
A pragmatic analysis of the European Court of Human Rights ruling on the French burqa ban

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Abstract

Peirce pointed out that the rule for attaining the third grade of clearness is to take into consideration the conceivable effects that have practical bearings. This pragmatic maxim will be taken as the methodological instrument to analyze the decision of the European Court of Human Rights in its recent ruling upholding the French ban on the wearing in public of any piece of clothing designed to fully conceal the face (case of *S.A.S. v. France*, judgment delivered on 1 July 2014). Then, methodologically, the pragmatic approach of C. S. Peirce, J. Dewey and O. W. Holmes Jr. will be used to explore logical reasoning and the social and political consequences of the legal adjudication.

Dewey represents the pragmatic philosopher who methodologically interpreted the interactions between the individual and his community, and how these interactions could be channelized towards the construction of genuine democratic society. It is relevant to observe how the decision of the European Court – object of this study – emphasized, as fundamental to its interpretation, the notion of socializing spaces as a possibility towards a more functional and peaceful social interaction. O. W. Holmes Jr. brings to the problem the legal pragmatic contribution through his aphorism, according to which the life of Law has not been logic but experience. In this case, Holmes' ideas seem to put into question the decision of the European court. Moreover, from a pragmatic point of view, it is necessary to examine whether the wearing of the burqa or niqab in public can cause the so-called "clear and imminent hazard" that serves as limit the freedom of speech and expression of thought. It is, therefore, a decision with fertile ground for pragmatic analysis.

The argumentative strategy chosen by the Court in order to justify its decision was a somehow surprising one, and consisted substantially, on the one hand, in subtly dodging the more crucial claims (made by the French and the Belgian Governments and objected by the claimant and the third parties) that the wearing of the burqa or the niqab in public was

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contrary to the "legitimate aims" of public safety, gender equality and human dignity, and, on the other hand, in acknowledging the existence of the fundamental "right to live in a space of socialisation which makes living together easier", as derived from the legitimate aim of the "protection of the rights and freedoms of others".

Behind of the apparent scene of the liberal and democratic decision of the European Court in dealing with the relationships between the European tradition of Human Rights and the Islamic culture, characterized by strong religious compromise, emerges the major problems of the mentioned decision of the Court. It represents a sample of the still existing prejudices between these different cultural environments. On the other hand, the logic of legal reasoning based upon a methodology of deductive syllogism (Logic of Antecedents) has acted as barriers to a more flexible interpretation of problems of such a nature. The deductive logic of the legal decision exposition is different from that of search and inquiry. To better understand this problem it seems relevant to appeal to the logic of abduction as a therapy to clarify these conflicts through the Logic of Consequences. Taking into consideration the contribution of the pragmatic method of abduction to the Philosophy of Science developed by Peirce, the legal analysis of the case would start with a real doubt, but not a complete doubt in Cartesian terms. According to Peirce, we must begin with all the prejudices we actually have when we enter a study. The form of the abductive reasoning was given by the following Peirce's expression: "The surprising fact, C, is observed; but if A were true, C would be a matter of course, Hence, there is reason to suspect that A is true".

In summary, the aim of this panel consists in articulating the logical of scientific inquiry developed by Peirce and the social and political concerns raised through the idea of democracy as a milestone of Dewey's Pragmatic Philosophy with the Consequentialism brought about by the legal realism of O. W. Holmes Jr. The aim, then, is to present a more open and functional interpretation of the decision of the European Court of Human Rights able to highlight better alternatives to reconcile individual freedom and social interests.

Keywords: Legal Pragmatism, Human Rights, Dewey's Political Philosophy, Logic of Abduction