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Straus Working Paper 04/12

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NYU School of Law • New York, NY 10011
The Straus Institute Working Paper Series can be found at
http://nyustraus.org/index.html

ISSN 2160-8261 (print)
ISSN 2160-827X (online)
Copy Editor: Danielle Leeds Kim

New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, STRAUS INSTITUTE WORKING PAPER NO./YEAR [URL]

A NEW GLOBAL PARADIGM FOR RELIGIOUS FREEDOM

By Rafael Domingo*

Abstract: This article articulates and defends a global normative paradigm of religious freedom: a minimum standard of respect for religious freedom that is rooted in human dignity and consistent with a variety of cultural and constitutional frameworks. This paradigm is fleshed out in three arguments: an argument about transcendence; an argument for a certain dualism about religion and politics, and an argument regarding regulation. The first focuses on the concept of religion; the second, on that of freedom; and the third, on rights. The first shows that, though the concept of religious freedom has rightly been expanded to protect nonbelievers as well as believers, all legal systems and constitutional frameworks should be open to the idea of transcendence as such, in order to protect the transcendent dimension of the human person. The argument for dualism calls for an interdependent dualistic structure that guarantees autonomy for both political and religious communities while imposing limits to the principle of laïcité and to theocratic impulses. Finally, the argument for regulation defends the power of political communities to regulate specifically those religious matters which affect the public sphere.

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I. Introduction

Over the last few decades, as religion and religious belief have been on the rise worldwide, the ranks of nonbelievers (agnostics and atheists) have grown in the political arena. Moreover, the rise of a theocratic constitutionalism, which places religion at the heart of the public sphere and political deliberation, has coincided with the spread of a strong liberal secularism that looks skeptically at any "reality of transcendent meaning"[1] and relegates religion to private life. For theocratic constitutionalists, on the one hand, any political community has the right to endorse and support a particular state religion as a source of its law.[2] Political community is an extension of the religious community, and the law a distillation of religion. According to this position, the famous Jeffersonian "wall of separation"[3] between church and state should be at most a thin veil, *prêt à traverser*. For liberal secularists, on the other hand, religion is one among many expressions of individual freedom and does not call for special treatment. It is a "matter of temperament,"[4] a human "attitude",[5] and religious freedom merely one legal consequence of a general principle of individual autonomy in ethical matters.[6]

In this article, I shall offer a wide normative paradigm of religious freedom, a minimum standard for protecting this liberty that is rooted in human dignity, compatible with various constitutional frameworks, and based on worldwide "opinionated disagreement."[7] For, just as there is no ideal legal order, neither is there a

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[1] Cf. Bruce Ackerman, *Social Justice in the Liberal State* (Yale University Press, New Haven, London, 1980) pg. 369.
[2] For a theory of constitutional theocracy, see Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, Cambridge, MA, London, 2010) esp. pgs. 21-49.
[3] For the story of this 'wall,' see Philipp Hamburger, *Separation of Church and State* (Harvard University Press, Cambridge, MA, London, 2002) esp. 1-9.
[4] Cf. Thomas Nagel, *Secular Philosophy and the Religious Temperament* (Oxford University Press, Oxford, New York, 2010).
[5] Cf. Ronald Dworkin, "Religion without God". Einstein lectures at Bern University on December, 12-14 2011 (*pro manuscripto*). I will use the draft presented on December 8, 2011 in the Colloquium in Legal, Political and Social Philosophy at NYU School of Law directed by Ronald Dworkin and Thomas Nagel: http://www.law.nyu.edu/academics/colloquia/clppt/index.htm. Videos from the three lectures are available in the following webpage: https://cast.switch.ch/vod/channels/1gcfvlebil.
[6] In this vein, see Ronald Dworkin, *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2011) pg. 376: "So we must not treat religious freedom as *sui generis*."
[7] I take the expression from Jeremy Waldron, *Law and Disagreement* (Oxford University Press, Oxford, New York, 1999) pg. 305.

perfect constitutional model for promoting and protecting freedom of religion.[8] Each such model, like each legal system, is a product of culture, history, tradition, public consent, and often religion. (Consider, for example, the histories of France, the United Kingdom, the United States, Israel, Turkey, and India.) Each such model must protect religious freedom in its own way. But history, culture, public consent and particular religions should never entirely preclude minimal protection of this liberty which permits every human being to live "religiously free" anywhere in the world as a global citizen. This article argues that constitutional models based on "laïcité", "mutual collaboration" and "establishment" of a church could all be in accordance with this normative paradigm, though not all specific laws pursuant to these models have been consistent with religious freedom. In other words, there is a healthy laïcité and an unhealthy laïcité, a beneficial collaborationism and a dangerous collaborationism, a helpful establishment and a harmful establishment; but the constitutional models of laïcité, collaboration and establishment as such are within this global paradigm of religious freedom. The paradigm is less amenable to the theocratic constitutional model, but it also accepts this framework under conditions that guarantee the minimum freedom of religion required to live in a political community.

The paradigm I propose is an expression of the complementary relationship exhibited among religious and nonreligious citizens engaged in democratic discourse.[9] It considers religion in the broadest sense of the term, which embraces historical religions and purely personal religions or beliefs, as well as first philosophies and moral convictions[10]. Historical religions, with different nuances and to different degrees, normally include three essential elements: an institution or church, a religious creed

[8] In the same vein, J.H.H. Weiler, "State, Church, Nation. A European Perspective" (2011) (unfinished version: http://www.wzb.eu/sites/default/files/veranstaltungen/weiler-statechurchnation-aeuropeanperspective.pdf).

[9] See Jürgen Habermas, "The Political. The Rational Meaning of a Questionable Inheritance of Political Theology," in Eduardo Mendieta and Jonathan Vanantwerpen, *The Power of Religion of the Public Sphere* (Columbia University Press, New York, 2011) pg. 27.

[10] I agree with Talal Asad, *Genealogies of Religion* (The John Hopkins University Press, Baltimore, London, 1993) pg. 29, that "there cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes." For the intricacies of defining the complex concept of religion in the US law, see Kent Greenawalt, *Religion and the Constitution. I. Free Exercise and Fairness* (Princeton University Press, Princeton, Oxford, 2006) pgs. 124-156.

and a moral code.[11] The variety of private religions is as great as the variety of peoples. It is even conceivable for one person to have two or more private religions. But this legal expansion of the concept of religion to private belief does not imply that religion as such is by definition private. Like law, religion can be both private and public and, also like law, it operates differently in each of these modes. The most important conflicts between a legal system and religion usually affect the public spheres of both law and religion: public law and public religion.

The paradigm proposed here is premised on the idea that the right to religious freedom is one of the greatest and most valuable achievements of modernity. This paradigm also relies on the idea that religion as such has an intrinsic value and justification[12], even though the world has been "divided by God"[13] at many points in history. Something similar is true, after all, of law and politics. It is difficult to question their basic value and justifiability, even though they have also been instruments of war, intolerance, crime, and corruption. Recent examples abound.

Without something like the framework defended in this article, freedom of religion as such would be hard to take seriously. Naturally, the paradigm I propose protects the rights of those who consider religion the obsolete product of primitive societies, or an irrational superstition responsible for much of the world's misery. This view of religion would be protected under any robust right to religious freedom (as a consequence of the so-called right to freedom *from* religion), but it could not be the starting-point for constructing a legal paradigm to protect religious freedom. The conceptual starting-point cannot be the idea that religious freedom is simply a "right to do wrong."[14] Reason operates in the religious realm as well as in any other cultural realm, including science.[15]

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[11] In this vein, see also Bertrand Russell, *Religion and Science* (Oxford University Press, New York, Oxford, 2007) pg. 8. For the elements of religion as an anthropological category, see Talal Asad, *Genealogies of Religion* (The John Hopkins University Press, Baltimore and London, 1993) esp. pgs. 29-30.

[12] For the beneficial influences of religion, see Jürgen Habermas, *Between Naturalism and Religion. Philosofical Essays* (Polity, Cambridge, Malden, MA, 2009) pgs. 124-125 and 209-247.

[13] I take the expression from Noah Feldman, *Divided by God. America's Church-State Problem and What We Should Do About It* (Farrar, Straus and Giroux, New York, 2005).

[14] On this concept, see Jeremy Waldron's important paper, "A Right to Do Wrong," in *Ethics* 92.1 (1981) 21-39; reprint in Jeremy Waldron, *Liberal Rights. Collected Papers* (1981-1991) (Cambridge University Press, Cambridge, New York, 1993) 63-87.

[15] Cf. Jürgen Habermas, "Dialogue: Jürgen Habermas and Charles Taylor," in Eduardo Mendieta and Jonathan Vanantwerpen, *The Power of Religion of the Public Sphere* (Columbia University Press, New York, 2011) pg. 61.

The paradigm I defend is based on three arguments. The first will focus on the idea of religion; the second, on the idea of freedom; and the third, on the idea of rights. These ideas will be formulated in negative terms, thus evoking the original meaning of liberty (*libertas*),[16] including religious liberty, as primarily a negation (immunity from coercion) rather than an affirmation (the possibility of acting in accordance with religious belief). Indeed, the positive aspect of religious freedom can only be supported by the negative one. The paradigm proposed in this paper is mainly a matter of negative limits.

The three arguments are the following: First, no legal system or constitutional model can adequately protect the right to freedom of religion without being open to transcendence; i.e., without acknowledging, at least implicitly, the transcendent dimension of the human person with all its legal implications. This paper refers to this argument, which focuses on the very idea of religion, as "the argument about transcendence." This argument tries to preserve the integrity of the human person in his or her multidimensionality and imposes a limit to both strong liberal secularist and theocratic approaches to religious freedom.

Second: no legal system or constitutional model can adequately protect the right to freedom of religion without creating a dualistic structure that guarantees autonomy for both political and religious communities. This argument is based on the concept of liberty and will be called in this paper "the argument for dualism." This argument defends the political community's autonomy of legitimation and also establishes a limit to both the strong liberal secularist and theocratic approaches to religious freedom.

Finally, the third argument is a legal consequence of the second: no legal system or constitutional model can adequately protect the right to freedom of religion without the power to regulate those religious matters that affect public order or the rights of other citizens, believers and nonbelievers. This argument, which will be called in this paper "the argument for regulation," is based on the essentially public and political dimension of religion, in virtue of which freedom of religion should be protected as a particular, *sui generis* right by the political community.

[16] On this double meaning of liberty, see the famous essay of Isaiah Berlin, "Two Concepts of Liberty" (1958), in *Four Essays on Liberty* (Oxford University Press, Oxford, New York, 1990) pgs. 119-172.

These three arguments seek to eradicate any expression of legal, political and religious totalitarianism. They are intrinsically intertwined insofar as they are all aimed at preserve human dignity as an integral aspect of the human being as a person.

II. The argument of transcendence

The argument about transcendence refers to the essence of the right of religious freedom as such, as an independent, genuine human right. It is indeed its justification, its raison d'être. This argument is focused on religion, as a trans-historical and trans-cultural phenomenon,[17] but it also takes into consideration the fact that the right of religious freedom, as an historical category which is chiefly a product of Protestantism[18], was founded on a concrete idea of religion. Otherwise, it would be difficult to understand the nature of this basic right in the legal context.

This original approach to religious freedom presupposed the existence of God, in the Abrahamic sense of the term. One of its more influential proponents John Locke, affirms: "We are capable of knowing certainly that there is a God,"[19] that "there is an eternal, most powerful and most knowing being; which whether anyone pleases to call God, it matters not."[20] According to this founding approach, religious freedom is the political freedom required to accomplish the duty of rending to God what human beings as creatures owe him according to justice or, in the words of James Madison, the father of religious freedom in the United States, "the duty which we owe our Creator and the manner of discharging it."[21]

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[17] In this vein, Talal Asad, *Genealogies of Religion* (The John Hopkins University Press, Baltimore and London, 1993) pg. 28.

[18] For the relation between Law and Protestantism, see John Witte, Jr. *Law and Protestantism. The Legal Teaching of the Lutheran Reformation* (Cambridge University Press, Cambridge, New York, 2002).

[19] John Locke, *An Essay Concerning Human Understanding*, chapter 10 section 1, in *The Selected Political Writings of John Locke* (ed. Paul E. Sigmund, W. W. Norton & Company, New York, London, 2005) pg. 200.

[20] John Locke, *An Essay Concerning Human Understanding*, chapter 10 section 6, pg. 201.

[21] Cf. James Madison, "Memorial and Remonstrance against Religious Assessments" (1785) no. 1; electronic version online: www.religiousfreedom.lib.virginia.edu. See also the Constitution of Massachusetts (1780) Pt. I, Art. II, drafted chiefly by John Adams (http://press-pubs.uchicago.edu/founders/documents/bill_of_rightss6.html) "It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great creator and preserver of the universe."

As a result of an intense process of Western secularization over the last several centuries, belief in God is no longer socially axiomatic.[22] This process has been accelerated so much by globalization and the resulting diversification that the right to religious freedom has changed shape in the international arena. The idea that the right to religious freedom should protect not only theistic religions, but all kinds of religious and nonreligious communities and creeds has been widely recognized worldwide by believers and nonbelievers, and firmly adopted by international law.[23] There is no question about this in contemporary democratic political debates.

But this positive and realistic shift, aimed chiefly at avoiding discrimination in religious matters, can never justify the exclusion or marginalization of the idea of God as understood by deism, by the Abrahamic religions (Judaism, Christianity, and Islam), and by other forms of transcendent monotheism (as, for instance, Zoroastrianism, Sikhism, or Baha'i Faith). Neither can it be used to reduce religion to a private matter. The idea of a transcendent God remains at the heart of the very idea of religion. Indeed, seeing transcendence as a non-constitutive element of the legal concept of religion, in order to extend the rights of religious freedom to all kind of convictions and beliefs, has nothing to do with eradicating transcendence (and especially God) from the idea of religion,[24] as the strong secular liberalist approach to religious freedom would do.

We can see parallels here with the legal concept of family. A legal system can admit that offspring are not a constitutive element of the legal idea of family, but it should not positively exclude offspring from the legal concept of family, with the implication that,

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[22] In the same vein Charles Taylor, *A Secular Age* (Belknap Press of Harvard University Press, Cambridge, MA, London, 2007) pg. 3. For a good synthesis about this process, and its meaning, see also Charles Taylor, "Western Secularity," in Craig Calhoun, Mark Juergensmeyer, and Jonathan Van Antwerpen (eds.), *Rethinking Secularism* (Oxford University Press, New York, Oxford, 2011) pgs. 31-53.

[23] Cf. for instance, *Guidelines for Review to Legislation Pertaining to Religion or Belief* (2004) Title II, Section A, no. 3, adopted by the Venice Commission at its 59th Plenary Session (Venice, 18-19 June, 2004). See electronic version online: http://www.osce.org/odihr/13993: "International standards do not speak of religion in an isolated sense, but of 'religion *or* belief.' The 'belief' aspect typically pertains to deeply held conscientious beliefs that are fundamental about the human condition and the world. Thus, atheism and agnosticism, for example, are generally held to be entitled to the same protection as religious beliefs. It is very common for legislation not to protect adequately (or to not refer at *all* to) rights of non-believers. Although not all beliefs are entitled to equal protection, legislation should be reviewed for discrimination against non-believers."

[24] Cf. Ronald Dworkin, "Religion without God." Einstein lectures at Bern University on December, 12-14 2011 (*pro manuscripto*). Videos from the three lectures are available on the following webpage: https://cast.switch.ch/vod/channels/1gcfvlebil. With the same title and a similar approach, among others, Ray Billington, *Religion without God* (Roudledge, London, New York, 2002).

say, a child is not an integral part of his family. This would be a discriminatory abuse of law.

That a legal system should be open to transcendence does not mean that it has to be closed to immanence, let alone that it should protect only transcendent religions and beliefs. As an essential expression of pluralism and diversity, a global paradigm of religious freedom has to protect both transcendent and immanent religions and beliefs, as well as all kind of creeds, convictions, first philosophies and *Weltanschauungen* in the broadest sense. Yet the protection of transcendent religions has some legal implications that the protection of immanent religions does not have, just as the legal protection of a couple with children has wider legal significance than the protection of a childless couple, and the protection of a couple more than the protection of a single person. To consider religion only as an immanent phenomenon and foreclose the legal protection of transcendence constitutes an unjustified reductionism, the imposition of a secular religion, an "irreligious religion". It is precisely transcendence which gives pride of place to the right of religious freedom.

1. Transcendence and legal systems

Transcendence, from the Latin *trans-* (beyond) and *scando* (climb), means to rise above, to go beyond the limits of, to cross from one sphere to another, overcoming the limit that separates them. For our legal purpose, transcendence means the complete freedom and self-determination of each person to overcome his or her own materiality in the search for the fundamental and most profound religious truths about the origin, meaning and purpose of human beings and the universe, and to freely follow and share these truths as he or she understands them.

It is not the goal of a legal system to try to answer all fundamental questions about the origin and destiny of the human condition. Nor is its purpose the full satisfaction of the deepest human longings for justice, in the most comprehensive political, social, and religious sense. The end of a legal system is to serve the human person[25] as a member of

[25] Cf. Hermogenian, *Digests* 1.5.2 (ed. Theodor Mommsen and Paul Krüger, *Digesta. Corpus Iuris Civilis*, vol. I, 16ª ed., Weidmann, Berlin, 1954): "*cum igitur hominum causa omne ius constitutum sit…*" [all law is constituted for the sake of men.]. Cfr also *Institutiones Iustinianus* 1.12.12. See also, John Finnis, "The

a political community doing justice under law, i.e. through the enforcement and application of legal norms and standards. Thus, as a member of a political community, every human person must obey the norms of his or her legal system, but not necessarily as the unique and exclusive way to achieve justice. "Justice under law" can also be rightly understood in the context of a "law under justice." In a political community it is indeed almost impossible to achieve justice without the norms of a legal system (justice under law). Yet the legal system is not by definition the perfect and exclusive mirror of justice, but at best just one manifestation of justice, whose achievement is the end of the law (law under justice). Thus a justice-under-law system neither necessarily implies nor necessarily excludes a law-under-justice system.

The domain of justice is wider than the domain of a legal system. We deal here with a matter of sources[26]. If there were no standards of justice beyond the legal system, no legal system, including Nazi law, could be regarded as "unjust."[27] But this same intrinsic limit of legal systems, which is constitutive of the modern idea of a secular legal system,[28] makes room for people to try to achieve the fullness of justice, according to their conscience, by means other than legal norms and standards—including the transcendent. In other words, a secular legal system should not deny transcendence, even though it does not operate in the transcendent domain.

The human person, by contrast, operates in the individual, social and transcendent dimensions. The individual dimension refers to the person as the self ("I"); the social

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Priority of Persons," in John Finnis, *Intention and Identity. Collected Essays* II (Oxford University Press, Oxford, New York, 2011) pgs. 19-35.

[26] Especially since analytical jurisprudence dominates jurisprudence, and even if we use the concept of legal source in the broadest sense including formal and material sources, interpretative sources, and so on. For a positivistic approach to the concept of source of law, see Joseph Raz, *The Authority of Law. Essays on Law and Morality* (Oxford University Press, Oxford, New York, 1979, reprint 2002) pgs. 45-52, esp. 47.

[27] In this way, see the emblematic paper of Gustav Radbruch written just after the end of the Second World War (1946), Gustav Radbruch, "*Gesetzliches Unrecht und übergesetzliches Recht*," in *Suüddeutsche Juristenzeitung* 1 (1946) 105-108, and reproduced in Gustav Radbruch, *Gesamtausgabe III. Rechtsphilosophie III* (C. F. Müller Juristischer Verlag, Heidelberg, 1990) pgs. 83-93. That does not mean that the idea of law, morality and justice are necessarily coextensive. In this vein, H.L.A. Hart, *The Concept of Law* (2nd ed. Oxford University Press, Oxford, New York, 1997) pgs. 155-184, and especially pg. 157: "There are indeed very good reasons why justice should have a most prominent place in the criticism of legal arrangements; yet it is important to see that it is a distinct segment of morality, and that laws and the administrations of laws may have or lack excellences of different kinds."

[28] For the modern idea of the legal system, see Harold Berman, *Law and Revolution. I. The Formation of the Western Legal Tradition* (Harvard University Press, Cambridge, MA, London, 1983) esp. pgs. 273-294.

refers to the person as a member of a community ("We"); and, the transcendent focuses on the person as a searcher of ultimate truths, especially as a creature in relation to his Creator ("He"). The individual dimension falls chiefly within the realm of ethics. The social dimension falls chiefly within the realm of politics; and the transcendent, in the realm of religion.

Legal systems mainly operate in the individual (private law) and social (public law) dimensions of human beings, but in order to protect the integrity of the human person, they have also to take into consideration the transcendent dimension. This insight is key to recognizing a right of religious freedom and to explaining its intrinsic relation to modern secular legal systems. The right of religious freedom is the first claim of a legal system that, operating in just the individual and social dimensions, tries to protect the integrity of the person by recognizing her transcendent dimension.

The incorporation of nonbelievers (atheists, agnostics, and so on) under the protection of the right of religious freedom should imply a long-range expansion of the paradigm of religious freedom, never a reduction or a simple shift to exclude the old paradigm. Transcendence continues to be a sufficient condition for the existence of the right of religious freedom, but these days it is not a necessary condition. This is the change and the challenge of the new paradigm of religious freedom in relation to its foundational approach.

Justice, unlike legal systems, embraces the three dimensions of the human person. Thus, one can talk about a legal concept, a political concept, and a religious concept of justice. The integrated idea of justice as a whole is more comprehensive than the mere sum of these three different domains. The problem arises when a concrete domain of justice (legal, political, or religious) claims a monopoly on justice, either denying the existence of the other domains or trying to absorb them. This happens, for instance, when a secular legal system expressly denies the possibility of the existence of any source of justice outside the legal system, or when a religious community attempts to use a religious legal system as a tool to achieve religious purposes and not legal justice.

2. Transcendent law

In this paper, I call "transcendent law" that law which operates in the third dimension of the human person without properly being a part of the legal system. Transcendent law is ontologically different from the law of the legal system, but it is also genuine law insofar as it also tries to achieve justice by applying a system of binding rules.

Transcendent law is close to the concept of religious law, but they are not synonyms. Religious law refers in general to the moral or ethical code and norms of the major religious traditions (Halakha, Sharia, Hindu Law, Patimokkha, canon law, etc.). Transcendent law, however, refers to laws that do not have a human origin, or at least those not based on a human legal source. Canon law, for instance, is religious law to the extent that it refers to the Catholic Church, but a considerable part of canon law is not transcendent law in the strict sense, but rather the legal system of a religious institution.[29] Canons 1404 to 1416 of the Code of Canon Law (1983), for instance, regulating "competent forum," are religious law because they refer to a religious institution, but they have nothing to do with transcendent law.[30] According to this terminology, there would be no "transcendent legal systems", but simply "religious" or "non-religious" (or secular) legal systems. A transcendent legal system would ultimately be a *contradictio in terminis*.

Transcendent law is a part of religion in the broadest sense. Paradoxically, however, religious law is not by definition a part of religion *stricto sensu*: a religion may have it, or it may not. Transcendent law is a human discovery, not properly a human invention. Therefore, it is not based on consensus law, nor should be it imposed by legal coercion.

[29] Canon law is not transcendent law in the strictest sense, but the legal system of the Roman Catholic Church. Indeed, Canon law is considered the first legal system of Western culture. See Harold J. Berman, *Law and Revolution* I. *The Formation of the Western Legal Tradition* (Harvard University Press, Cambridge, MA, 1983) pgs. 115 and 199-224.

[30] See for instance Canon 1416 which provides that "A conflict of competence between tribunals subject to the same appeal tribunal is to be resolved by the latter tribunal. If they are not subject to the same appeal tribunal, the conflict is to be settled by the Apostolic Signature." (electronic online version: http://www.vatican.va/).

All forms of the so-called "divine law" (*ius divinum*),[31] "revealed law" (Jewish law, Christian law[32], Islamic law), and "natural law" (*ius naturale*) in the original sense, for instance, are expressions of transcendent law. In addition, the very law of one's own conscience (*lex conscientiae*), considered not as a mere subjective wish or desire, but as the perceptible presence in human beings of transcendent, objective law (the innate sense of justice inherent to us), could be regarded as a source of 'private' transcendent law. Transcendent law requires otherness, because without otherness there is not transcendent law, or any law at all. Our very conscience has some elements of otherness that permits it to consider itself as a source of law. Ultimately, nothing belongs less to oneself than oneself.[33] Seneca rightly explained conscience as a "sacred spirit (*sacer spiritus*) dwelling within us, which marks out our good and bad deeds, and is our guardian."[34] In a real sense, we could speak, as with legal systems, of a public transcendent law, which binds the religious community as a whole, and a private transcendent law (*lex conscientiae*), which binds just a particular human person.

Though different in origin and nature, transcendent law and the law of legal systems are similar in certain respects. Both serve the cause of justice (religious, political and legal). They coincide in the content of some fundamental norms (golden rule, *pacta sunt servanda*, etc), and both generate some kind of binding moral obligations. These similarities are not mere coincidences. I think they explain why transcendent law and legal systems could be harmonized successfully, and why all legal systems should, at least implicitly, make a final decision about their relation (or lack thereof) with transcendent law.

Transcendent law is the part of religion that can most directly affect the positive law. Transcendent law might influence legal systems by illumination, attraction, and other

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[31] Cf. now, the excellent approach to this concept by Rémi Brague, *The Law of God. The Philosophical History of an Idea* (trans. Lydia G. Cochrane, Chicago University Press, Chicago, London, 2007) esp. pgs. 39-82.

[32] We refer with this expression to the part of Canon law that is revealed law (*ius divinum*) not a mere human creation.

[33] Cf. In this vein, Joseph Ratzinger, *On Conscience* (The National Catholic Bioethics Center, Philadelphia, Ignatius Press, San Francisco, 2007) esp. pg. 33: "My own 'I' is the site of the profoundest surpassing of self and contact with him from whom I came and toward whom I am going."

[34] Seneca, *Moral Epistles* 4.41.2: *Ita dico, Lucili: sacer intra nos spiritus sedet, malorum bonorumque nostrorum observator et custos; hic prout a nobis tractatus est, ita nos ipse tractat. Bonus vero vir sine deo nemo est.* (www.thelatinlibrary.com) [This is what I mean, Lucilius: a sacred spirit dwells within us, one who marks our good and bad deeds, and is our guardian and protector. As we treat this spirit, so are we treated by it! Indeed, no man can be good without the help of God.]

"modalities of causality"[35] or by moral authority (*auctoritas*),[36] but not by power (*potestas*), and never by human coercion. Thus, for example, the idea contained in transcendent law that all human beings have been created in the image of God[37] illuminates, upgrades and reinforces, among other things, the political principle of citizens' equality and the very foundation of human rights theory,[38] but it can never be imposed by a legal system using coercion. Secular legal systems do not need to depend on transcendent law. Transcendent law, however, can have some moral authority over them. Transcendent law operates within the secular legal systems as a value: it can be accepted or not, and to different degrees. Religious values, such as the Jewish value of 'Tikkun Olam' (repairing the world), the Buddhist value of right speech, and the Christian value of forgiveness, for instance, have positive and important social implications, but they should be distilled before being transformed into proper legal values since they operate in ontologically different scenarios.

Transcendent law can permeate the legal systems of democratic societies to the extent that the free and equal citizens of a political community so decide, through democratic procedures of political deliberation. So the final decision about the position and presence of transcendent law in a legal system is completely in the hands of the political community. The reason is that, for a legal system, transcendent law as such could never be compulsory law unless it is transformed into the law of the legal system through the appropriate legal mechanisms. The Declaration of Independence of the United States of America[39] is, in this vein, a prime example of how transcendent law can

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[35] In the same way, by referring to the relation between divine law and practice, see Rémi Brague, *The Law of God. The Philosophical History of an Idea* (trans. Lydia G. Cochrane, Chicago University Press, Chicago, London, 2007) pg. 264.

[36] On this difference, which is at the heart of ancient Roman law, see Rafael Domingo, *Auctoritas* (Ariel, Barcelona, 1999), and Alvaro d'Ors, *Derecho Privado Romano* (Eunsa, Pamplona, 2004) section 8. About the moral authority of religion, see Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford University Press, New York, London, 2011) pgs. 16-18.

[37] Genesis, 1.27.

[38] Cf. Jeremy Waldron, "The Image of God: Rights, Reason, and Order," in John Witte Jr. and Frank S. Alexander (eds.), *Christianity and Human Rights* (Cambridge University Press, New York, Cambridge, 2010) pgs. 216-235. In a similar way, Robert Audi, *Democratic Authority and the Separation of Church and State* (Oxford University Press, New York, London, 2011) pg. 18: "[T]he Biblical prohibition of killing and lying are equivalent to intuitive moral principles which have secular formulations and admit of exceptions such as self-defense in the same way."

[39] Declaration of Independence of 4 July 1776: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights." (See electronic version: http://avalon.law.yale.edu/18th_century/declare.asp

operate within a concrete, secular legal system, as a matter of political value. Political and legal values can be distillations of religious values, i.e. expressions of the belief or beliefs of the members of a free and democratic society.

As a minimum standard for secular legal systems, on the one hand, the argument about transcendence shows that legal systems should open the door to transcendence by recognizing and guaranteeing the right of religious freedom as a basic and specific human right which touches most intensely and extensively the transcendent dimension of the human being. In the individual dimension, the argument about transcendence calls for the protection of the consciences of citizens as sources of private transcendent law and grounds the duty of all legal systems to articulate a procedure for conscientious objection, which protects the unity of the human person (and his or her dignity) in cases of conflict between transcendent law and positive law. In the social dimension, the argument about transcendence defends the freedom of the communitarian expression (worship) and transmission (education) of the faith.

This openness to transcendence does not imply that a secular legal system should recognize the existence of God. That is not its business. To say so is not necessarily to defend a sort of "constitutional agnosticism,"[40] let alone to support a more generally agnostic approach to the law. Who does or does not believe in God is up to the individual citizen, not the legal system. This non-requirement of formal recognition is only a legal consequence of the nature of secular legal systems, as the result of a centuries-long process of secularization beginning with the oldest system (ancient Roman law).[41] The secular nature of a legal system, however, should make space for both the transcendent and the non-transcendent, enabling the human person to freely decide the issue.

As a minimum standard for religious legal systems, on the other hand, the argument about transcendence suggests that the presence of transcendence law inside the legal

[40] I take the expression from Paul Horwitz, *The Agnostic Age. Law, Religion, and the Constitution* (Oxford University Press, New York, Oxford, 2011) chapter 5, pgs. 143-168.

[41] For further information about the process of secularization of Roman law, and the original strong relation between law and religion, see Max Kaser, *Das altrömische ius. Studien zur Rechtsvorstellung und Rechtsgeschichte der Römer* (Vandenhoeck & Ruprecht, Gottingen, 1940) pgs. 22-34 and 301-360; Max Kaser, *Das römische Privatrecht* I (2nd ed., Beck Verlag, Munich, 1971) pgs. 27-29; Franz Wieacker, *Römische Rechtsgeschichte I. Quellenkunde, Rechtsbildung, Jurisrudenz und Rechtsliteratur* (Beck Verlag, Munich, 1988) pgs. 310-340.

system can never imply the legal obligation of believing or making an act of faith, given the essentially free nature of the act of faith. So the legal obligation (not the mere suggestion) of wearing the Jewish kippah or the Islamic headscarf under penalty, for instance, will be a violation of the right to freedom of religion, as would be the legal coercion of praying in schools or of making an oath, in the technical meaning of taking God as one's witness, which implies believing in God. The argument about transcendence also establishes that the presence of transcendence law within the legal system should be reasonably justified according to the standards of common legal reason, insofar as it applies to both believers and nonbelievers.[42] The religious idea of resting one day a week (Friday for Muslims; Sabbath for Jews, and Sunday for Christians) can be accepted by the legal labor system to the extent that resting is a requirement of the human condition. In some cases, transcendent law is optional, applying just to believers without being a form of discrimination. That is the case, for instance, in the family law of some countries, according to which the religious celebration of marriage has automatic legal effect without requiring a supplemental civil celebration.[43]

III. The argument of dualism

The argument for dualism establishes that no constitutional model can adequately protect freedom of religion without creating a dualistic structure that guarantees sufficient autonomy for political and religious communities. Dualism is beneficial for

[42] I deliberately try to avoid the Ralwsian concept of public reason because of its restrictive and narrow features especially in religious matters. On this point, I agree with the critiques of Habermas and Dworkin. Cf. John Rawls, "The Idea of Public Reason Revisited", in *Political Liberalism* (expanded edition, Columbia University Press, New York, 2005) section 3, pgs. 458-462; and in *Collected Papers* (ed. Samuel Freeman, Harvard University Press, Cambridge, MA, 1999) section 3, pgs. 588-591. For a critique by Dworkin of the Ralwsian doctrine of public reason, see Ronald Dworkin, "Rawls and the Law," in *Justice in Robes* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2006) esp. 251-254. For a critique by Habermas of the Ralwsian doctrine of public reason, see Jürgen Habermas, "Religion in the Public Sphere: Cognitive Presuppositions for the Public Use of Reason by Religious and Secular Citizens," in Jürgen Habermas, *Between Naturalism and Religion* (Polity, Cambridge UK, Marlden, MA, 2008) esp. pgs. 119-126; Jürgen Habermas, "The Political. The Rational Meaning of a Questionable Inheritance of Political Theology," in Eduardo Mendieta and Jonathan Vanantwerpen, *The Power of Religion of the Public Sphere* (Columbia University Press, New York, 2011) esp. pgs. 25-27.

[43] See, *inter alia*, Art 60 of the Spanish Civil Code: "A marriage performed in accordance with the provisions of Canon Law or in any of the religious forms provided in the preceding article shall have civil effect. […]"

both structures: it protects religious communities from political communities, and political communities from religious communities.[44] I use the expression 'political community' in the broadest sense of an institutional system of 'social cooperation'[45] governed by a constitutional authority under the rule of law. I use the expression 'religious communities' in the sense of an institutional system of religious and creedal cooperation usually governed by a religious authority under religious law and transcendent law.

There are at least three considerations supporting this dualistic structure of society, all of them deeply related and ultimately based on freedom. The first one is that the intrinsic unity of the person (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 an exclusive status of the human person.[46] When a political community, using (or abusing) its sovereign power, tries to reproduce as its own the same intrinsic three-dimensionality of the human person, it becomes totalitarian.[47] In some ways, the absolute nation-state, based on the idea of a sole and exclusive sovereignty, is an attempt to substitute dignity for sovereignty, i.e., the centrality of the human person for the centrality of the very nation-state.[48] Something similar happens when a religious community becomes also a political community without differentiating its religious structure from its political structure, or its religious beliefs from its political action.

The second consideration is that the act of adherence to a faith or creed is by nature completely free and personal. So, faith can be shared just within a community of voluntary membership, as it is in the religious community, and not of compulsory

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[44] In the same vein, John Rawls, "The Idea of Public Reason Revisited," in *Political Liberalism* (expanded edition, Columbia University Press, New York, 2005) esp. pg. 476.

[45] I take the expression from John Rawls, "Fundamental Ideas," in *Political Liberalism* (expanded edition, Columbia University Press, New York, 2005) esp. pg. 16.

[46] Further about dignity as *status*, see Jeremy Waldron, "Dignity, Rank, and Rights". The 2009 Tanner Lectures at UC Berkeley, April 2009, in *New York University School of Law. Public Law & Legal Theories Research Paper Series. Working Paper 09-50* (Electronic copy available at: http://ssrn.com/abstract=1461220) pg. 3 (Oxford University Press, Oxford, New York, 2012) (forthcoming); and Jeremy Waldron, "How Law Protects Dignity", in *The Cambridge Law Journal* 71 issue 1 (2012) 200-222 esp. 201.

[47] The famous book of Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, San Diego, 1994) explains clearly and passionately the intricacies of the two more devastated totalitarian movements of the last century: Nazism and Stalinism.

[48] Further about this argument, see Rafael Domingo, *The New Global Law* (Cambridge University Press, New York, Cambridge, 2010) pgs. 65-73 and 131-136.

membership, as in the complete political community.[49] If every human being has to be a member of at least one political community to satisfy his or her basic needs and to 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.

At the heart of the right to religious freedom is the idea that the purpose of a political community is not to make an act of faith in some religious truth, for citizens in this case would not have the required freedom to practice religion (or not). Thus, political and religious communities have by definition different purposes, although both of them have been established for the sake of the human person. Political communities can share religious values, which do not require the act of faith, but not a concrete religious belief as a matter 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 and not in a community of compulsory membership. This compulsory membership of the political community legitimates the existence of the so-called freedom from religion as a constitutive element of religious freedom. The first step toward protecting religious freedom is to protect those who freely decide to say No to God[50], just as *mutatis mutandis* the first step to protect the right to marriage is to protect those who freely decide not to get married.

The third consideration in favor of a dualistic structure is the public nature of transcendent law. The new expansion of the religious freedom paradigm, including the protection of all kind of beliefs, creeds, worldviews, first philosophies, and agnostic and atheist convictions, cannot lead to the rejection of the public dimension of transcendent law. The transcendent law of historical religions has by definition a public nature derived from the communion in faith, insofar as transcendent law is a law which binds the religious community as a whole and not only each one of its members. In some religions, as in Judaism and Islam, the public dimension of transcendent law is a presupposition of the existence of the very community: there is a community because

[49] The incomplete political communities of voluntary membership should not say "we believe" because believing is not a political purpose. For more on this topic in relation with the emerging global human community, see Rafael Domingo, "The Global Human Community," in *Chicago Journal of International Law* 12 (2) (2012) pgs 563-587, esp. pgs. 585-586.

[50] In this vein, J.H.H. Weiler, "Freedom from Religion". Lecture delivered on November 30, 2011, at the Nanovic Institute for European Studies at Notre Dame University (pro manuscripto).

there is transcendent law, and not vice versa. Thus, the religious community is at the heart of the political community. For the religious community does not take control of the political community, and transcendent law does not be confused with the law of the legal system; the legal system has to recognize a religious communitarian structure which is ontologically different from the political structure, and in which only transcendent law fully operates.

From a political point of view, an important consequence of the requirement of dualistic structure is that the political community does not need for its existence any kind of religious legitimation since 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 since the two are ontologically different. Each community has its own rules, its own institutions, and its own scope regardless of which community was born first. But both community structures need each other for the good of the human person.

1. Dualism, pluralism, and separation

I prefer the word "dualism" to "pluralism" in labeling this argument because the essence of it is the requirement of at least two different communitarian structures, and not the fact of the existence of many different religious and political communities. The quality of otherness comes with the existence of the second structure, and not with the actual existence of a more extensive plurality of them. Religious freedom is neither a matter of quantity nor simply a matter of mere diversity. It is a matter of liberty, and the establishment of a unique and exclusive community structure is contrary to liberty.

When it comes to religion, the rule "the more the better" does not necessarily work. So, the legal system of a country with a dominant religion could more adequately protect freedom of religion than the legal order of a country with no dominant religion. That happens especially when the dominant religion, as with Christianity for instance,

defends and promotes freedom of religion as a basic right.[51] Diversity of religions in society is a welcome consequence of immigration, of globalization, and even of the very existence of the right of religious freedom, but it is not a necessary condition of freedom of religion as such. Were it otherwise, the legal system should be close to the existence of religious truths.[52] Yet a legal system that expressly denies this possibility cannot adequately protect the religious freedom of believer citizens, as we saw above. What diversity demands is the impartiality of the political community. The greater the number and variety of religious communities, the greater must be the impartiality of the political community on religious issues.[53]

I also prefer "dualism" to "separation", even although the latter is more common in this field and has been used in the famous expression "separation of church and state."[54] The word "separation" has been manipulated to promote the creation of an artificial wall which excludes any kind of recognition and harmonization between governments and religious communities.[55] Dualism, however, defends the idea of a balance,[56] of the interdependence of both communitarian structures, always in service of the unity of the human person. Dualism means that each community calls for the existence of the other, insofar as both political and religious communitarian structures are established for the development of the human person. Indifference and even hostility between communities could be a way of a living "separation" between communities, but not a way of a living "dualism". Thus, a political community which fervently promotes

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[51] See, for instance, recently, Benedict XVI, "Religious Freedom, the Path to Peace." Message for the Celebration of the World Day of Peace, on January 1st, 2011 (electronic version available: www.vatican.va). For a general view on the Jewish approach to religious freedom, see Asher Maoz, "Religious Freedom as a Basic Human Right. The Jewish Perspective," in *Annuario DiReCom. Rivista ufficiale dell'Istituto Internazionale di diritto canonico e diritto comparato delle religioni* 5 (2006) 103-112.

[52] For a deep critique against the liberal legal position on religious truths, see Paul Horwitz, *The Agnostic Age. Law, Religion, and the Constitution* (Oxford University Press, New York, London, 2011) pgs. 15-16.

[53] In this vein, Charles Taylor, "Why We Need a Radical Redefinition of Secularism," in Eduardo Mendieta and Jonathan Vanantwerpen, *The Power of Religion of the Public Sphere* (Columbia University Press, New York, 2011) esp. pgs. 50-51.

[54] For the expression "separation of church and state" in the U.S. constitutional experience, see Philip Hamburger, *Separation of Church and State* (Harvard University Press, Cambridge, MA, London, 2002).

[55] In this vein Marta Nussbaum, *Liberty of Conscience. In Defense of America's Tradition of Religious Equality* (Basic Books, New York, 2008) pgs. 20-21: "The prominence of the bare idea of separation in current debate is a source of confusion, since separation, when no further interpreted through other concepts, may suggest the idea of marginalizing religion or pushing it to the periphery of people's lives."

[56] In this vein also Joseph Ratzinger, *Church, Ecumenism & Politics. New Endeavors in Ecclesiology* (Ignatius, San Francisco, 2008) pg. 156: "Thus each of these communities has a limited radius of activity, and keeping their mutual relationship in balance is the basis for freedom."

religious indifferentism or anticlericalism acts against dualism, and therefore against this paradigm, but not necessarily against separation.

The argument for dualism warns against the existence of "total community structures." In general, total community structures are those which do not make any substantive distinctions between transcendent law and positive law, or those which deny, at least implicitly, transcendent law. Theocracies, including constitutional theocracies, are likely to create total community structures, but so 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, on the one hand, 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 which differentiates between the religious community and the new political community. A religious community also becomes total when it tries to impose its religious rules in areas that are out of 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 to fully exclude them from the public sphere. History, life's teacher, offers us many examples of total communities in both senses.

2. Different constitutional models of dualistic structures

The first claim of the argument for 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, but only a monistic one, which is by definition totalitarian. A legal system which does not recognize the political freedom of establishing religious communities is opposed to the normative paradigm of religious freedom defended here.

These two communitarian structures should be ontologically autonomous but politically interdependent since all members of religious communities must be members of a political community but not vice versa. 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 huge variety of systems according to history, culture, political experience and religious diversity. Basically, they can be summarized in four categories: first, mutual non-interference (laïcité); second, cooperation in common purposes (collaborationism); third, integration of the religious community as a part of the political community (church establishment), and, lastly, integration of the political community into the religious community as an extension of it (theocracy).

The four models can be specified in so many ways that these days, constitutional models belonging to the same group can differ widely. French laïcité is different from Mexican or Turkish laïcité as well as from the U.S. model, based on the values of free exercise and non-establishment. German collaborationism is different from the Italian or the Brazilian constitutional model. Among established churches, the constitutional model of the United Kingdom is different from the model of Greece, Monaco, or Sweden. Lastly, Iranian theocracy is different from the constitutional model of Pakistan or Saudi Arabia.[57]

All four constitutional frameworks can be in accordance with the religious freedom paradigm that this article defends. There are, however, some restrictions that affect more directly the two extreme models, laïcité and theocracy. The constitutional model of laïcité fits with this paradigm provided that laïcité does not imply indifference, intolerance, exclusion of or hostility toward religion but simply neutrality. Indeed, laïcité, like silence, is neutral; thus it can be interpreted in many different ways. Just as there is a friendly silence and a hostile silence, an eloquent silence and a mute silence, a tolerant silence and an intolerant silence, an living silence and an empty silence; so is

[57] For an overview of the different models of church-state separation, see, for the Western countries, James Q. Whitman, "Separating Church and State: The Atlantic Divide," in *Historical Reflections* 34.3 (2008) 86-104; and, for theocratic governance, Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, Cambridge, MA, London, 2010). See also Chapter 14 "Religion Today" of the book by Charles Taylor, *A Secular Age* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2007) pgs. 505-535. For a general view of the US model, see John Witte and Joel Nichols, *Religion and the American Constitutional Experiment* (3rd ed., Westview Press, Philadelphia, 2011).

there also a friendly laïcité and a hostile laïcité, a tolerant laïcité and an intolerant laïcité, a healthy laïcité and an unhealthy laïcité, and so on.

This paper uses the term "laïcité" in the sense of a doctrine according to which the government adopts a position of 'religious neutrality' towards different religious communities and religious and nonreligious beliefs, avoiding any official expression of religiosity in the public sphere in order to protect freedom of religion, freedom from religion and social pluralism.[58] The fact that laïcité does not show a preference for any concrete religious or nonreligious belief does not mean that it is against religious issues, but that it respects all options (religious and non-religious) as a potential source of social value. A government of a political community based on laïcité that decides to refrain from taking into consideration any religious doctrine or belief except in cases in which religious issues can have practical effects on citizens' lives is compatible with this paradigm. So is a government that bans official expressions of religiosity in the public sphere. Neutrality as such could be a value; it is indeed a value[59], when the best way of protecting a public good is to practice abstention (*ius abstinendi*). This idea has been very well expressed in the famous saying: "La République est laïque, mais la France est chrétienne" [The nation-state is secular, but France is Christian]. An unhealthy laïcité would have said: "Just as the nation-state is secular (laïcité), so must France be secular". What is opposed to the paradigm defended here is a sort of laïcité which tries to extend the restriction of official expressions of religiosity in the public sphere to any personal expression of religion, private or communitarian, in the public sphere, denying the consideration of religion as a social phenomenon (see section IV, below).

The principle of laïcité has to be interpreted in light of the new expansion of the legal content of the right to religious freedom. If religious freedom protects all kinds of religious and irreligious belief creeds, first philosophies and *Weltanschauungen* (theistic, agnostic, deists, and atheists), laïcité as such cannot promote, according to the

[58] For a general view of laïcité, see Guy Haarscher, *La Laïcité* (5th ed. PUF, Paris, 2011) and the bibliography on pgs. 124-126; and Émile Poulat, *Notre Laïcité Publique* (Berg International, Paris, 2003). For an approach to French laicité as a modern expression of the French conception of sovereignty, see Michel Troper, "Sovereignty and Laicité," in *Cardozo Law Review* 30.6 (2009) 2561-2574.

[59] In the same vein, Jeremy Waldron, "Legislation and Moral Neutrality," in Jeremy Waldron, *Liberal Rights. Collected Papers (1981-1991)* (Cambridge University Press, Cambridge, Nueva York, 1993) 143-167, esp. 157: "Neutrality is itself a value: it is a normative position, a doctrine about what legislators and state officials ought to do. It is a doctrine that holds that it is wrong for certain considerations to enter the political arena."

neutrality principle on which it is based, any specific agnostic or atheist belief. When laïcité supports agnostic or atheist beliefs, laïcité is no longer a legal principle but a religious principle acting in the political arena. The dualistic constitutional model of laïcité would thus be transformed into a sort of establishment, a "secularist establishment", in which there is no place for neutrality. Laïcité becomes imposed irreligiosity. Rightly, Habermas considers it an imbalance for a liberal state, based on laïcité, to try to transform "the necessary institutional separation between religion and politics into an unreasonable mental and psychological burden for its religious citizens."[60]

The theocratic constitutional model could also fit with the normative paradigm of religious freedom we are defending. As with laïcité, there is a healthy and an unhealthy theocracy. A healthy theocracy takes into consideration the arguments of transcendence, dualism and regulation. It is a theocracy that does not refer to transcendent law and the legal system as if they were synonyms. It defends the ontological difference between political and religious structures, protecting the political autonomy of religious entities and the constitutional autonomy of the political community in relation to the religious community. It is ultimately a theocracy that, from the point of view of the argument of regulation: first, never legally imposes on citizens an act of faith, which is by nature completely free. Second, never develops any sort of hostility against a non-official religion, creed or first philosophy; and lastly, never applies transcendent law as a binding legal reference of the legal system without requiring a process of adaptation, since transcendent law and the legal system are ontologically different.

So, a theocracy that directly imposes as a binding reference of the legal system a revealed book like the *Quran* or the Bible is contrary to this paradigm of freedom of religion, but not a theocracy that takes as legal values and as a source of moral authority a revealed book or that approves as a part of the legal system specific provisions of revealed books or customary transcendent law (the Ten Commandments, or the Five Precepts of Buddhist Ethics, for instance).

[60] Cf. Jürgen Habermas, "Religion in the Public Sphere: Cognitive Presuppositions for the Public Use of Reason by Religious and Secular Citizens," in Jürgen Habermas, *Between Naturalism and Religion* (Polity, Cambridge UK, Malden, MA, 2008) pg. 130.

IV. The argument of regulation

The argument for regulation establishes that the political community has the moral claim and the power to regulate religious freedom as a particular and *sui generis* constitutional right. Since, as we have seen, freedom of religion affects the three dimensions of the human person –the individual, the social and the transcendent- in different ways, we shall consider in this section how and to what extent a political community is authorized to regulate this right in each of these three dimensions. We will deal first with the transcendent dimension; second, with the individual dimension; and lastly with the social dimension, which is the most complex.

In the transcendent dimension, the argument for regulation calls for regulation protecting the conscientious objections of each member of the political community[61], to resolve cases in which there exists a personal conflict between transcendent law and the legal system. In these cases, the person should have the final say about which law to follow except where adherence is required for public order. If conscientious objections are respected, an observant Jew will be able to keep Sabbath in a country in which Saturday is a working day; a Muslim will not receive Christian education in a country in which this religion is taught in public schools, and vice versa; a pacifist will not bear arms when he or she is called for the military, and an atheist will refuse to swear a religious oath upon assuming office in a country in which this is a legal obligation.

A legal system should draw a distinction between personal decision on religious matters based on binding transcendent law, which is therefore a decision that touches the conscience—e.g., to keep the Sabbath, to attend the Christian liturgy on Sundays, not to bear arms—and personal decisions based exclusively on religious conviction but not

[61] The protection of conscientious objection is at the heart of American legal thought. During the American Revolution, for instance, the Continental Congress did not hesitate to protect the conscientious objections of pacifists to participation in war. see the resolution of July, 18, 1775: "As there are some people who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them to contribute liberally, in this time of universal calamity to the relief of their distressed brethren in the several Colonies, and to do all other services to their oppressed Country which they can, consistently with their religious principles." (Resolution available online: http://lincoln.lib.niu.edu/cgbin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.5533). For a general view about this topic, see Kent Greenawalt, *Religion and the Constitution. I. Free Exercise and Fairness* (Princeton University Press, Princeton, Oxford, 2006) esp. pgs. 49-67; Martha Nussbaum, *Liberty of Conscience. In Defense of America's Tradition of Religious Equality* (Basic Books, New York, 2008) esp. pgs. 115-174: and Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution* (3rd ed. Wolters Kluwer, New York, 2001) pgs. 257-312.

strictly on transcendent law, which therefore does not affect conscience (e.g., to contemplate sunshine as a source of spiritual inspiration). The reason for this distinction is that in the first case, there is an objective conflict of laws to be resolved which jeopardizes the unity of the person and touches directly on the person's dignity; in the second, however, there is simply a conflict between a religious conviction and the legal system, but not properly a conflict of laws. In the first case, the law is operating in the third dimension of the person; in the second case, however, it is operating in the individual dimension. As the boundaries between both dimensions are not always clear, they have to be elucidated on a case-by-case basis within the legal system by a substantial degree of accommodation.

In the individual dimension, the argument for regulation calls for the legal protection of each human person and avoidance of any sort of discrimination for religious reasons except in cases of public order (including public morality). Since the decision about how to dress is a personal decision which belongs to the individual dimension, a political community can only discriminate in this realm for religious reasons when what is at stake is the public order. The prohibition of wearing full-face Muslim veils (*burqa* and *niqab*) in public spaces[62] fits with this paradigm, since looking at the face of a person is the ordinary way to recognize members of a political community and, therefore, is a matter of public order.[63] Also fitting within this paradigm: the legal prohibition of public religious nudity (the well-known naked Quakers[64]); the legal prohibition of polygamy (accepted, for instance, in Islam,[65] as well

[62] Cf., for instance, the French law: Loi n° 2010-1192 (11 October 2010) interdisant la dissimulation du visage dans l'espace public. Version consolidée au 11 avril 2011. art. 1: Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage [No person, in public, may wear clothing intended to conceal his or her face]; online version available: (http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=95F316A85E44295DAF149E8EA449A359.tpdj005v_2&dateTexte=?cidTexte=JORFTEXT000022911670&categorieLien=cid)

[63] For a critique of the strongest arguments for banning the *burqa* (based on security, transparency and civic friendship, objectification, coercion, health, homogeneity and sexuality), see Marta C. Nussbaum, *The New Religious Intolerance* (The Belknap Press of Harvard University Press, Cambridge, MA, London, 2012) pg. 105-138.

[64] The nudity was inspired by some examples from the Bible and particularly the prophet Isaiah. See Isaiah 20.2-3: "[…] the Lord said, 'As my servant Isaiah has walked naked and barefoot for three years as a sign and a portent against Egypt and Ethiopia, so shall the king of Assyria lead away the Egyptian captives and the Ethiopian exiles, both the young and old, naked and barefoot, with buttocks uncovered, to the shame of Egypt […]." On the Quakers in America, see Thomas D. Hamm, *The Quakers in America* (Columbia University Press, New York, 2003).

as in some fundamentalist North American sects[66]); or the prohibition of the old Hindu custom (*Sati*) of the self-immolation of Hindu widow meant to join her to her dead husband on his funeral pyre.[67] The legal prohibition of headscarves (covering the hair), imposed in Turkish universities, is an example of 'unhealthy laïcité,' which discriminates on grounds of religion.[68] Additionally, the controversial French law of 2004, which bans the wearing of 'conspicuous symbols' (effectively, the Islamic headscarf) in public primary and secondary school[69] as a part of the public space is contrary to this paradigm, since the use of such garments cannot be considered a threat to public order in the strictest sense.

The legal principle of laïcité cannot limit the individual dimension of the human person because this principle exclusively refers to relations between the political and the religious communitarian structures, i.e., to the social dimension of the human being, and not to all expressions of human behavior and attitudes (individual dimension). According to this paradigm, for instance, a political community can ban common prayers and religious ceremonies in public schools, but not private prayers in public school (e.g., several Catholic students reciting the rosary, or a group of Jewish students reading together from the Torah before, between or after classes). The ban of common prayers constitutes a limitation of the social dimension of the human being based on laïcité; this ban is, however, a limitation of the individual dimension in which the principle of laïcité cannot be applied, but only the principle of public order.

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[65] Cf. *Qur'an* 4.3 (Oxford World's Classics, Oxford University Press, 2010) pg. 50: "If you fear that you will not deal fairly with orphan girls, you may marry whichever [other] women seem good to you, two, three, or four."

[66]See the interesting report about domestic violence and child abuses in polygamous communities in the United States:
http://web.archive.org/web/20070719143759/http://attorneygeneral.utah.gov/polygamy/The_Primer.pdf

[67] Even after the custom was outlawed, this custom continues, - but infrequently and illegally. See John Broker (ed.), *The Oxford Dictionary of World Religions* (Oxford University Press, Oxford, New York, 1997) pgs. 861-862.

[68] Cf., in the same way, the *Memorandum to the Turkish Government on Human Rights Watch's Concerns with Regard to Academic Freedom in Higher Education, and Access to Higher Education for Women who Wear the Headscarf. Human Rights Watch Briefing Paper*. June 24 2004, esp. pg 46: "Recommendations Concerning Removal of the Headscarf Ban". Electronic version available:
http://www.hrw.org/sites/default/files/related_material/headscarf_memo.pdf

[69] Cf. Loi no 2004-228 of 15 Mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics; electronic version available:
http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977&dateTexte=&categorieLien=id.

In the social dimension of religion, the political community has more power of regulation than in the individual dimension. The reason is that the constitutional model which defines the dualistic relations between political and religious communities, nearly absent in the individual and transcendent dimensions, is totally embraced by the social phenomenon of religion. If political communities are different from religious communities and religious communities operate within the former's territories, political communities must have the power and the duty to regulate religious matters insofar as they affect not simply public order or public morality, as in the individual and transcendent dimension, but also constitutional essentials, and, obviously, the rights of other citizens. There is no religious matter within the public sphere that cannot be regulated by the political community in order to achieve its own ends and purposes. Religion as a social phenomenon, which affects the people of a political community, is also a political issue, because all matters that touch the people are political by definition.

The political community has the exclusive power and right to decide the constitutional model of its relation 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. Thus, this legal paradigm has nothing to say about what is the best constitutional model—laïcité, collaborationism, establishment or theocracy—provided each supports the three arguments of transcendence, dualism and regulation that we are proposing. The political decision about the constitutional model should be based on culture, history and moral reason. So, according to its constitutional model, political communities can allow or ban concrete religious education in public schools, religious symbols, and religious ceremonies in public institutions. They 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, they can promote the values of a specific religion as a 'state religion'. Political communities can consider religion as one of the most important source of values of the political community or just a mere matter of individual and social freedom which requires legal protection. They can emphasize the idea of religion more than that of freedom (theocracies) or vice versa (laïcité). But all political communities should recognize religious communities, even those that defend ideas and views against their own legal system, provided that the religious communities are under 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.

V. Conclusion

This article defends the coherence and reasonableness of a wide normative paradigm of religious freedom as a minimum standard demanded by human dignity. Outside this paradigm, religious freedom is hard to take seriously. This paradigm expands the classical paradigm which presupposed, as socially axiomatic, the existence of God in the Abrahamic sense of the term, to a new one which protects all kinds of religions (with or without God), beliefs, creeds, first philosophies and convictions in our globalized world. In no sense is this paradigm, however, an 'agnostic paradigm': it simply attempts to protect believers and nonbelievers alike. The paradigm is based on three arguments: transcendence, dualism and regulation. Transcendence defends the idea of religion as such; dualism, the idea of liberty; and regulation, the idea of rights.

According to the argument about transcendence, each person has the right to overcome his or her own materiality in search of a response to the deepest questions about the human condition and our universe. As a human creation, no legal system is perfect, so none can embrace the entire domain of justice, which fully operates in the three dimensions of the person: individual, social, and transcendent. No legal system can deny the moral right of each person to find a metalegal law (transcendent law) outside the boundaries of their own legal system. If the human person precedes the legal system, and if the person is the ultimate source of the legal system, then every legal system has to be open to the possibility that people can search for full justice in other ways, distinct from the application of the legal system. Obviously, not all religions should be based on transcendence, but all legal systems should be open to transcendence as a constitutive element of the legal approach to religious freedom. Legal systems are open to transcendence by protecting adequately the right to religious freedom in all its breadth.

The argument for dualism warns against the existence of total communitarian structures. It establishes that the community of citizens cannot be identified with the

religious community of believers, and that the act of faith should therefore be excluded from the political debate, though not from religion as such, since it is a social phenomenon. The argument for dualism defends the view that the political community has the power and the exclusive right to decide the constitutional frameworks that regulate relations with the religious communities (laïcité, collaborationism, church establishment and theocracy), provided that the chosen framework protects the minimum standard of religious liberty demanded by the three detailed arguments.

The argument for regulation shows that the political community has the power to regulate religious freedom as a particular and *sui generis* constitutional right. Legal orders can restrain freedom of religion in the individual dimension only in cases of public order (including public morality). Otherwise, this restraint is considered religious discrimination. In the social dimension, the power of regulation is higher because the political community has the political right to decide the dualistic constitutional model in relation to the religious structure. Thus, the limit of regulation is not only the public order but also the essentials of the adopted constitutional model: laïcité, collaborationism, establishment or theocracy. These constitutional frameworks can only operate in the social dimension, not in the individual one. Otherwise, these constitutional frameworks would promote religious discrimination. The diversification of constitutional models and legal rules and standards to support, promote and defend religious freedom worldwide, attentive to the essentials of the human condition and the richness of our national histories, is the best way to protect the basic human right to religious freedom in a globalized society.