational argumentation cannot be the *exclusive* justification of legal deliberation. Legal deliberation demands a secular rationale. This fact does not take away religious argumentation from political deliberation, let alone reduce it to the private realm. The demand of rationality is simply an expression of the essence of the secular legal system. Secular legal systems should be open to transcendence, but they must not be entangled in suprarational issues. In order to be inside the legal system, the suprarational argument should be supported by a rational argument; otherwise, it cannot be legal.

3. STRUCTURAL DUALISM

Structural dualism means that no legal constitutional model of a political community can adequately protect the transcendent or suprarational dimension of human beings without creating a dualistic structure that guarantees sufficient autonomy for religion and religious communities. Such dualism is also a necessary, though not a sufficient condition, for guaranteeing equal religious freedom for all citizens and preventing unfair religious interference with the political realm. Without dualism, a secular legal system cannot be properly developed and no state can be reasonably classified as a liberal democracy. Dualism is beneficial for both religion and politics—it protects religious communities from political communities, and political communities from religious communities.²⁵ Dualism is the most important consequence of the incompatibility between religious suprarationality and legal coercion.

There are at least four considerations that support this dualistic structure of society, all of which are deeply related to and ultimately based on freedom. The first was already explained: religion, in the strictest sense of suprarationality, constitutes a constitutional limit of the legal system of a political community. (That is not true of other goods and values, such as art, knowledge,

²⁵ See RAWLS, J., «The Idea of Public Reason Revisited», in *Political Liberalism* (expanded edition, Columbia University Press, New York, 2005) esp. pg. 476.

and sociability.) But religion in the *broadest* sense does have political dimensions. It can and should be manifested in the public sphere. There is no reason for restraint. Yet it also has a constitutive, nonpolitical dimension insofar as it involves the suprarational, which should not be a matter of state coercion. This is not a stipulation about what I mean by «religion», but the formulation of an aspect of religion with important legal relevance.

We can make the same two points from the perspective of politics. It has a religious dimension, in that it embraces all types of communities, including religious. At the same time, politics has a constitutive, nonreligious dimension insofar as it is not religious in the strictest sense—i.e., suprarational. In the suprarational realm, politics has no place. Politics and religion are two sides of the same coin—the public sphere. At the center of the public sphere should be the person, not the political community, because the person is at the same time both a religious and political being—a rational being open to suprarationality. Politics and religion are not incompatible, though. What cannot mix are some aspects of religion with some aspects of politics, namely suprarationality and legal coercion.

The second consideration is that the intrinsic unity of the person (i.e., the integration of the person's individual, social, and transcendent dimensions), based on dignity, cannot be projected onto the community as a whole, for dignity is a status of the human person exclusively. When a political community, using (or abusing) its sovereign power, tries to make its own this intrinsic three-dimensionality of the human person, it becomes totalitarian. In some ways, the absolute nation-state, based on the idea of sole and exclusive sovereignty, is an attempt to substitute dignity for sovereignty as the state's character (appropriating for itself the centrality of the human person).²⁶ An analogous error occurs when a religious community becomes a political community, without differentiating its religious structure from its political structure or its religious beliefs from its political action.

The third consideration is that the act of adherence to a faith or creed is, by nature, completely free and personal. Faith can be shared within a community of voluntary membership, as it is in the religious community, but not within a community of compulsory membership, as in the so-called complete political community. If every person must be a member of at least one political

²⁶ For more on this argument, see DOMINGO, R., *The New Global Law* (Cambridge University Press, New York, Cambridge, 2010) pgs. 65-73 and 131-136.

community to satisfy his or her basic needs and develop his or her personal capacities, but a compulsory political community cannot manage transcendence, then the existence of a dualistic structure is a democratic constitutional right that guarantees freedom of religion, for the sake of the person's full development.

At the heart of religious freedom is the idea that a purpose of a political community is not to make an act of faith based on some religious truth, for citizens in this case would not have the required freedom to practice or not practice religion. Thus, political and religious communities have different purposes, even though both have been established for the sake of the human person. Political communities can share religious values, which do not require acts of faith, but they cannot share concrete religious beliefs as matters of law. The communion of faith demands the fullness of freedom, without restrictions. This fullness of freedom can only be achieved in a community of voluntary membership, not in a community of compulsory membership, which would legitimize the existence of the so-called freedom of religion as a constitutive element of religious freedom.

The fourth consideration in favor of a dualistic structure is the public nature of suprarational law.²⁷ The suprarational law of historical religions has a public nature derived from the communion of faith, insofar as suprarational law binds the religious community as a whole, not only each of its members. In some religions, such as Judaism and Islam, the public dimension of suprarational law is a presupposition of the existence of the very community—there is a community because there is suprarational law, not vice versa. Thus, the religious community is at the heart of the political community. For the religious community to avoid taking control of the political community and for suprarational law not to be confused with the law of the secular legal system, the secular legal system must recognize a religious communitarian structure that is ontologically different from the political structure and in which only transcendent law operates.²⁸

From a political point of view, an important consequence of the requirement of a dualistic structure is that the legal system of a political community

²⁷ On the foundation of the idea of transcendent law, see BRAGUE, R., *The Law of God. The Philosophical History of an Idea* (trans. Lydia G. Cochrane, University of Chicago Press, Chicago, London, 2008).

²⁸ For further explanation, see DOMINGO, R., «A New Global Paradigm for Religious Freedom», in *Journal of Church and State* 56 (2014) 427-453.

does not need for its existence any type of religious legitimation, since a political community is not an extension of the religious community, but a completely autonomous community. Another important consequence is that the democratization of religious communities cannot be a demand of the political agenda of democratic governments. The political community cannot impose its constitutional model on the religious community because the two are ontologically different. Each community has its own rules, its own institutions, and its own proper scope, regardless of which community was born first. Both community structures need each other, however, for the good of humanity.

Constitutional dualism warns against the existence of total community structures. In general, total community structures are those that do not make any substantive distinctions between transcendent law and positive law, or those that deny, at least implicitly, transcendent law. Theocracies, including constitutional theocracies, are likely to create total community structures, but are strong secular liberal political communities when they do not recognize the social dimension of religion. Religious and political communities become total communities by mutual absorption or mutual exclusion. A religious community becomes total when, based on the principle of self-determination, it also becomes an independent, or at least autonomous, political community and objects to the creation of a new dualistic structure that differentiates between the religious community and the new political community. A religious community also becomes total when it tries to impose its religious rules on areas that are outside its sphere of business or uses coercive political power to impose its criteria on religious issues. A political community, on the other hand, becomes total when it tries to control religious communities or fully exclude them from the public sphere. History, life's teacher, offers us many examples of total communities in both senses.

The first claim of constitutional dualism is that both communitarian structures, the political and the religious, should recognize each other since they operate in the same territory and a greater or lesser proportion of the political community is also part of the religious community structure. Without at least an explicit act of recognition, there can be no dualistic structure, only a monistic one, which is, by definition, totalitarian.

These two communitarian structures should be ontologically autonomous, yet politically interdependent, as all members of religious communities must be members of a political community, but not vice versa. Additionally, religious communities operate inside and across the territories of a political community, so the distinction between political communities and religious

communities is a matter of the different goals and aims of each community. If a political community fails to recognize the value of religion, it will never fully recognize a religious community as an intrinsic piece of the dualistic structure.

4. THE ELECTION OF THE DUALISTIC MODEL AS A CONSTITUTIONAL DECISION

The status that the legal system gives religious communities and the degree of interdependence of these communitarian structures determine the dualistic constitutional model of a political community. Dualistic structures can adopt a wide variety of systems according to history, culture, political experience, and religious diversity.²⁹ The options can be classified into four basic categories: (a) unilateral state primacy over religion (e.g., French *laïcité*); (b) state neutrality (e.g., U.S. nonestablishment); (c) mutual cooperation in common purposes (e.g., German collaborationism); and (d) state singling out and adoption of a religion as the state religion (e.g., England's church establishment). There is a fifth category, the integration of the political community into the religious community as an extension of it (theocracy), but this model is incompatible with the secular legal system. Therefore, I do not address it here.

The models can be specified in so many ways that systems belonging to the same group can differ quite widely. French *laïcité* is different from Mexican or Turkish *laïcité*. German collaborationism is different from Spanish, Italian, or Brazilian constitutional models. Among established churches, England's constitutional model is different from Greece's model (where the national religion is Greek Orthodoxy), Denmark (with a strong established church), or Malta (where the state religion is Catholicism). The model of the United States is in some ways unique because of its originality and the singular judicial interpretation of the First Amendment.³⁰ All four constitutional

²⁹ See in this vein DURHAM, W. C. Jr., «Patterns of Religion State Relations», in WITTE, J. Jr. and GREEN, Ch., *Religion and Human Rights. An Introduction* (Oxford University Press, New York, Oxford, 2012) pgs. 360-378.

³⁰ For an overview of the different models of church-state separation, see, on Western countries, WHITMAN, J. Q., «Separating Church and State: The Atlantic Divide», in *Historical Reflections* 34.3 (2008) 86-104; and, for theocratic governance, HIRSCHL, R., *Constitutional Theocracy* (Har-

frameworks can be in accordance with a constitutional dualism. There are, however, some restrictions that more directly affect the extreme models (e.g., *laïcité*, at least in the French sense)³¹ and church establishments.

Laïcité is different from neutrality. Neutrality might involve avoiding any official expression of religiosity in the public sphere in order to protect freedom of religion, freedom from religion, and social pluralism. But *laïcité*, specifically French *laïcité*, is based on state sovereignty; whereas American neutrality, for example, is bilateral, with mutual noninterference between religion and politics. Historically, French *laïcité* was a constitutional political reaction against the dominance of Catholicism; American neutrality, on the contrary, was a political decision about how to manage Christian religious diversity. French *laïcité* is a consequence of strictly applying the principle of state sovereignty to religious issues.³² American neutrality is a consequence of strictly applying the principles of justice and equality to religious issues.³³

Thus, under French law, strong state interference with religion is compatible with the principle of *laïcité* since there is an absence of formal state recognition of institutional religious autonomy. Additionally, as Troper pointed out, «the power of the state over religion in France is not just a consequence of a preexisting doctrine of sovereignty; it is also constitutive of sovereignty, in the sense that the doctrine of sovereign State has been conceived from the beginning as an instrument of a religious policy.»³⁴ If the state is sovereign, no subject matter can escape its power, not even religion. So if the French state abstains from regulating religion, it is because it is deciding not to exercise any sovereign power over religion; however, it could do so if it pleased, based on its sovereignty. This justifies the state having ownership of religious buildings,

vard University Press, Cambridge, MA, London, 2010). For a European overview, see DOE, N., *Law and Religion in Europe. A Comparative Introduction* (Oxford University Press, Oxford, New York, 2011). For a general view of the US model, see WITTE, J. Jr. and NICHOLS, J., *Religion and the American Constitutional Experiment* (3rd ed., Westview Press, Philadelphia, 2011).

³¹ For a general view of *laïcité*, see HAARSCHER, G., *La Laïcité* (5th ed. PUF, Paris, 2011) and the bibliography on pgs. 124-126; POULAT, E., *Notre Laïcité Publique* (Berg International, Paris, 2003); and GUNN, T. J., «Religion and Law in France. Secularism, Separation, and State Intervention», in *Drake Law Review* 57 (2008-2009) 949-984.

³² In this vein, see TROPER, M., «Sovereignty and *Laïcité*», in *Cardozo Law Review* 30.6 (2009) 2561-2574.

³³ On specific American neutrality, see KOPPELMAN, A., *Defending American Religious Neutrality* (Harvard University Press, Cambridge, London, 2013) esp. pgs. 15-45.

³⁴ TROPER, M., «Sovereignty and *Laïcité*», in *Cardozo Law Review* 30.6 (2009) 2564.

and the prohibition of wearing religious signs or subsidizing religious schools. Laïcité defends dualism, but submits the religious community to the unique sovereignty of the political community. For that reason, a strong, unhealthy form of laïcité could violate individuals' free exercise of religion.

Having a church establishment clause can fit with the principle of dualism, but again only with some restrictions. First, the church and state should be perfectly differentiated. An established church cannot and should not be a «department of the state.» Church establishment should not imply or impose an act of faith onto fellow citizens or use a concrete religious argument in legal deliberation. Religious establishment should never support the recognition of a religion as a true religion, since a political community is not competent in suprarational matters. Religious establishment should imply exclusively an official recognition of the social values of a concrete religion, which is precisely what justifies a specific legal position for a concrete religious community inside a political community. In my opinion, this is the only way to justify the establishment of a religion in a democratic society. In practice, church establishment often endangers both individual freedom and equality. Even if it is merely formal, it promotes a political entanglement with religion, which may lead to a lack of impartiality in treating religion as a social phenomenon and often in treating individual citizens, especially secular citizens. Experiences of this abound.

The other two constitutional models of dualism, state neutrality (e.g., U.S. nonestablishment) and collaborationism (e.g., the German model) fit completely with the dual system. State neutrality is based on the negative principle of abstention as the best way to promote and guarantee the proper development of religious phenomena in public life. The model of collaborationism is based on the positive principle of cooperation searching for collaboration between political and religious communities to achieve common goals. Both models have advantages and disadvantages. U.S. neutrality promotes equal treatment of religion and protects the required autonomy of religious communities. But it risks degenerating into a strict separationist model, nearer to laïcité, which defends a secular establishment in which individual religious freedom is restricted. The advantages of the model of religious collaborationism are its openness to religion and the fact that religion is regarded as a public good with a clear space in public life. There are, however, two disadvantages of the collaborationist model: (a) the model can easily fall into an excessive and undesirable entanglement between religion and politics, and (b) it can come to involve religious preference, and thus

unequal treatment of communities and citizens. The German system of a church tax, which covers approximately 80% of the entire church budget, is probably a case of excessive entanglement between religious and political communities.

The precise scope of the protection of religion depends on the nature and framework of the constitutional model. Extensions of protection are justified by reasons of equality (which favor treating sufficiently analogous phenomena similarly), not by the precise argument that justifies the protection of religion. A secular legal system is not equipped to weigh the rational coherence of theological doctrine; that is not its business. However, the secular political community should favor religion because without religion, there is no secularity, just as without sheep there is no shepherd.

I prefer the American model of neutrality;³⁵ however, the political community has the exclusive power and right to freely decide the constitutional model of its relationship to the religious communitarian structure. This decision should not be shared by the religious communities because it is a political decision in the strictest sense and should be based on cultural, historical, and moral grounds. According to their constitutional model, political communities can allow or ban concrete religious education in public schools, and religious symbols and ceremonies in public institutions. Political communities can be more or less open to the celebration of religious holidays, as well as to the intensity of the presence of religious values in the legal system. They can defend religious equality or, on the contrary, can even promote the concrete values of a specific religion as a state religion. Political communities can consider religion one of their most important sources of values or as mere matters of individual and social freedom that require legal protection. All political communities, however, should recognize religious communities, even those that defend ideas and views against their own legal system, provided that the religious communities operate in accordance with the legal system. This variety of regulation on religious matters, according to the dualistic constitutional model adopted by the political community, protects global pluralism and personal freedom while assuring the minimum of religious freedom demanded by human dignity.

³⁵ In the same sense, KOPPELMAN, A., *Defending American Religious Neutrality* (Harvard University Press, Cambridge MA, London 2013) pgs. 1-14.

5. CONCLUSION

Suprarationality is a sufficient condition for the existence of religion and the ultimate justification for its legal protection because suprarationality constitutes a constitutive extrinsic limit of the legal, just as the land is an extrinsic limit of the seas. However, the protection of religion cannot be reduced to the protection of suprarationality. By analogical extension, it should be applied to protect other types of beliefs and even non-religion. To treat believers and nonbelievers equally does not require treating religion as non-religion; that would be a contradiction in terms. Suprarational acts and arguments should be free from legal reasoning. Since suprarational acts demand complete individual and collective freedom, a dualistic structure in which they are beyond the reach of coercion should be established in all democratic societies in order to protect religions and freedom of religion.

