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## *Religious Fundamentalism: A Theoretical-Constitutional Analysis*

### Fundamentalismo religioso: uma análise teórico-constitucional

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*ABSTRACT: This Article analysis the phenomenon of religious fundamentalism from a theoretical-constitutional perspective. The two basic questions are: what religious fundamentalism is? And what are its boundaries? At one side, religious fundamentalism is seen as a fundamental right (religious freedom) exercise, thus appointing proper constitutional boundaries in order to harmonize it with other rights, values, goods and interests. That is the question for applying balancing. From another side, religious fundamentalism is seen as a political control strategy, a platform for achieving political aims through a religiously based fundamentalist discourse. The Article demonstrates that not only the fundamentalist phenomenon crosses the constitutional boundaries of fundamental rights exercise, rather it denies central pieces of modern liberal constitutionalism.*

*RESUMO: O presente Artigo analisa o fenômeno do fundamentalismo religioso por uma perspectiva teórico-constitucional. Dois são os questionamentos principais: O que é fundamentalismo religioso? E quais são os seus limites? De um lado, o fundamentalismo religioso constitui uma forma de exercício de direito fundamental (liberdade religiosa), portanto encontrando limites constitucionais próprios com vista a ser harmonizado para os demais direitos, valores, bens e interesses constitucionais. Esse é o lugar da ponderação. Outrossim, o fundamentalismo religioso é visto como uma estratégia de controle político, uma plataforma para atingir objetivos políticos através de um discurso religioso fundamentalista. Este Artigo demonstra que não somente o fundamentalismo religioso excede os limites constitucionais que lhe são impostos como direito fundamental, mas como nega elementos centrais do constitucionalismo liberal moderno.*

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**Palavras-chave:** *fundamentalismo religioso, constitucionalismo liberal, ponderação, dignidade humana, Sharia, democracia.*

SUMMARY: I. *Introduction.* II. *Religious fundamentalism within a general constitutional structure.* III. *Religious fundamentalism as political engineering: confronting values of liberal constitutionalism.* IV. *Conclusion.* V. *References.*

## I. INTRODUCTION

What does fundamentalism mean? And what about religious fundamentalism? Are they the same thing? Is there an automatic linkage between religious fundamentalism and political extremist trends that urge for the practice of violence and the systematic disruption towards both fundamental and human rights? Or is it possible for one to practice religious fundamentalism without harming or violating any fundamental or human right? Can religious fundamentalism survive within democracies?

First of all, it is necessary to understand the general idea behind the term “fundamentalism”. Itself, “fundamentalism”, from a pure semantic perspective, as the root of the word denotes, entails the idea of expressing something that is “fundamental”, as the manifestation of the source, but not a random source, rather the deep rooted source of something. In this sense, “fundamentalism” is an abstract form, a formal symbol used to qualify some substantive idea. As such, there can be religious fundamentalism, political fundamentalism, cultural fundamentalism, ethical-moral fundamentalism, even economic fundamentalism.<sup>1</sup> In essence, the idea is to demonstrate that something is deeply rooted in its own ontological source, with such a high level of attachment that strongly turns against any evolutionary attempt. Despite its semantic essentials, the idea of “fundamentalism” has been commonly attached to the spectrum of religious expressions, and also to some political expressions that embrace a conservative trend (almost bordering extremism).

In the present Article, our object of interest is the fundamentalism practiced in the realm of religious manifestations. That is, religious fundamen-

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<sup>1</sup> For instance, within the economic field, the fundamentalist analysis is one of the most used analytical techniques for trading operations in the stock market.

talism. Though having a religious background, religious fundamentalism cannot be simply equated to the general idea of a conservative return to the “fundamentals” of faith, as it embraces different background reasons, motives and aims. For instance, religious fundamentalism can have sociological, cultural, political, moral and economic reasons and objectives. In this sense, a religious segment may want to embrace a fundamentalist doctrine for cultural reasons (tradition, for example), in order to maintain and propagate ethical-moral values in a certain pattern; or for political reasons, as a means to retain power in the hands of a religious oligarchy; or for economic reasons, to control the flow of economy.

Religious fundamentalism is a multifaceted phenomenon, which can be described by multiple ways and expressed in different degrees. Its origin dates back to the beginning of the twentieth century, namely at the *Fundamentals*, a series of booklets published to serve as a general call for believers to return back to the textual and doctrinal fundamentals of Christianity. Although originally linked to the Protestant movement,<sup>2</sup> religious fundamentalism is not something exclusive of Christian belief, rather being a phenomenon that can manifest itself within any religious segment, be it Christian, Jewish, Buddhist or Islamic (Marczewska-Rytko, 2007, p. 216). On its core, religious fundamentalism represents the attachment to an originalist, holistic and hermetic interpretation of religious texts, doctrines and dogmas, regarded as the only and “holy” truth, therefore rejecting any evolutionary approach (Paine, 1997, pp. 289-290).<sup>3</sup> In this sense, to be a “fundamentalist” means to be strictly bonded to the original core of a religious foundation, whose truth is comprehended as the eternal guide of life, rules by which one need to live and respect.

At this conceptual stage, it is very important to state that the before mentioned fact of being attached to an originalist, holistic and hermetic interpretation on the dogmatic connections between religion and life, religious fundamentalism does not equate to violence neither to any posture of physical combativeness (Gedicks, 2010, p. 908).<sup>4</sup> Nonetheless,

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<sup>2</sup> See Hamilton (2010, p. 883), affirming that religious fundamentalism, originated at the core of Protestant denominations, emerged as a “conservative response to the rise of theological liberalism”.

<sup>3</sup> Also, regarding the core characteristics of religious fundamentalism, Conkle (1994, p. 14), contends that it is absolute, plain and unchangeable.

<sup>4</sup> In this line, Paine (1997, pp. 293-294), notes that the relation between religious fundamentalist groups and acts of violence varies according to the type of state and gov-

since the occurrence of massive violent attacks at the beginning of the twenty-first century, which were hypothetically perpetrated in the name of certain religious dogmas, religious fundamentalism has been currently (and wrongly) associated to acts of terrorism, especially within the realm of Islamic fundamentalism (Conkle, 1995, pp. 337 and 340). Within this unidimensional approach, where religious fundamentalism is equated to violence and terrorism, it can only represent a socio-political issue to be tackled with criminal measures, in order to regulate the social environment of instability, insecurity and dangerousness. Besides that, it also creates the problem of generating a scenario of social stigmatization and isolation, whereby intolerance is increased, namely against Muslims. But this complex phenomenon cannot be fully understood in this sense, as fundamentalism, violence and terrorism are three different things. And although religious fundamentalism can sometimes border into acts of violence, also implicating acts of terrorism, it does not confuse with them. Actually, as will be seen, these borderline cases are situations that represent outlawing manifestations of the phenomenon, thus not deserving any kind of legitimate normative protection.

Conversely, from a more desirable analytic perspective, religious fundamentalism should not be simply equated to violence and terrorism. For a more comprehensive and realistic understanding of the phenomenon, and also for a relevant analysis from a legal-constitutional perspective, it should be distinguished in at least two significant ways, each with its own consequences and levels of expression. Here, the endeavour is to analyze, for their normative-constitutional interest, two core perspectives: religious fundamentalism as a form of exercising religious freedom (so, as a religious expression), and religious fundamentalism as a means to achieve political objectives (so, as a strategy of political control).

First, religious fundamentalism is a form of exercising religious freedom. As logically presupposed, religious fundamentalism can only be manifested where the exercise of religious freedom is minimally recognized and guaranteed, especially within a proper constitutional struc-

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ernment they inhabit. As Paine argues, acts of violence driven by religious fundamentalist groups are more plausible to happen where they are supported by a dominant or majority religion in a sectarian state, like Egypt, Iran and Sri Lanka. Conversely, if they inhabit a secular state or at least one without an official state religion, like Israel, where they will not have the support of the dominant or majoritarian religion, acts of violence perpetrated by religious fundamentalists groups are less plausible.

ture. For religious fundamentalism to happen, it is necessary that it appears within a constitutional structure that recognizes religious freedom as a (constitutional) fundamental right. As such, representing a form or a mode of exercising religious freedom, religious fundamentalism encounters proper constitutional boundaries in order to equilibrate it with other constitutional rights, values, goods and interests. From this perspective, religious fundamentalism is an issue that concerns the exercise of religious freedom and its relationship with other fundamental rights. This is to say that religious fundamentalism is a problem of fundamental rights' theory and praxis. At this point, an important question is: which problems can religious fundamentalism raise within the spectrum of fundamental rights protection?

In short, considering its conceptual core, the attachment to the fundamentals of faith activates a process of absolutization which enables the propagation of intolerant discourses, thus opening the possibility for a whole spectrum of fundamental rights violations. For instance, some fundamentalist speeches may want to propagate a (conservative) discriminative agenda on the basis of gender, sex, nationality or an abstract sense of religious morality. On themselves, strong critical arguments are not outside constitutional protection, but in order to be considered constitutionally legitimate, all the subjects must comply with their constitutional duty to respect the right of others on behalf of the constitutional recognition of human dignity as an equal human quality and fundamental right. In this sense, religious fundamentalist speeches cannot violate other rights, interests, goods and values equally protected under the constitutional frame, therefore needing a balancing process in order to harmonize conflicting claims. From this legal-constitutional perspective, some relevant questions can be raised. Within a theoretical-constitutional frame, what is the relation between religious fundamentalism and religious freedom? Should religious fundamentalism at any extent be restricted? If so, which would be the reasons for restricting it?

Second, religious fundamentalism can be comprehended as a form of political engineering.<sup>5</sup> The understanding offered through this perspective

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<sup>5</sup> Conkle (1995, p. 350), argues that the core feature of religious fundamentalism – the absolutization of religious discourse of faith – is troublesome to politics and law because it tends to exclude arguments and dialogues that relies on reason by claiming one holy truth that precludes any possibility to an open-minded and open ideologically-oriented decision-making process in the context of liberal democracy.

strongly diverges from religious fundamentalism viewed as form of exercising religious freedom. Characterized as a form of political engineering, religious fundamentalism acts as a path for political control, as a strategy of regime establishment, most of the time a theocratic one (Mayer, 1994, pp. 305 and 357). Therefore, religious fundamentalism serves a political aim, to establish a political order built upon a theocratic regime developed to control theological, political, cultural and moral standards as a form to achieve and hold social unity. As an instrument of political engineering, religious fundamentalism conflicts with the idea of exercising religious freedom as a proper constitutional fundamental right, leaving this constitutional legitimate area and entering the realm of political ideologies to operate as a tool of militant moral-theological claims aimed on taking control over every social, political, cultural and economic aspect of society. Here, the problem is not only that the fundamentalist approach makes religion and religious freedom to deviate from their legitimate purpose, but also that it normally entails acts of violence, as it generally turns into a call to war against the enemies of those in control of the political-theological regime.

Looking through this political-ideological lens, other questions can be raised. To what extent can religious fundamentalism be used as a political tool for regime establishment? Which consequences religious fundamentalism, serving a political agenda, engenders to human freedom? Is there any conflict between religious fundamentalism political discourse and the discourse of (liberal) constitutionalism?

From these two distinct perspectives, this Article endeavors to develop a theoretical-constitutional analysis, dealing with the theoretical-dogmatic possibilities of this legal-political phenomenon. As a methodological observation, it is relevant to note that this Article does not intend to proceed a constitutional comparative analysis, neither to analyze eventual conflicts between religious fundamentalism and any specific constitutional order on a concrete basis. Conversely, this Article assumes a more general-theoretical purpose. First, to properly locate religious fundamentalism within the spectrum of fundamental rights protection. And second, to confront the political endeavors of religious fundamentalism (as a control strategy) against core elements (*topoi*) of liberal constitutionalism, as democracy, rule of law, and political accountability.

Regarding its structure, this article has two main parts. After this brief Introduction (Part I), Part II will deal with religious freedom from the

perspective of fundamental rights' theory, analyzing it as a form of exercising religious freedom as a fundamental constitutional right. In this sense, religious fundamentalism will be assessed through the lens of religious freedom and its theoretical-constitutional features, as the ambit of protection and its constitutional boundaries; Part III will analyze religious fundamentalism as a platform of political engineering, pointing out its main characteristics and searching for its most problematic consequences in the realm of Constitutional Law; and at Part IV, some concluding arguments will be given.

## II. RELIGIOUS FUNDAMENTALISM WITHIN A GENERAL CONSTITUTIONAL STRUCTURE

### 1. *Religious freedom and religious fundamentalism: a theoretical perspective*

Observing religious freedom's general theoretical-constitutional framework, from where it raises as a fundamental right,<sup>6</sup> embraces a broad ambit of protection,<sup>7</sup> and is generally guaranteed without written (constitutional) reservations,<sup>8</sup> it can be assumed that religious fundamentalism, understood as a strong form of religiously driven behavior and as an interpretational dogmatical posture, integrates religious freedom as a legitimate form of ex-

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<sup>6</sup> Religious freedom is being comprehended here within a broad theoretical context, thus not being attached to any concrete constitutional order. As a theoretical-constitutional entity, religious freedom emerges as a cluster-right bonded to two central dimensions of liberty, one negative and other positive, whereby a free religious marketplace is aimed to be achieved in the context of liberal, democratic and pluralistic societies.

<sup>7</sup> The breadth of religious freedom's ambit of protection indicates, at least within democratic-pluralistic societies, that all substantive possibilities (actions, inactions, faculties, forms and modes of exercise, and practices) related to the protected constitutional good (religion) are assumed as *a priori* guaranteed.

<sup>8</sup> The lack of written constitutional clauses of reservation that supposedly would limit the exercise of religious freedom directly from its origin does not mean that this constitutional right is protected in an absolute manner, as it would allow the practice of every religiously driven action or practiced in the name of religion. Conversely, though generally guaranteed without written reservations, the exercise of religious freedom is submitted to other ways of constitutional restriction, notably for its necessity to be balanced with the exercise of other fundamental rights, from which restrictive measures can be raised.



ercise. In this sense, at least through theoretical lens, acts that are practiced under the expression of religious fundamentalism cannot be promptly regarded as unprotected acts in the eyes of Constitutional Law. Rather, all acts must be broadly embraced as *a priori* legitimate forms of exercising religious freedom. Only after an accurate analysis and by undertaking a rational process, one can conclude that a type of action/practice is constitutionally illegitimate.<sup>9</sup>

Within fundamental rights' theory,<sup>10</sup> there are basically two ways of comprehending the reach of fundamental rights: one restricted and the other broad. According to the first, every fundamental right has a limited reach of protection that clearly embraces specific (allowed) types of action/practice. On the other hand, according to the broad conception, every fundamental right embraces, at least at a first (*a priori*) stage of analysis, an unlimited possibility of actions and practices. These two theoretical postures imply two different manners of comprehending the idea of limits and restrictions. First, the "internal theory" (*Innentheorie*), following the idea of a restricted ambit of protection, asserts that all the limits of a fundamental right are acknowledgeable from its very inception, thus allowing only a dualistic posture: either an action/practice is fully protected, or it is fully prohibited (Borowski, 2018, pp. 68-69). Conversely, the "external theory" (*Außentheorie*), by not acknowledging the idea of original limits attached to each fundamental right, recognizes that any action/practice is capable of being protected, as long as it enters an optimized relationship toward other fundamental right through a balancing process.

According to Martin Borowski, to adopt the theoretical premises of the "external theory" (*Außentheorie*) implies that all fundamental rights assume an ambit of protection broad enough that must be spun off into two different zones: one, that can be defined as an *a priori* spectrum of protection (*prima facie Recht*), embraces any type of action or form of exercise that

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<sup>9</sup> As will be later mentioned, this rational process implicates a layered reasoning process that requires analyzing conflicting fundamental rights, their respective ambit of protection, balancing different claims, searching for any reason to restrict, and applying proportionality test.

<sup>10</sup> It is noteworthy saying that when mentioning fundamental rights' theory, there isn't any specific theory related to a concrete catalogue of fundamental rights under consideration. Rather, what is being highlighted is the general theoretical structure of fundamental rights, notably through the framework developed mostly in the context of German constitutional law.



is directly related to the constitutional good under protection, regardless of its dynamic relation toward other rights, values, goods and interests that are equally guaranteed by the constitutional order (Borowski, 2018, p. 66); the other, defined as the zone of definitive protection (*die effektive Garantiebereich des Rechts*), represents the space integrated only by those acts and types of exercise that in fact are protected, a stage achieved only after operating a balancing process (constitutional balancing) with other rights, values, goods and interests equally protected by the constitutional order.<sup>11</sup> Under this “external” theoretical perspective, what Borowski contends is that the area of definitive protection granted to a fundamental right can be acknowledged only after passing a two-fold test: first, it is necessary to know if an action, faculty of action or a form of exercise integrates the *a priori* spectrum of protection, thus asking if it constitutes a potential content of the right in question; and second, it must be concretely verified if that kind of action, faculty of action or form of exercise confronts any other constitutional right, value, good or interest at the extent that a legitimate restrictive measure is needed to balance the conflict in question (Borowski, 2018, pp. 67-68).<sup>12</sup>

As expected (and desired) within the context of an open-inclusive constitutional order – thus, in most democratic-pluralistic societies –, fundamental constitutional rights are granted as optimizing variables,<sup>13</sup> where, at least in a first glance, every action/practice and form of exercise are protected as *a priori* legitimate, an open posture that tends to reject any kind of *a priori* restriction, notably those handled as a way to completely avoid or hinder the exercise of a fundamental right. Under this reasoning, religious freedom must be comprehended as a fundamental right that embraces, at least within its *a priori* area of protection, all forms and ways of

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<sup>11</sup> In this sense, Borowski (2018, pp. 66-67) affirms that the faculties integrating the sphere of definitive protection are those ones that passed through all levels of constitutional balancing.

<sup>12</sup> Also, Novais (2003, p. 298) contends that the core characteristic of this theoretical approach is the necessity on distinguishing between two different areas of protection, an abstract one, where actions under the exercise of a fundamental right receive a broad and merely potential protection, and a concrete one, in which only certain actions receive full-definitive protection.

<sup>13</sup> This presupposes assuming fundamental rights as constitutional norms developed under the structure of principles, thus submitted to a (natural) duty of optimization. Generally, see Mathews and Sweet (2008, p. 94), referring to Robert Alexy’s understanding of fundamental rights as “optimization requirements”.

religious expressions, independently of its theoretical and doctrinal framework, including religious fundamentalism in a general manner.

Obviously, this open theoretical posture does not implicate that all acts committed under the label of religion are promptly protected as legitimate forms of exercising religious freedom. Rather, it only implies that religious liberty, as an open optimizing constitutional variable, offers a potential/possible (*a priori*) spectrum of protection to all kinds of religious manifestations, practices and expressions, but that the full-definitive protection is granted only for those that are properly exercised in a balanced relation with other rights, values, goods and interests equally embraced by the constitutional order (Möller, 2007, pp. 453 and 463).<sup>14</sup>

Emphasizing the need for constitutional balancing, Jorge Reis Novais contends that all fundamental rights, despite granted under *a priori* protection (a feature of the “external theory”), are submitted to an “immanent general clause of balancing” (*reserva geral imanente de ponderação*), through which that *a priori* protection turns into a full-definitive one (Novais, 2003, p. 573). This constitutional method – balancing – indicates the adequate form for achieving an optimal and non-conflictual relation between all fundamental rights.<sup>15</sup>

This “immanent general clause of balancing” constitutes, in fact, an original constitutional authorization for applying restrictive measures, under certain justified circumstances, over fundamental rights as constitutional reasons to restrict. According to Bernhard Schlink, this immanent constitutional authorization derives from the natural assumption that all fundamental rights exist in a constant flow of rights, values, goods and interests, where an optimal relation can only be achieved through a balancing process (Schlink, 1976, pp. 128-129). From this authorization clause,

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<sup>14</sup> This is to say that, everything can be a way to manifest religious freedom, but only for those that maintain a balanced dynamic with other fundamental rights can be in fact granted full protection.

<sup>15</sup> Conversely, under the “internal theory” (*Innentheorie*), fundamental rights are submitted to implicit constitutional limitations, whereby the spectrum of full-definitive protection is already known, because the ambit of protection is originally integrated by the right and its implicit limitations. See Borowski (2018, p. 69), arguing that, under the internal theory, the process used to acknowledge the reach of a fundamental right is achieved by just one step, that is because the right’s content exists within its internal limits, rejecting the possibility of any external restrictive measure. As Borowski explains, the “internal theory” understands that what is outside the internal boundaries of the right does not represent a legitimate form of its exercise.

Jorge Reis Novais recognizes the necessity that all fundamental rights must be balanced in a harmonic process of reciprocity according to the underpinning factual and legal circumstances (2003, p. 570). Thus, by recognizing the equal value of all fundamental rights within the constitutional order, and also considering the impossibility of granting an absolute protection to any of them, the “immanent general clause of balancing” leads a harmonization process directed to optimize the flow of rights, values, goods and interests.

After this brief theoretical overview regarding the structure of fundamental rights and the possibility of restrictions, it is time to get back to the discussion on religious fundamentalism. Applying these theoretical assumptions, it is not difficult to acknowledge that religious fundamentalism integrates religious freedom as an *a priori* protected form of exercise. In this sense, religious fundamentalism emerges as a spectrum of “possible actions” on exercising religious freedom. On the other hand, acts of religious fundamentalism will receive definitive protection as long as they enter a balanced relation toward other rights, values, goods and interests. In order to operate this balancing process, some restrictive measures can be addressed by the Public Power, which must also pass proportionality test. Notwithstanding, and independently of which restrictive measures can be stemmed from the balancing process, the simple fact of integrating the *a priori* zone of protection suffices to conclude that religious fundamentalism appears as a “possible” form of legitimate exercise of a constitutional right.

## *2. Religious Fundamentalism, human dignity and conflicting normative perspectives*

Once religious freedom’s theoretical-constitutional framework has been properly set up, it is time to investigate, in light of the full-definitive spectrum of protection, which normative reasons can be raised in order to balance the exercise and practices of religious fundamentalism with other rights, values, goods and interests at the constitutional level. From the outset, an indispensable variable to work with on balancing fundamental rights is human dignity. Human dignity, at least within the large spectrum of modern liberal-constitutional democracies, and also from a theoretical-constitutional standpoint, is generally embraced as a constitutional value,

serving as a core principle of liberal constitutionalism. In this sense, every balancing operation between two or more fundamental rights must first assess the axiological effects of human dignity over the normative elements at stake. This is the proper stage to ask questions as: What does human dignity mean on the foundation, construction and development of fundamental right “x”? What are the normative effects of human dignity over fundamental right “x”? What legitimate reasons can human dignity offer as to restrict the reach of fundamental right “x”? So, at this first stage, human dignity serves as a normative parameter.

Following this reasoning, and in order to assess human dignity’s impact over religious fundamentalism and its practices, it is necessary to evaluate the normative connections between religious freedom and human dignity. On its relation toward religious freedom, human dignity can play two basic roles: on the one hand, it can be viewed as a value for supporting religious practices, notably as a reason for developing one’s religious self-determination (including religious fundamentalist practices); on the other hand, it can also be raised as a legitimate reason for restricting religious freedom’s forms of exercise (including religious fundamentalist practices).

Undoubtedly, religion plays a special role at the private and social spheres of life. It emerges as a path on transcending the material aspects of life, supporting individual self-development through theological reasons (dogmas) as a means to give the material existence a set of metaphysical justifications. To search and find a proper meaning for human existence, renders religion a special factor on improving human dignity by making life meaningful beyond its limited material aspects. Therefore, religion can positively contribute on the development of human dignity. On the other hand, when religious beliefs and practices cross constitutional boundaries, instead of promoting human dignity, they are capable of affecting life in unimaginable and intrusive ways. For instance, in some conflicting situations, human dignity can be compromised at an extent of provoking serious physical and psychological damage on individuals and groups. In the end, religion can stand both as a positive and as a negative factor. And as the exercise of religious beliefs and its practices (including religious fundamentalism) depend on the level of protection granted to religious freedom as a constitutional right, it is of the most importance to assess the points of conflict toward human dignity.

At a positive dimension, religious fundamentalism, as long as its practices are developed within constitutional boundaries (properly balanced with other rights, values, goods and interests), promotes human dignity by assuring believers the possibility to conduct and to conform their lives in light of the strongest fundamentals of faith, thus turning their theological dogmas into their own individual law. Conversely, at a negative dimension, acts practiced under the pale of religious fundamentalism can raise serious conflicts with human dignity, needing a balancing process that will require applying reasonable restrictive measures. To better understand these pressure points, the idea and concept<sup>16</sup> of “human dignity” must first be adequately assessed.

In short, human dignity can be comprehended through two complementary perspectives. First, dignity implies autonomy, the natural human capacity of individuals to govern their own lives, according to their own made rules, whereby no person must be subjugated to the will of others; and second, human dignity means self-determination, the natural individual right to configure her or his own life according to freely chosen moral, political, ethical and ideological vectors (McCrudden, 2008, p. 658). Acknowledging human dignity as a value is tantamount to recognizing every person as inherently endowed with the broad capacity to live freely, independently of others’ will, a right to be treated as a person, not as an object (Chibundu, 2015, pp. 196-197). In this sense, Kant contends that human dignity is a value upon which no price can be given, thus representing an end in itself (Kant, 2017, pp. 412-413). Both above referred perspectives are built upon a theological reasoning, generally construed upon the Christian-Jewish heritage, where the value of human dignity stems from the idea of *imago Dei*, as if humans reflected God’s perfect image. Therefore, human dignity is construed as a value in itself, an *autopoiesis* value. As Christopher McCrudden contends, “being made in the image of God meant that Man was endowed with gifts which distinguished Man from animals” (McCrudden, 2008, p. 659).

Leaving the theological reasoning aside and approaching human dignity through constitutional lens, it is placed as a core objective value within modern liberal constitutionalism, not only as a fundamental constitution-

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<sup>16</sup> In this sense, Dan-Cohen (2011, p. 9), argues that a single concept of human dignity is doubtful to achieve. Also, Chibundu (2015, p. 195) notes that one of the most relevant features of human dignity is its “amorphousness”.

ally recognized right, but as one of the highest fundamental principles of the whole modern constitutional structure.<sup>17</sup> In the context of liberal-democratic constitutionalism, human dignity assumes a normative meaning, being not only a core objective value, but beyond that, a value to be protected, promoted and developed as a constitutional duty and as an aim to be achieved by the State.<sup>18</sup> It worth mentioning that human dignity's constitutional recognition as modern liberal constitutionalism's core value emerged as a form of "responsive constitutionalism", representing an oppositional movement toward several past historical atrocities<sup>19</sup>, namely at the end of World War II, where a global discourse on the centrality of human dignity started to form (Moyn, 2014, p. 43). Although not every Constitution textually embrace human dignity as a fundamental principle, its ontological-axiological relevance suffices to acknowledge the normative influence that naturally wields over the whole constitutional-political order.

Despite human dignity general acknowledgment in the postwar liberal-democratic constitutionalism, it should be noted that, although construed upon a universal-transnational discourse, human dignity cannot be understood under a unified process of comprehension, as if it was endowed with a shared unidimensional substantive content. This is to say that, despite its broad constitutional recognition and prominence over time, human dignity's concept is circumscribed by a palette of meanings constantly influenced by different cultural, ethnical and theological *topoi* through which assumes multiple shapes. The common perception on human dignity is generally connected to western liberal-democratic constitutionalism, especially after the adoption of the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948) as universal legal-international vectors. Though the general comprehension on human dignity has gained a reasonable direction after the enactment of those legal-interna-

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<sup>17</sup> Barroso (2012, pp. 354-355) states that "As a fundamental value and a constitutional principle human dignity serves both as a moral justification for and a normative foundation of fundamental rights".

<sup>18</sup> For instance, see the Constitution of the Federal Republic of Brazil, art. 1o., no. 3, where human dignity has been made a fundamental principle of the constitutional order.

<sup>19</sup> Generally, see Davis (2009, p. 1373), offering as examples the historical past of Germany at the Nazi-period and the dictatorial past of South Africa, namely at the time of apartheid.

tional instruments, it had already appeared, for example, in the early Arabic constitutionalism.<sup>20</sup>

In a first stage of development, the idea of human dignity (*karama*) in the Arabic constitutionalism was not attached to a conception of individual protection neither used as a form of limitation against state activities or against state restrictive measures on individuals. Rather, it was only connected to an idea of granting the state, the nation or religious groups a status of respected entities. Besides the western expansion of the concept, human dignity was mostly improved in the Arabic world after the Arab Spring, whereby several constitutional documents, as in Jordan, Libya, Mauritania, Morocco, Oman, Somalia, Syria, Egypt and Tunisia, adopted it as a core structural legal-political element, although assuming different ways and levels of significance (Pin, 2017, pp. 38-39).

These parallel constitutional processes, that equally recognized human dignity within their constitutional orders, although giving human dignity some centrality, have not implied on granting an absolute immunity against gross fundamental rights' violations, thus raising some concrete paradoxes within the political reality. For instance, Andrea Pin contends that the Saudi Arabia 1992 Basic Law, although expressively mentioning human dignity (art. 39), tends to manage it only as a rhetoric expedient for justifying limitations on the freedom of expression within the context of *Sharia* (Pin, 2017, p. 50). Also, it should be noted that it is because of that mere rhetorical recognition, that women's ostensible segregations under *Sharia* still occurs without further problems (Mayer, 1994, p. 360). Another example can be found in the field of criminal justice. Mayer contends that, according to the Cairo Declaration of Human Rights (art. 19, d), some fundamental principles, as the principle of legality, are directly oriented by *Sharia* prescriptions and interpretations, whereby gross violations toward human dignity still exist, as types of punishment allowed under the *Qur'an*, like amputation, stoning to death and crucifixion, appointing an evident internal paradox (Mayer, 1994, p. 340).<sup>21</sup>

<sup>20</sup> In this vein, Pin (2017, pp. 6 and 18-27) mentions that the word "dignity", that has a correspondent word in Arabic (*karama*), first appeared in the Lebanese Constitution from 1926 and in the Syrian Constitution from 1930.

<sup>21</sup> Also, Mayer (1994, p. 341) notes that it is difficult to harmonize the language of human rights protection used in different passages of the Cairo Declaration. As an example, Mayer appoints that, at the same time that under Article 20 of the Declaration all kinds of humiliating punishments are expressively prohibited, the provision of the Article



All these paradoxes are even more evident within religious practices, especially within the Islamic world, like the veiling obligation for women, the lack of equality between men and women in several spheres of social and private life, and even in the realm of criminal responsiveness. Actually, it should be asked if these religious practices are in some point culturally perceived as practices that promote human dignity development or violate it in an objective manner, an answer that depends upon which substantive perspective human dignity is comprehended. Despite its multi-layered possibilities of meaning (moral, cultural, theological and ethnical), the most important comprehension on human dignity is the constitutional-normative one, where it assumes a normative value, protected as a constitutional good and as a core principle of the social-political order, serving not only as a foundational principle, but, above all, as the proper essence of all fundamental rights (Barroso, 2012, pp. 354-355).

Therefore, which theoretical-dogmatic consequences stem from human dignity constitutional-normative meaning? Which elements integrate human dignity normative content?

A starting point, as already argued, is to assume human dignity as the foundational piece of the objective order of values encrusted in the complex of fundamental rights, that is to say that human dignity justifies the existence, recognition and protection of all fundamental rights as a whole. Throughout a developing process that flows from inside towards outside, human dignity appears as the bonding element between all fundamental rights, constituting their essential content (Drews, 2005, p. 241). In this line of reasoning, the development, promotion and protection of all fundamental rights depends on respecting human dignity as the highest constitutional value. From a more concrete perspective, a relevant issue to address is if the lack of protection – or even the violation – of fundamental rights affects human dignity in some level, as in the case of human rights infringement by some religious practices within Islamic sta-

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19, d, leaves to *Sharia* the establishment of criminal penalties, allowing, in an ostensible contradictory way, punishments that severely violates human dignity. Moreover, Mayer (1994, pp. 327-328) appoints that the Cairo Declaration's core feature is that it has been engendered as a form of response to the Western human rights conception, submitting it to specific restrictions under the Islamic law, especially under *Sharia*. Besides all of these observations, it should be noted and remembered that the Cairo Declaration on Human Rights, in an evident paradox, recognizes human dignity in art. 1, (a), as a foundational element to human rights.

tes.<sup>22</sup> Related to that, another problem is whether respecting and improving human dignity is something exclusively addressed by the vector of western human rights law framework, or it is, indeed, a universal challenge within a global network of constitutional orders (Mayer, 1994, pp. 316-317). As Christopher McCrudden argues, human dignity, at least within its development within the context of human rights discourse at the final first half of twentieth century, served as a blank linguistic device to utter the convergence of multiple human rights theories into a unified legal complex (McCrudden, 2008, p. 678). Nevertheless, it does not rule out the need for a common constitutional-normative ground.

Searching for a common constitutional-normative ground, Christopher McCrudden (2008) argues that human dignity constitutional recognition implies a three layered standard of protection: *first*, the basic comprehension that all human beings are naturally endowed with an intangible self-value; *second*, that this inherent self-value demands respecting all individuals; and *third*, this immanent self-value is the constitutional vector that hinders any attempt on turning individuals into mere objects (Drews, 2005, pp. 242-244). From that, McCrudden (2008, pp. 686-694) appoints at least four expressive normative consequences: *first*, the prohibition of inhuman treatment, acts of humiliation and degradation; *second*, a right and duty to respect and secure the right of free self-determination and autonomy of all individuals; *third*, the prohibition of all kinds and levels of discrimination, granting everyone an equal status; and *fourth*, human dignity implies the recognition of an existential minimum to all individuals. These constitutive elements serve to better assess the normative content of human dignity. But from a more rights-based reasoning, they all bring the necessity to respect core fundamental rights,<sup>23</sup> as the right to physical,

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<sup>22</sup> In this sense, Mayer (1994, p. 364) notes that, while some view that this comprehension is due to a certain kind of Western nations “cultural insensitivity” over Islamic states, others comprehend it with skepticism, arguing that some Islamic states indeed violate human rights law.

<sup>23</sup> It worth mentioning that all fundamental rights, at least in a certain way, can be linked to the idea and concept of human dignity. Nonetheless, some fundamental rights have a narrower substantial relation with it, for its proximity to the essence of human dignity. Also, there is a practical problem that should be noted. If all and any constitutional right, even indirectly, could be regarded as related to human dignity and its protection, it could be entailed that every constitutional claim naturally involves a claim of human dignity violation, a practical problem that can cause the exhaustion of the constitutional jurisdiction apparatus. See, for example, McCrudden (2008, p. 681) noting that while

psychological and moral inviolability (the prohibition of degrading treatments), the right to an equal treatment, and also the right to privacy and intimacy (McCrudden, 2008, p. 683).

Once human dignity normative significance had been properly assessed, it is time to ask which connections does it have with religious fundamentalism?

Assuming those appointed fundamental rights as the human dignity normative standard, it is important to assess which practices under religious fundamentalism can conflict with those rights and also under which circumstances should (or must) they be constitutionally restricted. As considered earlier, religious fundamentalism is a specific way of interpreting and practicing doctrinal-theological principles, calling the return to the dogmatical fundamentals of faith. The problem begins when some acts committed under this “theological-dogmatical” calling conflict with human dignity normative expressions. Its closure to evolutionary aspects of theological discourse and also to other kinds of comprehensive world-views tend to engender potentially dangerous behaviors, generally driven with intolerance and social stigmatization,<sup>24</sup> some leading to concrete acts of physical and psychological violence.<sup>25</sup> For instance, Ruud Koopmans affirms that Christian fundamentalism appears commonly as a religious reflection of right-wing authoritarianism capable of directing intolerance as a means for practicing acts of physical and psychological harm (Koopmans, 2015, p. 38). To better understand the spectrum of clashing consequences between human dignity normative meanings and some practices related to religious fundamentalism, each possible conflicting situation must be assessed separately.

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in some constitutional orders human dignity is a fundamental principle of the order, in others it operates as a concrete fundamental right enforceable before Courts, especially before Constitutional Courts.

<sup>24</sup> In this sense, Claudio (2010, p. 15) affirms that religious fundamentalism is bonded to “various forms of intolerance, including racism, sexism, homophobia and elitism”.

<sup>25</sup> Young, et. al. (2013, p. 111) argues that religious fundamentalism normally entails a negative comprehension and intolerance towards homosexuality, and that it also hermetically defends a traditional distinguishing based on gender role differentiation. Also, Koopmans (2015, pp. 34 and 38) notes the existence of empirical data that appoints the strong connection between Christian fundamentalism and out-group hostility, practiced namely towards homosexuals, Jews, members of other religious groups and other ethnic and racial minorities.

### *A. Right to psychological and physical inviolability*

Both kinds of inviolability stem from the recognition of human dignity as the uppermost value within modern democracies whole general constitutional structure. On recognizing psychological inviolability, the internal spectrum of human capacities, encompassing mind, thought and conscience, is put under absolute protection. A free mind, free thought capacity, and free conscience are all elements indispensable for human autonomy and self-development. Any external attempt to control human psychological capacities would equate to a process of objectification. In this sense, the right to psychological inviolability not only protects human most internal psychological faculties, but, beyond that, psychological health (mental health) as a whole. Regarding the right to physical inviolability (bodily integrity), the whole physical body is a “temple” under protection. Without physical health, life is incapable of development. Thus, any attempt of physical harm or any committed physical damage are unlawful acts. But what is the relation between these two types of inviolability and religious fundamentalism?

Some research points out that religious fundamentalism is capable of provoking and increasing psychological harms, as depression, anxiety and other psychological disorders, because the pressure exerted upon believers to stay within their religious dogmatical boundaries curtails the individual sense of self-development and autonomy (Savage, 2011, p. 135). Although not all acts driven through religious fundamentalism imply concrete acts of violence, the non-violent dimension of fundamentalism, as argued by Muzaffer Ercan Yilmaz, carries a common “process of dehumanization”, through which the fundamentalist believer, by a sense of nullified personality, assumes a posture of lacking empathy toward out-group members.<sup>26</sup> Moreover, considering evidences that relates fundamentalist tendencies with believers’ poor socio-economic and cultural backgrounds, “brain-washing” practices within groups that deploy intense religiosity, clearly inflict and increase psychological harms by the use of drugs, sleep deprivation and other measures directed to induct a blind compliance with the propagated religious dogmas (Young, 2012, p. 2).

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<sup>26</sup> In this sense, Yilmaz (2006, p. 3) affirms that “It systematically destroys the individual’s tendency to identify himself or herself with other human beings”.

Besides that, there is also a violent dimension of religious fundamentalism, involving acts of physical harm against individuals, even capable of provoking death (Yilmaz, 2006, p. 4). Considering that religious fundamentalism, among several causes of its emergence, comes associated with a reactive intent towards a perceived threat supposedly driven by modernity, violence may be used as a means to achieve compliance to the “fundamentals” of faith, as a way to ensure that believers and non-believers will invariably be bonded to and commanded by the professed religious dogmas.<sup>27</sup> This strictly conducted religious imposition has been a major platform for practicing violence, especially against women, as a manner of controlling their “religious-based honor” through the enactment of sexual norms, even justifying sexual violence against them (Claudio, 2010, pp. 18-20). Against this violent dimension of religious fundamentalism, raises the physical inviolability of individuals as a fundamental right that yields pressure for the restriction of those practices (Neff, 1991, pp. 337-338). To affect the integrity of human body is certainly to violate human dignity (Borgmann, 2014, pp. 1065 and 1067).

Therefore, given these two dimensions – psychological and physical – of inviolability, especially their direct connection to the protection of human dignity as a constitutional good, the clash between religious fundamentalist practices with them produces a substantive constitutional justification for stopping excessive acts committed under the exercise of religious (fundamentalist) beliefs. Hence, the use of religion to produce psychological or physical harms under the pale of religious fundamentalism is not (and must not be) immune to constitutional restriction.

### *B. Right to equal treatment*

This not only a philosophical axiom,<sup>28</sup> rather a normative and logical one: the dignity that inhabits one is the same that inhabits others, as we are all equal. Recognizing human dignity as an irreducible constitutional axiological quantum is tantamount to equality as a normative assumption. Therefore,

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<sup>27</sup> Gregg (2016, p. 347) offers, as an example, the anti-abortion movement that began in 1980s in the United States, where, among others, the movement “Army of God” perpetrated several acts of violence, carrying out massive assassinations.

<sup>28</sup> In this line, Richards (1981, pp. 342-343) remembers that equality has its philosophical roots in Kantian deontological moral theory.

from human dignity as a constitutional principle stems the fundamental right to equal treatment, forbidding any kind of discriminative posture, be it based on gender, race, sex, culture, nationality, religious affiliation, or any other reason. In sum, this is the rule of non-discrimination (Lurie, 2020, p. 178).

Gender discrimination is one of the uppermost factual and normative challenges of equality,<sup>29</sup> and also one of the most problematic issues in the realm of religious fundamentalist practices. In several religious fundamentalist practices, gender-based discrimination is a common fact, one that stems from theological-dogmatical postures. For instance, Korinna Zamfir (2018, p. 6) argues that, despite the metaphorical language, fundamentalist postures on interpreting some historical passages of the Bible tend to stigmatize the image of women, observing them as immoral and promiscuous, thus raising the possibility to provoke or increase violent treatment against them. This is to say that, although metaphoric designed, a strictly religious fundamentalist-based interpretation represents a concrete channel for imposing gender inequality and even legitimating physical violence. Also, it should be noted that the influence of religious fundamentalism in matters of gender inequality has also negative consequences on women's political participation, as some Catholic fundamentalist practices within the historical experience of Philippine demonstrates (Aguiling-Pangalangan, 2010, pp. 90-93). Within the doctrinal framework of Islamic fundamentalism, notably on the basis of a sexist interpretation of some Qur'an passages, and also supported by the jurisprudence of some religious scholars, restrictions are normally impinged upon the political capacity of women, stigmatizing their role in society (Machrusah, 2010, pp. 68-71). Another deep contested issue relates to women's veiling practices, which are, at least indirectly, an issue based on stigmatized assumptions driven from gender-based discrimination.<sup>30</sup>

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<sup>29</sup> From a constitutional-normative perspective, the right to equal treatment, as basic principle, forbids any discriminative normative posture based on sex and gender. For that, see Brown, et. al. (1971), p. 889.

<sup>30</sup> It is known that practices of veiling can have different backgrounds. Notwithstanding, it is undisputable that a large part of women reports they are indeed obligated to veil themselves under the pressure inflicted by their families, notably by their husbands within a marital-abusive relation. Despite this pressure can be related to several causes, it is undeniable that most of cases have a religious fundamentalist-based discourse as background, especially on assumptions of gender inequality. For that, see generally Dunlap (2017, pp. 975-978), arguing that veiling practices can be related to a religious mandatory obligation, to a religious commitment under the faith, be regarded as a cultural bond and

As seen, a large part of religious fundamentalist-based discourse on gender differentiation (that is, discrimination and stigmatization), based on a supposed natural distinguished role of men and women in society, not only avoids women to have a full length exercise of their political and social rights, but also is capable of transforming them into mere objects (Zamfir, 2018, p. 10). When a sexist and discriminative religious fundamentalist discourse promotes a general unequal treatment, it violates basic fundamental rights, requiring a prompt reaction by the constitutional order through an adequate balancing process. This process of objectification is an undeniable challenge on the protection of human dignity, and of course a plausible reason to restrict these types of religious fundamentalist practices.

### *C. Right to privacy and intimacy*

Directly connected to the value of autonomy, privacy, as some voices remember, can be comprehended as “the right to be let alone”, resembling what Warren and Brandeis have argued as “the more general right of the individual to be let alone” (Warren and Brandeis, 1890, p. 205). In what concerns its basic content, Jana Nestlerode affirms that the Supreme Court has already recognized that it embraces the right to be free from any external pressure to disclosure personal information, and also the right to take personal decisions without any outside interference (Nestlerode, 1993, p. 61).<sup>31</sup> Considering the right to intimacy, it encompasses the most internal and personal choices made under the exercise of the right to privacy, reason why intimacy can be comprehended as representing the core dimension of privacy,<sup>32</sup> involving, for instance, sexual<sup>33</sup> and family choices as matters insusceptible of violation or restriction.

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expression, as a political expression, and also as a symbol of anti-imperialism. Also, see Nanwani (2011, p. 1437), affirming that veiling practices come often as a religious obligation under Salafism, where women are pressured to cover themselves at the public sphere.

<sup>31</sup> Also, Cain (2004, pp. 111-114) contends that, under the American Federal Constitutional Law, the right to privacy involves, essentially, questions over individual choices, referring to *Griswold v. Connecticut* as the leading Supreme Court case on the matter, through which the use of contraceptives was comprehended as an act protected under that right.

<sup>32</sup> In this sense, Cain (2004, p. 118), affirms that, regarding the existing substantial relation between privacy and intimacy, the core of the former “is connected with the creation of personhood, the process by which each of us creates an authentic self”.



And what about religious fundamentalism? What does it implicate on the rights to privacy and intimacy? In a nutshell, the dogmatical stiffness of religious fundamentalist doctrines, at some point, ends up invading privacy and intimacy matters when concerning personal sexual choices, family development and family planning (Austria, 2004, pp. 97 and 101). For instance, in the United States, the Christian Right, strictly bonded to its dogmatical view on marriage and family, succeeded on hardening gay marriage laws;<sup>34</sup> Christian fundamentalists engage on the attempt to fiercely restrict the access to abortion (Castle, 2011, p. 1); in the Muslim world, some Islamic fundamentalist strands, as in Saudi Arabia, punish homosexuality with death sentence or other inhuman penalties, being women the most affected (Rehman, 2013, p. 31).

Naturally, an opposite contention would be to affirm that individuals submit themselves to a certain fundamentalist doctrine as a matter of free choice, and also that doctrinal self-determination of religious groups/communities as a protected good under the exercise of religious freedom must also be considered at verifying any violation on the matter. Nonetheless, it is indisputable, at least in its greatest part, that religious fundamentalist practices come accompanied with a level of group-based coercion, be it physical or psychological, reason why the majority of believers that shares fundamentalist views are at some point pressured to comply with imposed religious tenets, thus acting in a non-free manner, and having their own rights to privacy and intimacy constantly violated.<sup>35</sup>

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<sup>33</sup> See Rosenbury (2010, p. 810), contending that the Supreme Court jurisprudence on the matter submits the constitutional protection of sex to the protection of “emotional intimacy”, thus assuming intimacy as a constitutional good under which sexual choices must be constitutionally protected. Also, see Cain (2004, p. 119), stating that, in *Stanley v. Georgia*, the right to intimacy was treated under two perspectives, as a right to protect the “intimacy of place” and to protect “sexual expression”.

<sup>34</sup> In this vein, Cox (2005, p. 47) argues that “In perpetrating the view that Christianity has only one view of homosexuality – condemnation – the Christian Right dismisses the reality that a significant number of gays and lesbians are members of faith communities”.

<sup>35</sup> This is also true in the case of veiling practices within Islamic fundamentalism, where the veil no more appears as a mere religious symbol or as an element of cultural bond, rather as an instrument of oppression. For that, see Hochel (2013, pp. 41-43), arguing that, within Islamic fundamentalism, as in Iran, the veil was transformed into a symbol of women subordination and inferiority, through which women’s freedom of choice is constantly violated.

### 3. *Human dignity and religious fundamentalism: balancing the equation*

As previously argued in this Article, religious fundamentalism integrates religious freedom's *a priori* dimension of protection, but to reach the acts (actions and omissions) that indeed compose the definitive dimension of protection it is indispensable to analyze which restrictive measures derive from the balancing process between that fundamental right (religious freedom) and other constitutional rights, values, goods and interests. Accordingly, on submitting religious freedom (and so religious fundamentalism) to the "immanent clause of balancing", those three basic rights' perspectives (right to psychological and physical inviolability, right to equal treatment, and right to privacy and intimacy), all emanating from human dignity, emerge as legitimate reasons to restrict acts practiced under the label of religious fundamentalism. These fundamental rights operate as relevant normative data at the balancing process, justifying the rejection of unreasonable (excessive) acts that, once committed under the pale of religious fundamentalism, appear as burdensome constrictions over those rights. It is also relevant to argue that, though only three rights' perspectives were appointed, those same normative data generally raise other normative dimensions as reasons to restrict. The right to physical and psychological inviolability, the right to equal treatment, and the right to privacy and intimacy, all also involve the protection of other fundamental rights, for instance, the right to free movement, freedom of expression, right to choose a professional occupation, and the general right and duty to protect children.

In parallel, it is important to recognize that religious freedom can also, itself, rise as a constitutional reason to block acts of religious fundamentalism. Besides its positive dimension, religious freedom has also a negative one that emerges as a protected personal sphere under which one can resist and reject any practice of excessive acts of religious fundamentalism. For instance, no one must be obligated, passively and indisputably, to bear an act of proselytism discharged through a religiously fundamentalist discourse (Stahnke, 1999, pp. 287-288).<sup>36</sup> Of course, those above referred

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<sup>36</sup> In this sense, the negative dimension of religious freedom manifests itself as the one's freedom to maintain a religion, where an individual is not obligated, for instance, to be a target of a proselytist discourse.

normative data and the balancing processes that can be taken cannot be described in an abstract manner, as the underpinning factual and legal data must be also considered, here being sufficient to say that acts of religious fundamentalism, although initially protected, have, at least in a theoretical-dogmatic approach, reasons for being constitutionally blocked.

### III. RELIGIOUS FUNDAMENTALISM AS POLITICAL ENGINEERING: CONFRONTING VALUES OF LIBERAL CONSTITUTIONALISM

At this Part, religious fundamentalism will be assessed through a different angle, observing it as a vehicle for achieving political claims. This is religious fundamentalism as a political engineering platform, where a religious group (or groups), strategically oriented towards a political aim, uses a “theological discourse of truth” as the political, moral, cultural and economic agenda of society<sup>37</sup>, pursuing, in the end, the establishment of a political regime theologically driven, that is, a theocracy (Cliteur, 2012, pp. 135-137).

That a state can freely choose a fundamentalist theological approach to address its public matters is not itself a problem, because this is a choice taken under the broad concept of state sovereignty and political self-determination, an issue to be addressed under the interconnections between Politics, Law and Religion. Nonetheless, a manifest problem arises when the political decision on assuming a theological-fundamentalist approach comes up with extremist tendencies, notably by committing acts of violence and totalitarianism (An-Na'im, 1987, p. 328). In this sense, it is relevant to state that, as a form of political engineering, religious fundamentalism not only exceeds the boundaries of religious freedom's constitutional framework, but also conflicts with liberal constitutionalism on an institutional basis. Recently, even the most religiously driven fundamentalist states have been adopting (or trying to adopt), at least in a tempered manner, a (liberal) constitutional structure, as occurred, for instance, in

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<sup>37</sup> In this vein, see Halliday (1995, p. 400) states that “What defines contemporary fundamentalism is not on its own the call for a return to the literal reading of a holy text, but the combination of this appeal with an intervention in the political system, a mobilization of population and the building of an organization for the taking, and retention, of political power”.

Iran by the time of the so-called Islamic Revolution. But the adoption of (liberal) constitutionalism calls to abide to its most core elements (*topoi*), as democracy, human rights/fundamental rights, separation of powers, and political accountability.<sup>38</sup> If any of these elements are violated, the whole structure suffers a deep fracture. This why it is necessary to assess this “model” of religious fundamentalism from the standpoint of liberal constitutionalism values, a task to be accomplished in the present part of the Article.

First, the basics. The two core political ideals that form the fulcrum of liberal constitutionalist thinking, popular sovereignty and public reason, would promptly reject any pretension on justifying state power, state activities, and public policies by a theologically guided reasoning.<sup>39</sup> Of course, if religious arguments are used at the public space as an expression of public reason, in a way that can contribute to the communicational process, it is undisputable that they acquire argumentative force, thus being allowed to have influence at the decision-making process. On the other hand, using religious fundamentalism as a political agenda, trespassing Religion’s social function (and also religious freedom’s constitutional boundaries), exceeds a state’s option on recognizing any religion or religious denomination as the majoritarian one, and also on assuming an official religion (Blois, 2010, p. 99).<sup>40</sup> In this sense, entrenching Religion through a fundamentalist-political discourse directed on making an established religious denomination the only true moral agent and vector of the entire society contradicts with the proper idea of liberal constitutionalism (March 2015, p. 114).<sup>41</sup>

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<sup>38</sup> Fombad (2011, p. 1014) contends that the modern concept of constitutionalism is bonded to core elements like “the recognition and protection of fundamental rights and freedoms; the separation of powers; an independent judiciary; the review of the constitutionality of laws; the control of the amendment of the constitution; and institutions that support democracy”.

<sup>39</sup> In short, popular sovereignty and public reason demand that public policies be implemented through a broad process of popular participation where only arguments deduced in a reasonable and general understandable way are considered capable of influencing the political communicational process.

<sup>40</sup> In this vein, looking to the English experience, the public recognition of the Anglican Church as an established one does not conflict with the exercise of religious freedom, nor does it imply the establishment of a theocratic regime.

<sup>41</sup> In fact, this is a “two way street”, because not only it does conflict with core values of liberal constitutionalism, but also the moral-political basis of liberal constitutionalism

## 1. *Religious fundamentalism, Politics and Islamic fundamentalism: a control strategy*

As a starting point, it is noteworthy to mention that using religious fundamentalism as a platform of political engineering does not presuppose the relation between Religion and Politics as automatically leading to extremism and radicalism. Religion, as a social factor *per se*, can and should influence multiple spheres of society (politics, economy, culture, literature, among others) with its doctrines, tenets and values serving as moral-political vectors, as long as they be expressed and justified on a rational basis (a matter of public reason).<sup>42</sup> For instance, religious groups, as the Christians in the United States of America (Hoover and Dulk, 2004, pp. 10-12), pursue to directly influence public policies according to their moral-theological vectors, a practice that certainly is not in disagreement with secularism<sup>43</sup> as the proper “theological” vector of liberal constitutionalism (Gedicks, 1990, p. 421). In this vein, Samuel W. Calhoun (2018, p. 486) argues that since Religion and Politics are originally interconnected, it is perfectly acceptable religious groups to rely on faith-based arguments to influence decision on public matters. Nonetheless, on the duality Re-

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do not encounter philosophical-moral correspondence in religious fundamentalist political tendencies.

<sup>42</sup> In this line, Gedicks (1992, p. 765) argues that “value choices must be rationally defended in public life, for unlike private actions, public actions cannot be justified by mere appeal to an individual’s tastes or preferences”. Also, Greenawalt (1990, p. 1022) contends that human behavior should not be prohibited only because one defends it as sinful or wrong in theological terms, rather only if it engenders any harm to a good comprehended through a secular language, that is, in the context of a reasonable and rational discourse. Moreover, Greenawalt (1990, p. 1033) argues that the only possible and reasonable hypothesis of direct influence of religious convictions over political choices is when they serve as a mere form of instrumental reasoning, functioning as elements of a rhetorical discourse.

<sup>43</sup> Regarding the possible relations between Church and State, see Cliteur (2012, pp. 130-131), arguing that a religiously neutral state is the most proper way to conduct public policies in clear harmony with the democratic regime, whereby “political secularism” is normally understood as “the separation of church and state”. Nonetheless, this idea of secularism does not imply the dislocation of religion to the private realm. The proper constitutional comprehension of secularism must be a positive one, a constitutional posture that enables a balanced subsistence of Religion within state and society. See also Smolin (2018, p. 533), offering some European examples of positive relations between State and Religion, like the Church of England as an established religious institution.

ligion-Politics, David M. Smolin (2018, pp. 531-538) draws attention to some situations that consider potentially dangerous: first, when there is no religion at all, contending that its absence, as history has already shown under the example of communism and fascism, does not assure a political environment free of totalitarian visions; second, when politics substitutes religion becoming the moral-parameter of individuals; and third, when religion becomes substantially reinforced by an ethnic or nationalistic identity.

Summing up, Religion and Politics can, at least within proper constitutional boundaries (protection of fundamental rights, public reason, secularism, and state religious neutrality to name a few) influence each other on a rational and balanced basis. Though said that, it is very important to not forget that any excess on their intertwinement can push dangerous possibilities forward. Both Religion and Politics are natural instruments of social influence. While Religion has the capability to conform the mind-body-action spectrum, Politics embodies the capacity to shape public spectrum on general matters. So, if any of the sides pushes beyond its legitimate realm, crossing the rational lines of dialogue, the means of influence become means of control. This is what happens when religious fundamentalism turns theological discourse into Politics in order to take control of every aspect of society, thus becoming a strong, ablative and dangerous strategy of mass control.

That is the case when the influence of religious groups pursues, through their militant-fundamentalist discourse on the decision-making process, the establishment of a theologically guided political body of public actions and rules, accompanied by a totalitarian agenda<sup>44</sup>, as the example of *jihadi* fundamentalism (Freamon, 2003, p. 302). Within the spectrum of this politically guided religious fundamentalism, it is undoubtful that Political Islam<sup>45</sup> is the uppermost problematic manifestation,<sup>46</sup> especially for the means

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<sup>44</sup> For instance, in the context of political Islam, *Sharia* is intended to be operated as the source of legal-political authority. For that, see Arafa (2014), pp. 878-879.

<sup>45</sup> Referring to Political Islam under the term “Islamism”, see Mozaffari (2007, p. 18), stating that “Surely, it has become evident that this particular form of Islam was (more) political, often violent and severely critical towards the West, and, last but not least, determined in its hostility towards established regimes in the Muslim world”.

<sup>46</sup> It is noteworthy to mention that this affirmation does not mean that Islam, as a system of belief, is objectively incompatible with democracy. For that, see Jillani (2006, pp. 727-728), contending that Islam is perfectly compatible with democracy. Also, Jillani

commonly operated to achieve the intended holistic treatment of state, religion and politics (Ariwidodo, 2017, p. 255), as the historical experiences of Egypt, Iran, Afghanistan, and others demonstrate (Ahmed, 2014, p. 623). The common and most problematic feature of political-religious fundamentalist bodies, as the Muslim Brotherhood, Al-Qaeda, Hezbollah, Hamas and ISIS,<sup>47</sup> is that their actions, directed to achieve a holistic control of society (politics, culture, economy, family planning etc.), transcend the boundaries of public reason, and struggle with core normative constitutional elements, those essential values and tenets of liberal constitutionalism.<sup>48</sup>

Considering themselves as autopoietic sources of power, religious fundamentalist groups reject popular sovereignty in order to control the whole decision-making process, thus preventing any democratic development (Ariwidodo, 2017, p. 261). In this vein, Mohamed A. Arafa contends that *jihadi* fundamentalism, strictly based on the sovereignty of God as the core political tenet, rejects the alleged sovereignty of people in order to assume the entire control of the state and society.<sup>49</sup> Beyond that, Abdul-

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(2006, pp. 737-739) contends that democratic values and principles have correspondence in Islam throughout three core elements that are embraced in *Quran*: consultation – *shura* –, consensus – *Ijma* – and reasoning – *Ijtihad*. Moreover, Jillani (2006, p. 742) affirms that the proclaimed incompatibility between Islam and democracy is due to a misleading interpretation of *Quran*. Nonetheless, Jillani (2006, p. 746) recognizes that along the world history three facts implied the weakening of the idea of democracy within Islam: colonialism, the development of authoritative governments after de process of decolonization, and the emergence of fascism.

<sup>47</sup> In this sense, March (2015, p. 109) notes that these fundamentalist-militant groups normally embrace acts of sacrifice and martyrdom “as a necessary means for attaining their goals”. About ISIS, Simons (2018, p. 326) appoints some research noting ISIS as a theocracy.

<sup>48</sup> Arafa (2014, pp. 862-863) appoints that this is the case of political Islamism under the actions of the Muslim Brotherhood in Egypt, whose acts bear totalitarianism. Also, Arafa (2014, p. 864) contends that “war on terror under a religious cover, or the umbrella of defending religion or Islam, may permit the state to deny – to some extent – the individual’s public rights and freedoms”. In this sense, Arafa (2014, p. 866) stresses that, in 2013, the Egyptian President Morsi stated, by a controversial affirmation, that his executive decisions could not be contested through judicial review and that a proper Constitution would be one that gives him the authority to govern above legality. Yet, Arafa (2014, p. 867) contends that the Muslim Brotherhood intention was to use constitutional means and instruments to develop and implement an Islamist Constitution in 2012.

<sup>49</sup> In this line, see Chase (1996, p. 281), referring to a Khomeini’s statement asserting that “the sole determining principle in a government...is divine law, law that is the expression of divine will, not the product of the human mind”.



lahi Ahmed An-Na'im (1987, pp. 323-324) argues that *jihadi* is, in fact, a theory of international relations through *Sharia*, whereby Islam must pronounce a public war against any of those that do not submit themselves to its core tenets, principles and values. In an interesting historical contextualization, Tassaduq Hussain Jilani (2006, p. 747) notes that the militancy of Islamic fundamentalism has its roots in the fascist movements of the second quarter of twentieth century, offering, as an example, the foundation of Muslim Brotherhood by Hassan-al-Banna, who, directly inspired by fascism and Nazism, brought the language of totalitarianism to political Islam.

Although extremist religious fundamentalism may appear as a common feature within Islam, it is necessary to remember, as noted earlier, that the intertwinement between Religion and Politics does not emerge as a dangerous situation in itself, and also that Islam is not inherently fundamentalist, violent, as automatically propagating *jihadi* ideals.<sup>50</sup> At the time of Arab Spring (2011),<sup>51</sup> many Muslim countries began to reform their Constitutions in order to integrate *Sharia* into the constitutional order, thus turning *Sharia* principles “the” or “a” core source of the legislation (supremacy clauses). Hypothetically, this process of pseudo-constitutionalization sought the harmonization between Islam and liberal constitutionalism (notably with democracy), in the sense that then *Sharia* Law would no more be viewed in a conflictual relation towards human rights and other constitutional values, a process some scholars normally evaluate under the idea of “post-Islamism” movement (Gordner, 2010, pp. 8-9).

Moreover, some legal scholars, as Ahmed and Ginsburg, contend that this “Islamization” process of Constitutions is not due to a special desire of putting Islam as “a” or “the” legal-political parameter, nor due to a fundamentalist vision of religion, rather being a form of emulating British repugnancy clauses from the colonialist period (Ahmed and Ginsburg, 2014,

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<sup>50</sup> Notwithstanding, see Mozaffari (2007, p. 24), noting that, although multiple Islamists sects diverge on the use of violence as a means to achieve their political goals, a moderate-quiet behavior is exception within political Islam. Also, Mozaffari (2007, p. 24) notes that “In general the use of violence is integral to their strategy for achieving their ends. Among the various violent methods, terror is proven to be the preferred one, and is indeed frequently used by Islamist groups”.

<sup>51</sup> Although these “supremacy clauses” widely appeared at the time of Arab Spring, *Sharia* has already occupied a prominent constitutional status in the Constitution of Iran from 1907.

p. 637). Notwithstanding, this pseudo-constitutionalization process does not ensure a plenty compatibility between Islam and liberal constitutionalism, rather only that the former is a core part of governance, and that a (pure) secular constitutional structure is promptly rejected.<sup>52</sup> In sum, examples constitutionalizing *Sharia* appoint a form of commitment between two channels of social-political configuration, at one hand, liberals see the indispensability of a constitutional structured government as a form of guaranteeing democracy, fundamental rights, political accountability and checks and balances, and at the other hand, the religiously-guided ones demand assuring Islam a significant social-political role to play.

Conversely, despite the tendency on constitutionalizing *Sharia* as a harmonizing mechanism between Islam and liberal constitutionalism (especially, democracy), what is been highlighted in the present section is the political engineering strategy led by religious fundamentalist groups at its violent, militant and warfare dimension (Freamon, 2003, pp. 303-304). Although others religious fundamentalist sects are also capable of using fundamentalist discourse with this quality of strategical political engineering, the direct reference made to Islamic fundamentalism is due to its terrorist approach.<sup>53</sup> Highlighting this trend, Ladan Boroumand and Roya Boroumand argue that *jihadism* is a terrorist ideology created by the Iranians without having any substantial relation to Islam as a religious belief system, and also disconnected from any plausible root on Quranic religious tenets (Boroumand and Boroumand, 2002, p. 12).

One of the most prominent exposers of Islamic fundamentalism with this political-militant shape was Ayatollah Khomeini, notably under the direct influence of the extremist ideology spread by the Muslim Brotherhood and its founding leader, Hassan al-Banna (Boroumand and Boroumand, 2002, pp. 9 and 11). This Islamic fundamentalist-militant trend can be properly understood within Revivalism, a specific approach to Islamic law that, differently from Reformism, has the militant-political activism as its most remarkable feature (Khan, 2010, pp. 300-301). At its core, this

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<sup>52</sup> Yet, Ahmed and Ginsburg (2014, p. 625) note that the constitutional inclusion of *Sharia* does not appoint automatically to a theocratic regime, and that it is empirically attested that the Constitutions that embrace *Sharia* clauses recognize more human rights that those that do not embrace it.

<sup>53</sup> In this sense, see Chase (1996, p. 389), affirming that “with political legitimacy tied to the demonization of the “other”, Iran has maintained a (politically convenient) stance of a beleaguered community at war with the world”.

political-ideological-militant Islam does not emerge as a simple system of belief, rather it is construed as an ablative comprehensive system that affects both private and public life, rejects the nation-state ideal, the western discourse of human rights and the whole legal basis that forms international law.<sup>54</sup> Moreover, within Revivalism, it is noteworthy making reference to Wahhabism, that although considered a minority posture within Islamic fundamentalism, has inspired various radical movements between 1970-80. In this vein, Hamid M. Khan (2010, pp. 307-308) contends that Wahhabism, following Revivalism, a social-political movement embodied by *Muhammad ibn Abd al-Wahhab*, envisioned the revival of Islam through an ideological turning point, embracing intolerance, literalism and extremism on the basis of *Qur'an*.

Once this framework of analysis has been set, it is time to bring liberal constitutionalism's factors to the equation in order to assess which values does religious (Islamic) fundamentalism is in confront with.

## 2. *Liberal constitutionalism, democracy and political Islam*

From the outset, it is necessary to remark that the expression “political Islam” is used in reference to Islam's political-fundamentalist-militant trend (Islamism). Islam, as a system of belief, and not as a political-ideological control strategy, is not automatically in opposition to democracy, as it is also capable of contributing on the development of a democratic regime (Pipes, 1995, p. 55).<sup>55</sup> In this sense, Islam, as any other religion, can influence public matters, as long as it be within proper constitutional boundaries. But that is not the case with Islamism. As previously contended, political Islam (Islamism) is a political-ideological/theological system that, (supposedly) acting on behalf of God, pursue establishing a new institutionalized holistic way of governance in order to control every aspect of social, cultural, political and economic life, assuming extremist,

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<sup>54</sup> In this sense, Khan (2010, pp. 301-302) affirms that Revivalists understand Islam as a “comprehensive ideology embracing public as well as personal life”.

<sup>55</sup> Moreover, see Fish (2002, p. 16), noting that there is no automatic connection between Islam and authoritarianism per se, rather that Muslim countries are more prone to undemocratic regimes because, in comparison with other countries, they are clearly underdeveloped and poorer, factors that are directly linked to a regime's capacity on being democratic.

revolutionary and totalitarian postures as method (Pipes, 1995, pp. 49-52). Under Islam's uppermost intolerant religious trend, Wahhabism fundamentalism, the concept of *jahiliyya* is taken as a guiding principle, through which non-Muslim and Islamic sectarian groups are viewed as outsiders in light of God's prescriptions (sinners), thus justifying coercive intervention as a means to abide to Islamic law.<sup>56</sup> For those orthodox Muslims, the ablative project of political Islam justifies using *jihad* as a means to achieve the unification of *umma*, the true Islamic community (Samuelson, 1995, p. 337). But again, this is just one perspective on the compatibility issue. Within Islam's political stream, it is not quite clear if democracy is completely accepted, and if it is, on what level.

For instance, under the short experience of the Islamic Salvation Front in Algeria, two opposite political trends hindered a proper assessment on the compatibility between political Islam and democracy. From a more moderate side, under the direction of Abassi Madani, the fundamentalist agenda of the Party would not hinder the complete enjoyment of political and civil liberties, assuring tolerance towards Western conceptions of democracy (Samuelson, 1995, pp. 343-344). On the other hand, under the leadership of Ali Belhadj, the fundamentalist agenda of the Party would have to act under the slogan "No law. No constitution. Only the laws of God and the Qur'an", in notable opposition to democracy.

In order to properly evaluate political Islam, instead of analyzing it by taking the risk of being dogmatic-theologically biased, it is necessary to look it from an external perspective, that is, through the lens of liberal constitutionalism. Theoretically, liberal constitutionalism encompasses the need for a government constitutionally structured, construed upon shared values, submitted to substantive and procedural limitations, and oriented towards the achievement of fundamental goods selected by public policies that are decided in a broad forum of public reason. This is why liberal constitutionalism demands for democracy. Thus, to assess the political-fundamentalist paradigm of political Islam through the eyes of liberal constitutionalism, we need to ask if democracy is actually possible there.

And for an adequate assessment on the conflictual intersection of political Islam and democracy, it is first indispensable to evaluate what a

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<sup>56</sup> See Khan (2010, p. 309), stating that "Revivalists have used this powerful tool to justify overthrowing what are ostensibly Islamic States by denying that they are truly Islamic at all".

democratic regime demands as core elements. Therefore, it is important to ask what democracy is and what does it imply.<sup>57</sup> Under liberal constitutionalism framework, a valuable and qualified concept of democracy is one beyond the idea of majority principle as the regime's cornerstone (Sultany, 2012, pp. 425-436). A suitable concept of democracy is one developed within a procedural-discursive context, recognizing that a democratic-political regime demands an effective political discussion through broad popular participation, and also guaranteed by instrumentals responsible for an equal access and equal voice to all individuals and groups at the decision-making forums, thus a genuine constitutional democracy (Shelly, 2007, pp. 64-66).

The cornerstone of constitutional democracy is represent by its capacity to balance the strains between the majoritarian will and the necessity to protect minority rights, notably through the promotion of individual and political freedoms.<sup>58</sup> For this deliberative process to take place as a feasible decision-making process, the regime must have a representative character, where those who detain the power (the source of sovereignty), "the people", delegate their authority to chosen representatives in order to discuss, vote and approve public policies. Besides that, for this capacity to choose political-delegates, and then to have equal voice and influence at the decision-making process, it is indispensable to recognize core instrumentals to assure the process's reasonableness and fairness, notably through fundamental rights (Shelly, 2007, p. 68). Therefore, within a substantive approach to democracy, fundamental rights as freedom of speech,

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<sup>57</sup> See generally, Coppedge, et al. (2011, pp. 253-254), appointing six possible models of democracy: the electoral conception, the liberal democracy, the majoritarian, the participatory democracy, the deliberative, and the egalitarian. Also, see Fadl (2003, p. 7), arguing that for a democratic regime to exist, is indispensable, beyond recognizing a limited government on the basis of rule of law, that the government to recognize that the source of the legitimacy of political power is on people's hands, and also that governance must conducted on the basis of fundamental rights, reason why, although the classical jurists of Islamic law recognized the relevance of a limited government under the rule of law within the boundaries of the Caliphate's regime, these conditions were not sufficient to assure democracy in Islam.

<sup>58</sup> In this sense, see Murphy (1991, pp. 109-113), affirming that "Constitutional democracy's pledge does not imply the end of economic and political struggle, but the beginning, or continuation, of a politics conducted in peace, through clearly marked and more or less open processes, for limited goals that always include respect for the interests of opponents as well as allies".

freedom of information and freedom of assembly constitute core elements responsible for the democratic character of the political decision-making process (Feldman, 1990, pp. 3 and 11). In sum, as Aziz Huq and Tom Ginsburg argue, a constitutional-liberal democracy must embody three core elements: the promotion of free-democratic elections, core fundamental rights directed to ensure broad political participation, as freedom of speech and freedom of association, and the guarantee of rule of law (Huq and Ginsburg, 2018, pp. 87-92).

Once this brief explanation on democracy was given, it is time to assess the reasons why fundamentalist-political Islam is in clear opposition towards democracy.<sup>59</sup> As Nazrul Islam and Saidul Islam (2017, pp. 3-4) argue, Islam is commonly comprehended as incompatible with democracy because it supposedly does not embrace core values as social-political openness, political and ideological pluralism, equality, tolerance, popular sovereignty, political accountability and also for its opposition to human rights.<sup>60</sup> Moreover, according to Adrienne Katherine Wing, democracy uppermost values, fundamental rights as freedom of speech, freedom of association, freedom of assembly and the right to equal protection, are elements constantly put under the threat of Islamic religious militant-fundamentalism (Wing, 2009, pp. 416-417).<sup>61</sup> A closer look on democracy's essentials is here necessary.

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<sup>59</sup> See Fadl (2003, pp. 11 and 13), arguing that the core issues on the compatibility between Islam and democracy are the religious law of Sharia and the problem of people as the source of the legitimacy of political power as contradictory claims, and also contending that the most problematic claims of rejection and opposition to democracy within Islam have come from the Colonial and post-Colonial eras, these being the periods of the emergence of fundamentalist trends.

<sup>60</sup> Nonetheless, it should be remembered, as stated earlier in this Article, that some scholars contend that Islam is not automatically incompatible with democracy. In this sense, see Islam and Islam (2017, pp. 4-9), appointing some Islamic scholarship that contends the original doctrinal compatibility between Islam and democracy. Moreover, the Author argues that these ancient and modern Islamic scholars, like *Rifa'ah Al-Tahtawi*, *Khayr Al-Din Al-Tunisi*, *Jamal Al-Din Al-Afghani*, *Muhammad Abduh* and *Muhammad Rashid Rida*, state that democracy has its core substantial fundament in Islam's doctrines on morality and ethics.

<sup>61</sup> Also, Pipes (1995, p. 57) argues that, as a matter to combat Islamic fundamentalism, elections do not stand as an adequate measure to ensure democracy, rather that it is necessary to implement and guarantee indispensable democracy's prior conditions, as political participation, rule of law, freedom of speech, religious freedom, minority rights and freedom of assembly and association.



### A. *The source of political sovereignty*

One of the most contested issues concerning the (in)compatibility between political Islam and democracy is on who or where the source of political sovereignty lays, because Islam, especially through the testimonial of the Prophet (*Sunna*) and the principles embodied in *Qur'an*, acknowledges God (*Allah*) as the only source of political power (Islam and Islam, 2017, pp. 10-12). In this sense, Peter A. Samuelson argues that, at least for some Muslims, if the act of establishing a government does not seek compliance with God's commandments, it is not a legitimate act at all (Samuelson, 1995, p. 308). As a matter of fact, the problem is not Islam assuming *Allah* as the sole source of political power (sovereignty), rather if government and public policy both rest on a deep and dangerous intertwining between religion and politics,<sup>62</sup> an issue to be properly addressed under the secularism principle<sup>63</sup> within liberal-democratic constitutionalism (Islam and Islam, 2017, p. 12).<sup>64</sup> If liberal-democratic constitutionalism demands a government based on (public) reason, religion, although having a relevant social role to play, cannot be used as source for public authority (Rosenfeld, 2009, p. 2341).<sup>65</sup> Religion's social function must be constitutionally assured, but this guarantee ought to be circumscribed into the boundaries established by the secularism principle

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<sup>62</sup> In this sense, see Mustafa (2003, p. 233), stating that "Their belief in the indivisibility of politics and religion, as well as in the exclusive role of the Islamic religion in all spheres of social life, prevents them from a full understanding and acceptance of democracy".

<sup>63</sup> See Rosenfeld (2009, p. 2333), stating that "from a constitutional standpoint, the modern state steeped in the normative order dictated by the Enlightenment should at once be both neutral with respect to religion, by neither favoring it nor disfavoring it within its (public) sphere of legitimate action, and also equally protective of its citizens' freedom of and from religion within the private sphere". Conversely, denying secularism the nature of a constitutional principle or value, see generally Bader (2010), pp. 9-10. Also, see Kramer (2003, p. 191), stating that Islam "contains an unambiguous rejection of secularism which applies equally to the situation both inside and outside of the country".

<sup>64</sup> Also, see Quraishi-Landes (2015, pp. 553-554), contending that the modern negative approach on the relation between state and religion, and also on the intertwining between religion and politics, is due to an "Eurocentric narrative" that does not represent the case of Islam, notably because the pre-modern Islamic Law, with its pluralistic legal sources, does not automatically imply theocracy..

<sup>65</sup> Also, Fadl (1996, p. 1530) contends that, within liberal democratic regimes, religious-based arguments cannot be used at the public realm, as they have inaccessible nature.



(and state neutrality), because although religion cannot be restricted to a limited private sphere of life, it also cannot emerge as a source of public authority.<sup>66</sup> Reisman contends that the political-fundamentalist approach indisputably leads to the establishment of a theocratic regime, where the political legitimacy rests only on God and his words (Reisman, 1994, p. 514). Following this, political Islam rejects popular sovereignty by demanding religious law (Sharia Law) to be the sole source of political power.<sup>67</sup> Therefore, Khaled Abou El Fadl (2003, p. 7) asks, “If God is the only sovereign and source of law in Islam, is it meaningful to speak of a democracy within Islam, or even of Islam within a democracy, and can an Islamic system of government ever be reconciled with democratic governance?”<sup>68</sup>

Some Islamic scholars argue that Islam and democracy can be properly reconciled if recognized under classical Islamic law, where, although God’s commandments constitute the sole source of power, government would have to be exercised in a representative way, because *Qur’an* demands consultation under the rubric of *shura* (Fadl, 2003, p. 35). Nevertheless, *shura* must not be equated to democratic-political representativeness, for the competence and function of this kind of consultation were granted only to a specific group composed by prominent jurists responsible for choosing the ruler, the Caliph.<sup>69</sup> For instance, under the Taliban regime

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<sup>66</sup> In this sense, see Kramnick and Moore, (1997, p. 64), stating that “No one who cares about civil peace would deny that morality is important. In that sense none of the present disputants in American politics argue that moral questions never impinge on public policy issues. The dispute is rather between those who argue that the content of morality is itself a question for public debate and those who argue that morality is an issue already settled by the religious views of a purported majority”. Also, see Fadl (1996, p. 1530), following Kent Greenawalt when arguing that religious-based arguments are not at all excluded from the legislative activity, because as other comprehensive views they can be used, at least in a restrained way, at the communicational process.

<sup>67</sup> Mustafa (2003, p. 233) states that “This is expressed in the refusal to accept the principle that the nation is the source of authority, as well as in the call for the cancellation of modern civil laws and legislation. From their point of view, these should be substituted by the application of the Islamic sharia, according to their own vision and interpretation”.

<sup>68</sup> Also, see Khan (2010, p. 520), contending that “Islamic law submits to God’s Sovereignty and rejects the competing notions of sovereignty under which the supreme authority to give laws flows from the people, the parliament, or some entity such as the royal family, territorial state, or empire”.

<sup>69</sup> In this vein, Fadl (2003, p. 24) affirms that this system of consultation “does not seem to mean the existence of a representative government that seeks to give effect to the will of the people”.

in Afghanistan, notably after taking power and asserting that they would develop a Constitution, a United Nations representative appointed that the document would probably not be recognized as a product of a democratic process, because the majority of the Afghanistan people were still being alienated from the political decision-making process (Middleton, 2001, p. 454). According to Andrijana Maksimovic (2018, pp. 43-45), regarding the recognition of God's sovereignty among Islamic states, three different groups can be grasped: a first group, integrated by Iran, Libya and Pakistan, the divine nature of political power is objectively, normatively and absolutely recognized; a second group, composed by Afghanistan, Iraq, Kuwait, Syria, Jordan, Malaysia, Yemen, Morocco and others, although an existing constitutional order and that the concrete holder of political power is the nation, God's sovereignty emerges as the sole limit to them; and a third group, involving Egypt, Tunisia, Algeria and Mauritania, God's sovereignty has been institutionally weakened through the recognition of popular or nation's sovereignty, but are constantly submitted to a latent recall for Islamic revivalism.

In total opposition, liberal constitutionalism (thus, democracy) demands popular sovereignty. That is, at the top of political power chain rests the people as the sole detainer of power. From a moral-philosophical point of view, political power can only be construed upon public reason, and not by claims theologically driven. On these terms, political Islam clearly conflicts with democracy (and of course, with liberal constitutionalism). In fact, it denies democracy and liberal constitutionalism.

### *B. Basic rights and freedoms (fundamental rights)*

Beyond the contested debate on the polarization between cultural relativism and universalism within Human Rights International Law, the issue of recognizing and protecting basic rights and freedoms in Islamic Law is something to be assessed on the primary basis that all political and legal aspects of Islamic governments are fundamentally submitted to *Sharia* (Reisman, 1994, p. 517).

For instance, at the end of 1990, under the Taliban regime in Afghanistan, women suffered excessive restrictions on their basic fundamental rights and freedoms (Fish, 2002, p. 5). As Shannon A. Middleton (2001, pp. 442-454) notes, women under the Taliban regime were severely restricted on their right to freedom of movement, being forbidden to appear

in public without a male relative, and also prohibited to participate on weddings or to stay in hotels; restricted on their freedom of thought, expression, assembly and association, as being forced to comply with strict rules of clothing, and also being forbidden to take action in public debate, forums and activities; restricted on their right to health, by being prohibited to receive medical attention; restricted on their right to employment, as most of time they are prohibited from working; restricted on their right to education, being prohibited to take an effective education after eight years old or even having none; and restricted on their right to physical and psychological inviolability, constantly target of public beatings and executions. In Iran, a bill passed at the National Assembly, accepting the terms of the Convention on the Elimination of Discrimination Against Women, was fiercely vetoed by the Guardian Council, where was argued that the bill violated the Constitution and Islamic law (Stilt, 2004, pp. 718-719).

Regarding religious freedom, Islam does not allow apostasy,<sup>70</sup> assuming in most cases a violent response against those that leave the Islamic faith, an issue that also affect interfaith marriage, which Islam prohibits Muslim women to marriage anyone outside their system of faith (Islam and Islam, 2017, p. 13). In terms of equal rights, Islam is known by its discrimination towards women, especially when related to family, marriage and work issues (Islam and Islam, 2017, p. 14). On the political rights question, the non-democratic nature of political sovereignty in political Islam, where the sole justification of political power rests on God's commandments, intensively restricts the political participation of individuals at the decision-making process, notably reducing the political capacity of ordinary muslims, women and members of minority religions. (Reisman, 1994, 515). For instance, looking back to the political agenda of the Islamic Salvation Front in Algeria, a clear sign of its anti-democratic discourse was the tendency to withdraw women from the decision-making process, thus denying effectiveness to a core democratic principle, the equal access of all individuals to political participation.<sup>71</sup> Regarding

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<sup>70</sup> Concerning specifically the contradictory issue of apostasy in Islam, see Kamali (1992, pp. 70-71), contending that the death punishment as a consequence of apostasy in Islam does not encounter support in Qur'an and in the Sunnah of the Prophet, rather only in an individual and isolated *hadith*.

<sup>71</sup> In this sense, Feldman (1990, p. 3) affirms that "it would be undemocratic to deny the vote to blacks, Jews, or women, because that would contravene the principle of political equality".

freedom of expression, Islamic fundamentalist regimes, because of their profound conviction on self-righteous and carriers of the one divine truth that Allah gave to the Prophet and then to his followers, tend to not accept political opposition, reason why view freedom of speech, assembly and association as unfavorable elements to the regime (theocracy) stability (Reisman, 1994, p. 520). In this line, Reisman exemplifies that the Islamic fundamentalist regime in Iran, notably under the rule of Khomeini, has prohibited various professors and literary authors on practicing their activities freely, even sanctioning one to death for his supposedly heretical writings (Reisman, 1994, p. 521).

Thereby, is it really possible to talk about basic rights and freedoms within the realm of political Islam? As such, no, it is not. The recognition, promotion, and protection of fundamental rights is something completely blurred through the lens of Sharia law. Fundamental rights are one of the most relevant constitutional materials that cannot be subjected to theological interpretation, much less one with a fundamentalist trend. Thus, once again, political Islam conflicts with liberal constitutionalism.

### *C. Political alternation*

One of democracy's core elements is the regime's underlying necessity to ensure political alternation, a principle to be respected as a means to ensure pluralism of ideas and equal political access both for majority and minorities to the decision-making process. Political Islam, because of its institutional goals and political agenda, supposedly legitimated by the one true belief embodied in Islamic Law, emerges as a real threat to democracy for lacking any assurance that political power will always be alternated, especially for the fiercely restrictions that are commonly driven upon basic freedoms, as those against freedom of speech and of assembly.<sup>72</sup>

In Islamic countries like Iran and Saudi Arabia, despite some institutional differences, is quite evident the absence of concrete conditions which turn political alternation of power into something possible. Khomeini's *wilayat*

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<sup>72</sup> Samuelson (1995, pp. 345-356) argues that, if the Islamic Salvation Front had not been withdrawn from power after the elections in 1992 and had assumed power, its theological-political agenda, contended as legitimate by the words of God, would probably be a threat to the democratic regime, notably because the Party would not peacefully leave the power after losing parliamentary elections.

*al-faqih* system in Iran, the government of the (religious) jurists led by a supreme religious leader, and also the institution of the Council of Guardians, were created to submit all the stages of political decision-making process to chosen clerics, keeping them away from any attempt of removing them from power, all of this within a system that yet has instituted a Parliamentary body and a Presidency (Mallat, 2006, pp. 33-34). In the same vein, the Kingdom of Saudi Arabia, though invested under a monarchic regime, does not embrace a representative regime, granting the King the sole exercise over the executive, legislative and judicial powers, thus also eliminating any possibility of political accountability vis-a-vis checks and balances model (Mallat, 2006, pp. 34-37).

Therefore, it is impossible to talk about liberal constitutionalism and democracy within a regime that do not have any guarantee that political alternation will take place. The founding basis of political Islam, leading to the establishment of theocracy, does not harmonizing with democratic essentials. Rotation of political power is needed in order to “refresh” ideas and prevent dogmatization. Something that does not take place within political Islam.

#### D. Political accountability

One of the core problems concerning political accountability in Islam, especially in political Islam, is that its constitutive elements, responsibility and transparency, are submitted to a kind of double-step non-democratic process, because all actions in public matters are first accountable to Allah and then to his respective trustees under the principles of *Qur'an* and Sharia (Dauda and Yusha'u, 2017, pp. 453-454). As Khaled Abou el Fadl (2003, p. 21) argues, “Whether the Caliph is considered God’s deputy or the Prophet’s deputy, the question is: to whom does the Caliph answer?”. Surely not to the people.

Actually, the reasoning is very simple. As a regime that submits public matters to theological reasoning, giving to a limited circle of religious authorities the power to control and review public policies, transparency is something quite impossible to be assured. And so, without transparency, accountability is also quite impossible, as power is not exercised with responsibility, also lacking the guidance of shared common values resting upon human dignity. As such, political Islam is not an open politi-

cal system under the guidance of the people, rather one that encloses itself in theological dogmas, thus hindering any possibility of external accountability centered on neutral constitutional goods.

### E. *Rule of law*

The central idea of rule of law is that government must abide by law, ruling through law and in accordance with it. Following Jeremy Waldron's and Joseph Raz's philosophical-legal reasoning, the principle of rule of law claims that government is better when it is exercised through law in a normative way, that is, respecting certain core principles and features as generality, prospectivity, non-contradiction, stability, clarity, publicity and openness of legal rules (Rodriguez, et. al., 2010, pp. 1466-1467). Moreover, as Jeremy Waldron puts, the idea of rule of law is directly connected to the necessity of applying public rules without any interference of public agents' biases, preferences and ideologies (Waldron, 2008, p. 6).

Beyond these formal features that are commonly attached to the idea of rule of law, Robert Stein reminds us that under almost more than two thousand years of philosophical and legal thought, to abide by rule of law implies a substantive approach on public matters, an assessment of the concept that takes core substantive elements of law seriously, reason why rule of law must be comprehended as more than requiring law as superior to all individuals, binding also government and its branches, and that law must be stable, general known and predictable; that it must assure the participation of all individuals affected by it at its creation and development; must protect human rights, assuming human dignity as its moral-legal vector; and must also guarantee the existence of an independent judiciary capable of effectively applying law (Stein, 2009, p. 302). According to Daniel B. Rodriguez *et. al.* (2010, pp. 1475-1480), for a specific legal system to be in accordance with the idea of rule of law it must have and comply with at least four basic elements: first, the existence of a Constitution (preferable a written one), where the structure of government and the limits to the exercise of public power are properly delineated; second, an institutionalized system of judicial review, one there is capable to address the compatibility of the actions of public power to the Constitution, thus promoting the rules and values of the law of the Constitution; third, an adequate system of separation of powers (checks and balances), avoiding

the accumulation and excessive centralization of power; and fourth, the existence of an effective independent judiciary, one that has the capacity to act freely from any external pressure.<sup>73</sup>

Once the concept of rule of law was briefly assessed, it is necessary to measure it within the political spectrum of Islam. First, it is noteworthy mentioning that within political Islam, Sharia is commonly linked to the idea of rule of law.<sup>74</sup> For example, in Saudi Arabia, Islamic law, notably under the political-ideological influence of Wahhabism, is represented by the strict compliance to the principles of *Qur'an*.<sup>75</sup> Because Sharia represents the legal system in Islam, to comply with it is not the problem from the perspective of respecting rule of law,<sup>76</sup> rather the issue is whether Sharia is sufficient, as the core element of Islamic rule of law, to guarantee not only formal-procedural fairness, but the fulfillment of substantive

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<sup>73</sup> It should be noted, however, that in what concerns the abstract relation between rule of law and constitutionalism, it is better (and more proper) to comprehend that the former is a constitutive element of the latter. Since the rise of constitutionalism, the idea of rule of law has been transmuted into the idea of rule of the Constitution, although the mere existence of a Constitution does not guarantee substantive compliance to core values as justice and equity.

<sup>74</sup> In this sense, al-Hibri (1992, pp. 3-9) notes that Sharia, as the body of Islamic Law, has multiple sources, as the Qur'an, the Sunnah of the Prophet, *Ijma'* – representing established consensus –, *Qiyas* – representing reasoning by analogy –, and specific basic principles, as the necessity of adapting law throughout time, the necessity to avoid harm and the connection between the application of law and the respective factual situation that urged its concrete incidence. Moreover, Quraishi-Landes (2015, p. 559) affirms that “In this way, sharia as God’s Law is meant to cover more than just the fiqh elaboration of scriptural rules. In short, sharia is a rule of law, not a mere collection of rules”. Recognizing Sharia as the rule of law of the Caliphate of the Islamic system of government, see Fadl (2003), pp. 5-6. Conversely, see Wielandt (2003, p. 204) contends that “The historical realities of Islamic countries demonstrate that the political structures and current laws have never been determined by Islamic norms only”.

<sup>75</sup> Mallat (2006, p. 35) affirms that, for Saudi rulers, “the Qur'an is the Constitution, and the whole institutional set-up is but a derivative of the Qur'an”.

<sup>76</sup> See Quraishi-Landes (2015, pp. 557-564), demonstrating that in pre-modern Islamic Law there were two different types of law, one that was created by rulers, *siyasa*, and other that was engendered by religious scholars, *fiqh*, both coexisting in great harmonization, notably because each had its own issues to address, not interfering in the realm of competence of the other, reason why the Author argues that it cannot be said that Islam’s Law leads to a theocratic regime. Also, Fadl (2003, p. 28) notes that the mere fact of complying with Sharia’s determinations, like in the field of criminal penalties and rules concerning clothing and modesty are not sufficient to affirm that Islamic law respects the idea of rule of law.



values (Harvey, 1961, p. 487). As Jeremy Waldron argues, legal systems that do not respect due process, both procedural and substantive, be it by interfering in Court's praxis and reasoning, thus threatening their institutional independence, and also by withdrawing the procedural safeguards of freedom in society, are in clear confront with the rule of law ideal (Waldron, 2008, p. 5).<sup>77</sup> That is the case of political Islam.

Applying Sharia lacks both transparency and normative security, for its sources do not offer a clear and evident guidance on the terms of compliance with its own rules (Wielandt, 2003, pp. 205-206). Yet, given the uncertainty of Sharia commandments, the necessity of previous human interpretation increases even more the problem, because, as Rotraud Wielandt argues, "People are not infallible, and are apt under certain circumstances to err in the direction of extreme positions" (Wielandt, 2003, pp. 209-210).<sup>78</sup> This is why Sharia does not equate to rule of law. Rule of law, as such, must bear on public reason, a condition that Sharia does not fulfill, because it is construed upon theological reasoning. Also, even in the presence of a Constitution, Sharia appears as a filter of what is theologically right or wrong (Sharia principles as supremacy clauses), thus denying not only rule of law, but as such, the rule of the Constitution. An insurmountable problem from the perspective of liberal constitutionalism and democracy.

#### IV. CONCLUSION

Religious fundamentalism is not itself a social and normative problem, as it does not automatically imply force, violence and terrorism. From the constitutional perspective of fundamental rights, religious fundamen-

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<sup>77</sup> Also, Waldron (2008, pp. 20-36) appoints that legal systems that do not embrace core elements as the presence of courts, generality and publicity of norms, the positivity of norms, the attachment of law to the orientation towards public good, and the systematicity of legal norms, are not legal systems at all, reason why the Author (p. 14) contends that the regimes of Kim Jong-II in North Korea and of Saddam Hussein in Iraq were not legal systems. In the same vein, Fadl (2003, p. 29) argues that, in what it concerns rule of law as a form to avoid the misuse of law as a means to establish authoritarianism, "More importantly, it means that the processes of law, themselves, are bound by fundamental and unwavering moral commitments that insure that the law is not used as an instrument of tyranny and oppression".

<sup>78</sup> In the same vein, see Gosalbo-Bono (2010, p. 286) argues that "Since the Koran does not cover all actions, Islamic scholars had ample latitude to interpret the will of God according to their scholarly consensus or *ijtihad*".

talism appears essentially as a form of exercising religious freedom. Therefore, although commonly related to societal conflicts, and modernly, to violence, terrorism and totalitarianism, religious fundamentalism is a phenomenon that appears within the practice of a religion or faith.

The idea of fundamentalism represents a social-religious movement recalling believers to abide to the fundamentals of faith. Despite its Christian origins, fundamentalism is a religious phenomenon spread worldwide within different types of religion and faiths. To return to the fundamentals of faith is tantamount to conform all aspects of life to theological dogmas, texts, values and tenets as real rules of private and social life. Thus, to practice religious fundamentalism, religious freedom is necessary, as the former integrates the latter.

On the other hand, beyond a model of exercising religious freedom, religious fundamentalism also appears as a vehicle for justifying public policies in order to a religious group (or groups) assume political power and control all spheres of society (politics, economics, culture, literature). This is religious fundamentalism as a political control strategy, aiming the achievement of a theocratic regime, notably by the practice of violence and terrorism.

Following this line of reasoning, and applying a theoretical perspective with constitutional lens, the phenomenon of religious fundamentalism must be distinguished into two different stances: first, as a type of fundamental right exercise (religious freedom); and second, as a political control strategy.

As a form of exercising religious freedom, religious fundamentalism ought to respect properly constitutional boundaries, as it sometimes is capable of confronting other fundamental rights, values, goods and interests. Thus, religious fundamentalism shall encounter some reasons to restrict after being balanced with other fundamental rights, values, goods and interests. Essentially, human dignity, as the uppermost constitutional value within liberal constitutionalism, is simultaneously a source and a limit to religious fundamentalists practices.

As shown along this Article, three are the normative reasons that form religious fundamentalism boundaries: the right to psychological and physical inviolability, the right to equal treatment, and the right to privacy and intimacy. Therefore, any act of religious fundamentalism must be contrasted to each one of these fundamental rights in order to fulfill a balancing operation, then verifying if any reason to restrict the fundamentalist ac-

tion appears. Religious fundamentalism, as a form of exercising religious freedom, is not absolute, rather is constantly submitted to constitutional boundaries.

On another spectrum, as a political control strategy, religious fundamentalism represents a dangerous and excessive intertwining between religion and politics. Crossing the rational boundaries of public reason, religious fundamentalism serves a platform of political engineering, aiming the founding of a theocratic regime. Here, religious fundamentalism not only confronts basic rights and freedoms (fundamental rights), but beyond that, confronts core values of liberal constitutionalism on an institutional basis.

Under the example of Islamic fundamentalism, especially Islamism (political Islam), this Article demonstrated that core structural elements of modern liberal constitutionalism, as the popular source of political sovereignty, basic rights and freedoms, political alternation, political accountability, and rule of law, are put under threat, thus appointing a major and unsurmountable conflict between religious fundamentalism embraced by religious-political groups under Sharia and liberal constitutionalism. As such, religious fundamentalism denies liberal constitutionalism.

As seen, religious fundamentalism raises one basic question from a theoretical-constitutional perspective: does it represent a form of practicing religious freedom, or does it serve as a platform of political control strategy? In sum, be one or the other, both are constitutionally limited. The first (practicing religious freedom), human dignity and core fundamental rights stemmed from it block any excessive practice, and the second is at any time blocked, as it collides with structural pieces of liberal constitutionalism.

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