

Fundamental human rights and controversial cultural practices: A new reading of the concept of human dignity

Direitos humanos fundamentais e práticas culturais controvertidas: uma nova leitura sobre o conceito de dignidade humana

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Abstract

This article proposes a new philosophical approach to fundamental human rights to clarify the differences between controversial cultural practices and violations of rights, through a new reading of the concept of human dignity developed by Immanuel Kant. This investigation suggests the adoption of an ethical concept of fundamental human rights with the aim of reconciling relativistic theories, which are opposed to the universal respect for these rights, with the universalist positions that advocate the unconditional observance of these rights in all cultures. The compromise between these two positions is possible, using Kant's theory, through an understanding of fundamental human rights as a subspecies of the genus human rights, which is responsible for maintaining human dignity at a fundamental level and protecting individuals against any form of objectification or reduction of their status as subjects with rights. Thus, the moral peculiarities of each culture are respected and recognized as individual forms of human achievement, provided that they do not imply the reduction of the individual to a mere instrument or object.

Key words: Fundamental Human Rights, Universalism, Relativism, Multiculturalism, Human Dignity.

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Resumo

O presente artigo propõe uma nova abordagem filosófica sobre os direitos humanos fundamentais buscando tornar clara a diferença entre práticas culturais controvertidas e violações de direitos, através de uma nova leitura sobre o conceito de dignidade humana desenvolvido por Immanuel Kant. Sugere-se a adoção de um conceito ético de direitos humanos fundamentais com o objetivo de reconciliar as teorias relativistas, as quais se opõem ao respeito universal desses direitos, com as posições universalistas, que advogam a observância incondicional desses direitos em todas as culturas. A composição entre essas duas posições é possível, usando-se a teoria de Kant, através da compreensão de que os direitos humanos fundamentais são uma subespécie do gênero direitos humanos, a qual é responsável por proteger a dignidade humana em sua dimensão básica, protegendo os indivíduos contra qualquer forma de objetificação ou redução de seu status como sujeitos de direitos. Assim, as peculiaridades morais de cada cultura são respeitadas e reconhecidas como formas individuais de realização humana, desde que não impliquem a redução do indivíduo a mero instrumento ou objeto.

Palavras-chave: direitos humanos fundamentais, universalismo, relativismo, multiculturalismo, dignidade humana.

Introduction

When basic human rights are discussed, they are normally associated with the expression of high moral principles and political ideals relating to the protection and realization of human dignity³ and the freedoms associated with it. However, the generality of the term, combined with the difficulty of understanding what human dignity has come to mean, has created problems in understanding when a concrete fact is a moral practice adopted within a social group as a way of achieving this dignity or when the same fact becomes a violation of fundamental human rights. The problem lies in the evaluation of each concrete case because the moral interpretations made by each culture often diverge and may even be contradictory.

To illustrate the issue, this study examines the situation of the use of the burqa, a garment worn by women in some Muslim societies according to religious belief. The burqa covers the entire body, including the face, and has a small piece of mesh at eye level that allows the user to see without being seen. To some Western cultures, the use of this garment characterizes the degradation of women, which is why in countries like France it has come to be banned in public places. We observe how a moral practice in two different cultural contexts (one society requiring its use, the other forbidding it) is capable of generating antagonistic and seemingly irreconcilable responses, leading to a reflection on the underlying issue: whether it is a real violation of fundamental human rights or simply a lifestyle choice based on the beliefs of a culture.

The difficulty in responding to this question arises because there is still no clear understanding about which human rights are fundamental; there are many doubts about what characteristics a right must possess to be recognized as fundamental and to what extent rights should be universally observed or relativized according to the moral values adopted by each society. This theoretical gap hinders the resolution of practical issues such as the burqa question and justifies the need for research on the epistemology of fundamental human rights as a way of

³ In this work, the term human dignity is used to provide an abstract representation of an attribute given to humankind as a whole, thereby avoiding the use of the term dignity of the human person, which is associated with the attribute of an individual person. This is the same distinction made by Sarlet (2001, p. 38).

understanding their limits and applications, ensuring that the process of identifying attributes that may or may not be recognized as fundamental rights is clear and objective.

This work aims to develop this discussion by studying the philosophical and legal aspects of fundamental human rights with the aim of identifying an objective way to evaluate individual cases and distinguish cultural practice from violations of human dignity. To this end, we study the morphology of fundamental human rights and the ethical characteristics of the legal rights that make up this category. Based on this study, an ethical concept of fundamental human rights is formed, using the situation of the French government's controversial ban on wearing a veil to demonstrate the usefulness of this definition for real cases.

The morphology of fundamental human rights

At the outset of the analysis of the morphology of fundamental human rights, it must be noted that there is no semantic agreement in the field about the terminology and the conceptual range of fundamental rights, a term often used synonymously with *human rights*, *individual rights*, *public subjective rights*, *rights of man*, *fundamental freedoms* and *civil liberties*⁴. Moreover, the term is commonly used to define the phenomenon of the assertion of human rights in the internal constitutional framework of states, which becomes confused with what most academic writers interpret as fundamental rights (Perez-Luño, 1984).

To establish the semantic agreement necessary for understanding the theoretical context proposed here, human rights must be understood as a genus that contains species: fundamental human rights and fundamental rights. Fundamental human rights constitute an essential standard for the implementation of human rights and are responsible for protecting the basic dimension of human dignity, which will be detailed below, while fundamental rights (Sarlet, 2001) represent the affirmation of human rights at the internal state level.

But why separate the categories of *human rights* and *fundamental human rights*? The need for this distinction lies in the fact that human rights (as a genus) have been formed historically (Leal, 2000) according to different standards of influence. Currently, we talk about environmental human rights, economic human rights and cultural human rights, among others (Lima Junior, 2001), which are implemented asymmetrically within the social, economic, political and cultural limits of each state. This asymmetrical development shows that this category is developing to varying degrees, ranging from the protection of basic human needs to the most sophisticated forms of cultural, economic and social dignity.

Human Rights as a Genus

To adequately understand fundamental human rights, one must first study their origin, or rather, the *genus* human rights. Numerous proposals can be found in the search for a definition of human rights, ranging from their association with natural law (Carpintero-Benitez, 1999) to their use as a *minimum standard* (Rawls, 2001) that serves to legitimize the legal systems of states and reduce pluralism among people. The most widespread concept, however, is that human rights constitute a set of rights

⁴ The Brazilian Constitution of 1988 indiscriminately uses the terms rights and fundamental guarantees (art. 5, § 1), human rights (art. 4, II), individual rights and guarantees (art. 60, § 4) and constitutional rights and freedoms (art. 5, LXXI).

inherent in all human beings, who possess them simply because they belong to the human species (Donnelly, 2003). Thus, these would be inherent moral rights (Ishay, 2004) that must be recognized in individuals without distinction and regardless of personal covenants or rules of law (Dias, 2006). There are also those who simplify the issue by asserting that human rights are those contained within the Universal Declaration of Human Rights promulgated by the United Nations in 1948 (Pérez-Luño, 2001).

However, the proposals listed above do not offer a satisfactory explanation of how one might recognize a particular right as integral to the human rights category. This is so because these concepts are limited to the display of certain traits, such as *those who hold them* (by claiming that they are inherent rights of humans), *their principal characteristics* (by establishing that they are moral rights, above laws, existing independently of covenants or legal rules) and, finally, *by showing some examples* (such as rights enshrined in the Universal Declaration of the UN) without explaining why the rights therein should be considered human rights.

The search for an objective concept for this class of rights must begin with the Universal Declaration of Human Rights of the United Nations because it was the first instrument of human rights proclaimed by a global international organization (Buergeth et al., 2002) and, for many researchers (Bobbio, 1992), represents a general consensus about the validity of a system of values founded on humanity. Note, however, that the issue in this analysis does not lie in the process of asserting human rights *per se* but in understanding why certain values were chosen to be included in this Declaration and what they contain is so important that they have been made the object of concern and proclamation by an entire community of states in the international domain.

The understanding of the rights enshrined in the Universal Declaration requires the analysis of events that occurred in the years preceding its enactment. In the period from 1940 to 1945, the Second World War left humanity with the experience of the cruelty of the Nazi concentration camps and the devastating effect of nuclear weapons on Hiroshima and Nagasaki (Hobsbawm, 2006). Facing the crisis created in the social, political and economic spheres at the end of this devastating period, nations understood the need to create an international force to maintain peace and respect for human life (Chacon and Cruz, 2005). Thus, there was a search for the development of a joint declaration on the rights of man that would be capable of reconciling and inspiring respect for humanity and, at the same time, would be broad enough to be understood and adapted by the peoples of the world, taking into account their different cultures (Rodley, 2002). In 1947, during the preparations for the drafting of this document, UNESCO sent a questionnaire with considerations and problems of both general and specialized character to the writers and thinkers of different nations to ascertain the moral and philosophical doctrines adopted by different groups, arguments which could lend theoretical support to the set of rights to be included in the Declaration (Croce, 2002). The main issue to be resolved at that time was the following: "In today's world, what are the theoretical bases, the practical range and the effective guarantees of specific rights or freedoms such as the following: [...]" It proceeded to list freedom of conscience, religion, speech, assembly, association, locomotion, living free from all fear, the equality of economic, social and educational opportunities, employment, access to subsistence and all other rights and freedoms (Croce, 2002, p. 2). Among the responses received were declarations by Mahatma Gandhi, Benedetto Croce, Aldous Huxley, Jacques Maritain, Teilhard de Chardin, John Lewis, Harold Laski and Salvador de Madariaga. UNESCO (1973) attempted to synthesize these responses and use them as a philosophical basis for the justification and rational interpretation of rights that would be contained in the Declaration of Human Rights.

However, when the questionnaire responses were returned, it became apparent that the issue was more complex than the UNESCO Commission for Philosophical Foundations of Human Rights could imagine. The declarations received and the positions taken by members of the Commission showed the division of opinion between those who recognized human rights as natural rights (inherent in human beings and above society and its laws) and those who saw human rights as a result of a variable and relative historical process, depending on the cultural context adopted by each society (Barreto, 2010). According to Jacques Maritain, the ambassador who headed the French delegation in this discussion, the difficulty experienced by the Commission at the time was this ideological rivalry, which was so irreconcilable that at times there was agreement among all parties on the list of rights that should be recognized as human rights, yet with no consensus on why these rights should be recognized as belonging to this category (Unesco, 1973). These difficulties led Maritain to say that only when they could go beyond a mere enumeration of rights to *key values* that could be substantiated and could establish a practical criterion for use would they be able to ensure respect for this category (Unesco, 1973).

Despite all the difficulties, the Commission of UNESCO achieved consensus on at least one element that should be the basis and measure for all rights with a claim to be recognized as human rights, which was incorporated in the first paragraph of the preamble of the Universal Declaration of Human Rights (1998, p. 23) and recognized explicitly that "[...] **dignity inherent in all members of the human family and their equal and inalienable rights constitutes the foundation of freedom, justice and peace in the world.**" Thus, *human dignity* became the foundation, the base and the theoretical justification of freedom, justice and peace in the world, serving as the cornerstone of the 30 articles included in that international pact. However, with the recognition of human dignity as the basis of human rights, the problem of its definition arose. At the time the UN Declaration was drafted, this fact led Benedetto Croce to advocate the need for holding a formal, international and public debate within which logic, culture and belief would contribute to an *agreement* on the principles that would be used as the foundation of human dignity (Unesco, 1973). Although this debate may have occurred in part during meetings of the UNESCO Commission for Philosophical Foundations of Human Rights, the clash of different moralities brought to the discussion prevented the participants from reaching an agreement that could lead to the establishment of a values-based definition capable of elucidating what constituted human dignity. Consequently, human rights remain without a clear foundation in the Universal Declaration. As a result, the rights enshrined in the Universal Declaration were listed generically, awaiting, as Maritain stated (Unesco, 1973), a future construction of *key values* capable of ensuring their understanding and application.

This generality in the articles of the Universal Declaration of Human Rights has caused serious problems in applying them to concrete cases. Take the example of the situation of Muslim women who wear the burqa. This attire was used in ancient times in the region in which Afghanistan and Pakistan are now situated (Heath, 2008) so that the noble monarchs would not be seen by commoners (Kahf, 2008). During the Taliban regime (1992-2001), however, the dress became popular and became mandatory in public under the premise that the books and sacred texts of Islam (the Quran, Hadith and Sunnah) required men and women to dress and behave modestly in public (Lyon and Spini, 2004). The controversy surrounding this cultural practice lies in the fact that for some Western cultures it represents a degradation of the dignity of women, relegating women to the role of objects and violating a fundamental human right (Tarlo, 2010). On the other hand, wearers of

the artifact claim that it is a part of their cultural expression and that they do not feel diminished by the cultural imposition of this moral conduct. By contrast, they feel protected by it and point to women in bikinis in Western beer commercials as a real example of reducing women to mere objects of desire (Ali, 2010). The arguments presented by both supporters and opponents of the use of the burqa create doubt as to whether this practice is simply a cultural expression of a society's way of realizing the human dignity of its members in accordance with its moral principles or instead embodies a subtle instrument of violation of the human dignity by lowering the status of women.

In some Western societies, such as France, wearing the veil is seen as a violation of fundamental human rights, and its use has been banned in public places and accepted only in places of worship (Law No. 524 of 13 July 2010) (*Jurist Legal News*, 2010a). The polarity of French culture on the subject is so strong that the law governing the matter states that offenders should receive a fine of 150 Euros or compulsory attendance in citizenship classes (*Jurist Legal News*, 2010c). According to the French Constitutional Court, which was brought in formally to rule on the matter during a law suit regarding alleged unconstitutionality, the justification for such rigidity lies in the fact that this is a way of ensuring gender equality for the generation of young Muslim women living in France who are forced by their families to wear the burqa (França, 2010). The attitude of the French Government led Muslim women in France to protest, arguing that the law is a form of discrimination and disrespect for their culture and that they want the right to choose, even if their choice would be to wear the burqa (*The New York Times*, 2011). The situation has created tension because Islam is the second-largest religion in France in terms of practicing members, who represent almost 10% (ten percent) of the population (that is, approximately 6 [six] million people), consisting mostly of immigrants from former French colonies in Africa such as Tunisia, Algeria and Morocco (*BBCNews*, 2010).

There is no clear explanation in the UN Declaration that dictates whether wearing the veil or its ban is a violation of human rights. The problem lies in the fact that both the Commission that drafted the Declaration and the scholars who advocated the universality of this category attempted to create a foundation based on a *universal morality*, which has been regarded by many cultures as an attempt to impose a cultural imperialism (Souza and Kretschmann, 2003).

The solution to this impasse does not lie, therefore, in an attempt to create a universal morality, but in the use of a theoretical tool that allows a dialogue between different moralities. After that, one can extract the points of contact that can be used as the foundation of human rights. At that point, the use of *ethics* stands out as the most feasible alternative by which to establish this dialogue and overcome the moral barriers that have impeded the realization of human rights (Saldaña, 1999). This choice is justified by the fact that ethics is a branch of philosophy, the purpose of which is the study of moral values. Moral values are the raw material of human rights (Shestack, 2000) because they guide the implementation of human dignity in every social group. Moreover, this statement challenges us to understand how we could develop *ethical* arguments to conceptualize human rights in the face of *moral diversity* in contemporary society.

This apparent *obstacle* is overcome by making a clear distinction between "ethics" and "morals" and by understanding the connotation of the ethical foundation in this conceptual construct. Ethics, as an area of philosophy, is the science of human conduct (Aristotle, 2007) and human actions (Bittar, 2004). Morality, in turn, is the object of the study of ethics. It is characterized as the set of rules of conduct or customs that are adopted by a particular social group (Nalini, 1999). In this context, ethics are used to discuss the various moralities in an attempt to

establish a broader sense of human behavior and to draw from the moral facts their common fundamentals (Guisán, 1995).

As an example of this heterogeneity, we may cite Christian, Jewish and Islamic moralities, among others, which establish in different ways the values used as guidelines of conduct for the societies that adopt them. Within this axiological diversity, it is the responsibility of ethics to work on the various moralities, finding points of connection and contact between them, composing and preparing their critiques.

In all such situations, the use of ethical reasoning proves to be the most suitable tool for establishing a definition of human rights (Bidart Campos, 1993), because its capacity to engage with various moralities facilitates an intercultural approach and the establishment of values that form the conceptual core of this category of rights, thus removing the risk of its inapplicability in certain cultural contexts.

Human Dignity as the Ethical Basis of Human Rights

The formulation of an ethical definition of human rights must begin by identifying the core element that forms this class of rights and seeking the ethical value common to all rights that are qualified as and elevated to the category of human rights.

The Universal Declaration of Human Rights recognized in the first paragraph of its preamble an ethical value to be used as the basis of all rights enshrined there, namely human dignity. Similarly, the various theories that attempt to justify human rights (Baez and Barretto, 2007) assert, through different arguments and routes, that these rights are ways of realizing human dignity, emphasizing that this is the core ethical element of this class of rights (Fernandez, 1991) because they are rooted in the intrinsic value of the dignity found in human beings (Flood, 1998).

According to Kant (1980), human dignity is a congenital and inalienable quality in all human beings that prevents their objectification. It is embodied through the capacity for self-determination that individuals possess by virtue of reason. This quality, however, is also recognized in individuals lacking self-generating conditions, such as young children and people suffering from mental problems, because they also have the right to a dignified treatment (Dworkin, 2003). According to these characteristics, human dignity does not depend on legal recognition (Martinez, 1996), since it is an inherent and ethical right placed above cultural specificities and their various morals and because it has the ability to persist even in those societies that do not respect it. Its violation is an affront to the capacity for human self-determination and to the condition of being free.

On the other hand, authors such as Croce (2002) and Pérez-Luño (1984) consider the concept of human dignity to be expanding and variable because they understand it as inherent in every historical moment and directed by external human needs for the moral values adopted by each society.

The works of Kant, Croce and Pérez-Luño demonstrate that human dignity is best understood when divided into two levels. The first level, which is called the *basic dimension* in this work, is where Kant's theory applies and where the basic legal rights essential to human existence are found—rights that ensure the exercise of each individual's self-determination and prevent his or her objectification. The second level, which is called the *cultural dimension* in this study, encompasses the theories of Croce and Pérez-Luño. This dimension contains the values that vary across time and space and that seek to meet the social demands of each era, in every society, in accordance with their economic, political and cultural capabilities.

On the basis of these premises, one can see that the *basic dimension* of human dignity is an inherent quality of the individual that demands respect for life, liberty

and physical and moral integrity as the basic rights that prevent the objectification of the human being (Sarlet, 2005). Its violation is easily detected in any situation where a person may suffer a reduction of his or her status from a human with rights to a mere instrument or thing that is no longer an end in him or herself.

The *cultural dimension*, in turn, represents the ways and conditions in which human dignity, in its *basic dimension*, has been implemented by every social group throughout history. At this level of analysis, space is opened up for cultural peculiarities and practices that vary across time and space, seeking an ethical understanding of the goals of each social group to construct meanings that can be understood cross-culturally (Hoffe, 2005).

Having acknowledged human dignity and its relation to human rights, one can say that human rights (genus) are a set of ethical values, positive or otherwise, that aim to achieve human dignity in two dimensions: *basic* (protecting individuals against any form of objectification or reduction of their status as humans with rights) and *cultural* (protecting moral diversity, represented by different forms as each society implements the basic level of human dignity).

The concept associates human rights with a *set of ethical values* to allow a philosophical discussion of the different existing moralities and to extract from them common foundations to serve as a cultural approach that, while demanding respect for universal values protected by these rights through the observance of the *basic dimension* of human dignity, preserves the moral peculiarities of each social group in the development of the *cultural dimension* of this dignity.

The proposed definition does not attempt to cover legal or moral details in order to avoid the risk of becoming inapplicable in certain cultural or legislative contexts. Any attempt to conceptualize human rights through the choice of certain moral values would result in a relativization of this category because the construction of a uniquely valid or absolute morality is difficult to achieve in the contemporary multicultural context. The definition also omits reference to any rule of law because human rights are supra-legal; that is, they are independent of juridical recognition by laws or treaties. Take, for example, freedom, which is regarded in many cultures and in the UN Declaration as belonging to the class of human rights. According to the concept proposed in this work, we can conclude that freedom was recognized as a human right to protect the basic dimension of human dignity because it aims to avoid the objectification of individuals, providing them with free movement and expression of thought and belief, among others. Imagine a hypothetical society that did not recognize freedom within its legal system and that allowed slavery. Although under the legal procedure of this social group there would be no violation of the established normative order, there would be a violation of human rights because the basic dimension of human dignity was not achieved: people's status as human beings would be diminished, and they would become mere objects of someone else's will.

Thus, we see that the concept proposed here suggests a method for analyzing each concrete case, which facilitates the process of identifying human rights by the following parameter: a *right* is only *human* when it contains ethical values that represent ways of achieving human dignity, whether in the basic dimension or in the cultural dimension. This conclusion is confirmed by an analysis of the preamble of the Universal Declaration of Human Rights and the 30 articles included in it. The preamble contains the explicit recognition that the rights set forth therein are based on human dignity. Additionally, an individual analysis of each of the articles shows that they all represent ethical values chosen and recognized as human rights because they represent forms of realizing human dignity (Baez, 2010).

Fundamental Human Rights as a species of Human Rights

Within the *genus human rights* is the category *fundamental human rights*, which should be understood as a set of ethical values, positive or negative, intended to protect the basic dimension of human dignity. The use of this expression seems appropriate because this is the dimension that contains the list of basic, essential and fundamental legal rights that should be shared by all members of the human species in equal measure without objection (Flores, 2009). Thus, we see that this basic right is characterized as the minimum foundation required for each society to build the other dimensions of human rights, which represent the different cultural forms of realizing human dignity.

It should be noted that this distinction between *human rights* and *fundamental human rights* is not intended to relativize the other dimensions of human rights, but to uphold the universal basic set of rights that represents the fundamental assertion of human rights. Once implemented and respected, this can serve as the basis for the specification of cultural dignity according to the peculiarities of each group. It is therefore at this level of human rights that the necessary theoretical basis for the universal application of human rights, so desperately sought by the international community in recent decades⁵, may be formed without the risk of relativization because of cultural specificities.

The ethical concept of fundamental human rights as a tool for resolving specific cases: the controversy of wearing the veil

We return to the issue of the veil in order to better understand how the ethical concept of fundamental human rights can help in solving concrete cases. The burqa is currently adopted in some Muslim societies based on the moral foundation of religion (Lyon and Spini, 2004). Its use, however, is not confined to a limited number of countries in the Middle East; according to the Pew Forum on Religion & Public Life (2010-2030), 23.4% of the world's population is Muslim. Therefore, out of the 6.8 billion current inhabitants of this planet, over 1.6 billion people across the world adopt Muslim beliefs. For certain western groups, however, wearing the veil is seen as a sign of the exclusion and degradation of women and as incompatible with human dignity (*The Guardian*, 2011). In France, for example, the wearing of the veil was banned in public places by Law No. 524 of July 13, 2010 (*Jurist Legal News*, 2010a). In the same year, the Senate of Spain approved a motion urging the government to prohibit the wearing of veils that cover the entire face in public places (*Jurist Legal News*, 2010b). In April 2010, the Belgian House of Representatives voted to pass a law that would ban the burqa and other veils covering the face in public places (Belgium, s.d.). In May 2010, in Quebec, Canada, a discussion was begun about Bill No. 94, which contains a proposal to force Muslim women to remove the veil from their faces as a condition for receiving some public services (*CBCNEWS*, 2010). Around this time, the Vice-

⁵ Since the end of the Second World War, an international effort has aimed to establish a minimum set of rights relating to human dignity that can be applied to all human beings. Evidence of this effort can be found by examining the declarations and international pacts that emerged from 1948 to 1966: Universal Declaration of Human Rights, the International Covenant on Social Rights and the International Covenant on Civil Rights.

President of the European Parliament, Silvana Koch-Mehrin, publicly expressed her full support for the ban of the burqa in all countries of the European continent (*Juris Legal News*, 2010b).

The wearing of the veil is open to diverse meanings depending on the cultural context in which it is analyzed, a fact that has led to conflicting interpretations of its relationship to the human dignity of women. This moral disagreement has occurred mostly because the cultures involved attempt to judge each other's practices using their own value criteria when, in fact, the only way to fairly assess a social behavior is by using the native values-based environment in which it exists.

When analyzing the issue of the burqa in terms of the two dimensions of human dignity set out in this work, we see that in the *basic dimension* wearing the veil can only be considered a violation of basic human rights if it significantly reduces the status of the person using it, leading to that person's treatment as a mere instrument or object. In this respect, both the imposition of wearing the veil as well as the banning of it embody violations because both positions ignore the rights of women as individuals with their own wishes and the ability to exercise their right to belief and choice. When a culture imposes physical, moral or legal sanctions upon a woman who wears this garment, it reduces her to a mere instrument (object) of the will of others, in violation of the right inherent in all human beings that protects them from being treated as objects. Moreover, the ban on wearing the veil also embodies the degradation of women as humans with rights because it prevents them from exercising their freedom of belief and choice by treating them as incapable of deciding for themselves the kind of life they want to adopt in the pursuit of happiness and fulfillment.

Regarding the analysis of the situation from the aspect of the *cultural dimension* of human dignity, once the woman's right (fundamental human right) to choose whether or not to wear the burqa is respected, this practice can be recognized as an expression of the cultural identities adopted by each society. This is possible because this choice represents the free adoption of certain moral values that the wearer of the burqa, together with the group in which she lives, chooses for her personal development. Note that at this level of analysis cultural peculiarities and practices are respected because one is seeking an ethical understanding of the purposes of each social group without value judgments about the best way to value women or make them happier, concepts that are by nature relative. Thus, the woman's dignity is respected, in its basic dimension, and represented by her right to choose. The way she chooses to achieve this dignity is preserved according to the moral values that she elects to follow.

Thus, we conclude that the position taken by France to ban the use of the burqa in public places, based solely on moral values embraced by that society, embodies the attempt to impose a moral/cultural imperialism with total disregard for the beliefs and axioms of women who see wearing the veil as a way to maintain their dignity. The desire displayed by the French government to choose what is right, valid and good for women in its territory based solely and exclusively on a set of morals adopted by most of its nationals represents a flagrant violation of human dignity and a disrespect for cultural diversity. The fact is that this prohibition does not take into account that the women who wear the burqa out of conviction, and who are treated, in this case, as mere objects, have feelings, desires, dreams and beliefs that must be understood and respected. In this regard, we believe that the Universal Declaration of Human Rights explicitly recognizes the right to freedom of religion or belief and its public manifestation (United Nations, 1948).

Final considerations

From the perspective of fundamental human rights, the debate over the ban on wearing the veil shows the clash between the desire for universal observance of this class of rights, which has been sought since the proclamation of the Universal Declaration of the UN, and the relativization applied by certain societies that argue for their adaptation to the moral practices they adopt.

The situation of Muslim women in France is just one example among many others that can be seen daily in the media, where one culture tries to impose a moral view upon another by using the banner of fundamental human rights to justify this practice. Note that the texts of international treaties expressly recognize the freedom of religion and belief, as well as their respective means of externalization, as a form of expression of human dignity. However, the absence of a clear and objective foundation for how these rights should be interpreted has led the French government to see the dress worn by Muslim women as contrary to the moral concept of human dignity. Thus, in its territory, the government has banned the public expression of religious beliefs by these women through the banning of the use of the burqa and other veils that cover the face.

As shown in this work, these controversial situations have occurred due to the absence of an understanding of what constitutes fundamental human rights. This is because the concepts developed thus far regarding the generalization of the texts of international treaties do not clarify the parameters that must be used to identify a *right* as being *human* or to find out how these rights must be interpreted.

The theory presented in this study proposes the use of ethics and their ability to engage with the various moralities as a tool to conceptualize and build a parameter for the identification and interpretation of human rights. In this regard, this work suggests, both through the analysis of the various theories on the subject and of the wording of the preamble of the UN Declaration, that a *right* may only be considered *human* when it is based on the realization of human dignity in at least one of its dimensions: *basic*, protecting individuals against any form of objectification or reduction of their status as humans with rights, and *cultural*, respecting the moral forms chosen by each society to implement this dignity.

Thus, when faced with concrete cases such as the ban on wearing the veil in France, any moral benchmarks are replaced by an objective and ethical analysis of facts verifying whether the assessed circumstances imply the degradation of the individuals involved to mere objects, devoid of a will of their own. If this degradation is present in the case studied, it is a clear case of violation of fundamental human rights. If the practices evaluated, although controversial and incompatible with certain moral readings, do not bring about this degradation, then respect for individuals as humans with rights who are free to follow their beliefs must be protected as a cultural expression of human dignity.

If the French government simply prohibited Muslim women within its territory from being forced to wear the burqa, the conclusion would be different. In this case, there would be a clear respect for the fundamental human right to freedom of choice. The choice of clothing would be seen as a different realization of the dignity of these women according to the beliefs they have freely chosen to govern their lives.

Thus, the theory proposed here allows an objective assessment of individual cases that reconciles relativistic theories with universal ones as it pursues the universal protection of the basic dimension of human dignity while simultaneously respecting the moral differences adopted by each society.

References

- ALI, K. 2010. Burqas and Bikinis: Islamic Dress in Newspaper Cartoons. In: E. TARLO (ed.), *Visibly Muslim: Fashion, Politics, Faith*. New York, Oxford, p. 281-289.
- BAEZ, N.L.X. 2010. Dimensões de aplicação e efetividade dos Direitos Humanos. In: Congresso Nacional do CONPEDI, XIX, Florianópolis, 2010. *Anais...* Florianópolis, p. 7120-7134.
- BAEZ, N.L.X.; BARRETO, V. 2007. Direitos Humanos e globalização. In: N.L.X. BAEZ; V. BARRETO (orgs.), *Direitos Humanos em evolução*. Joaçaba, Unoesc, p. 18-39.
- BARRETO, V. 2010. *O fetiche dos Direitos Humanos*. Rio de Janeiro, Lumen Juris, 2010, 278 p.
- BBC News. 2010. London, July 6. Available at: <http://www.bbc.co.uk/news/10508069>. Accessed on: March 28, 2011.
- BELGIUM. [s.d.]. La Chambre des représentants et le Sénat. Projet de loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage. Available at: <http://www.dekamer.be/kvvcr/showpage.cfm?section=/questure&language=fr&story=building.xml&rightmenu=right>. Accessed on: April 6, 2011.
- BIDART CAMPOS, G.J. 1993. *Teoría general de los Derechos Humanos*. México, UNAM, 443 p.
- BITTAR, E.C.B. 2004. *Curso de Ética Jurídica*. 2ª ed., São Paulo, Saraiva, 193 p.
- BOBBIO, N. 1992. *Era dos Direitos*. 10ª ed., Rio de Janeiro, Campus, 219 p.
- BUERGENTHAL, T.; SHELTON, D.; STEWART, D.P. 2002. *International Human Rights*. 3ª ed., St. Paul, West Group, 119 p.
- CARPINTERO-BENÍTEZ, F. 1999. *Historia del derecho natural: un ensayo*. México, Universidad Nacional Autónoma de México, 346 p.
- CBCNEWS. 2010. Quebec, May 28. Available at: <http://www.cbc.ca/news/canada/montreal/story/2010/05/18/niqab-hearings-quebec.html>. Accessed on: April 6, 2011.
- CHACON, M.P.; CRUZ, I.F. 2005. Derechos Humanos y medio ambiente. In: A.H.V. BENJAMIN; E. MILARÉ (coords.), *Revista de Direito Ambiental*, 10(39):189-211.
- CROCE, B. 2002. *Declarações de Direitos*. 2ª ed., Brasília, Senado Federal, Centro de Estudos Estratégicos, Ministério da Ciência e Tecnologia, 73 p.
- DECLARACIÓN Universal de los Derechos Humanos – Versión Comentada. 1998. México, DF, Amnistía Internacional – Sección México, 208 p.
- DIAS, M.C. 2006. Direitos Humanos. In: V. BARRETO (coord.), *Dicionário de Filosofia do Direito*. Rio de Janeiro, Renovar, p. 246-248.
- DONNELLY, J. 2003. *Universal Human Rights in Theory and Practice*. 2ª ed., New York, Cornell University, 287 p.
- DWORKIN, R. 2003. *O domínio da vida: aborto, eutanásia e liberdades individuais*. São Paulo, Martins Fontes, 308 p.
- FERNÁNDEZ, E. 1991. *Teoría de la justicia y Derechos Humanos*. Madrid, Debate, 193 p.
- FLOOD, P.J. 1998. *The Effectiveness of UN Human Rights Institutions*. Westport, Praeger Publishers, 168 p.
- FLORES, J.H. 2009. *A (re)invenção dos Direitos Humanos*. Florianópolis, Fundação Boiteux, 203 p.
- FRANÇA. 2010. Le Conseil Constitutionnel: Loi interdisant la dissimulation du visage dans l'espace public. Décision n° 2010-613 DC, October 7. *Official Journal* of October 12, 2010, p. 18345. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html>. Accessed on: March 28, 2011.
- GUISÁN, E. 1995. *Introducción a la ética*. Madrid, Cátedra, 189 p.
- HEATH, J. 2008. *The Veil: Women Writers on Its History, Lore, and Politics*. Los Angeles, University of California Press, 226 p.
- HOBBSBAWM, E. 2006. *A era dos extremos – O breve século XX*. São Paulo, Companhia das Letras, 598 p.
- HÖFFE, O. 2005. *A democracia no mundo de hoje*. São Paulo, Martins Fontes, 564 p.
- ISHAY, M. 2004. *The History of Human Rights: From Ancient Times to the Globalization Era*. California, University of California Press, 438 p.
- JURIST LEGAL NEWS & RESEARCH. 2010a. Pittsburgh, July 13. Available at: <http://jurist.org/paperchase/2010/07/france-parliament-approves-burqa-ban.php>. Accessed on: March 28, 2011.

- JURIST LEGAL NEWS & RESEARCH. 2010b. Pittsburgh, June 23. Available at: <http://jurist.org/paperchase/2010/06/spain-senate-calls-for-government-ban-of-face-veils.php>. Accessed on: April 06, 2011.
- JURIST LEGAL NEWS & RESEARCH. 2010c. Pittsburgh, October 7. Available at: <http://jurist.org/paperchase/2010/10/france-constitutional-court-approves-burqa-ban.php>. Accessed on: March 30, 2011.
- KAHF, M. 2008. From Her Royal Body the Robe Was Removed: The Blessings of the Veil and the Trauma of Forced Unveilings in the Middle East. In: J. HEATH (ed.), *The Veil: Women Writers on Its History, Lore, and Politics*. Los Angeles, University of California Press, p. 27-43.
- KANT, I. 1980. *Fundamentação da metafísica dos costumes*. São Paulo, Abril Cultural, 304 p.
- LEAL, R.G. 2000. *Perspectivas hermenêuticas dos Direitos Humanos e Fundamentais no Brasil*. Porto Alegre, Livraria do Advogado, 224 p.
- LIMA JÚNIOR, J.B. 2001. *Os Direitos Humanos Econômicos, Sociais e Culturais*. Rio de Janeiro, Renovar, 265 p.
- LYON, D.; SPINI, D. 2004. Unveiling the Headscarf Debate. *Feminist Legal Studies*, 12:328-351.
- MARTINEZ, M.A.A. 1996. *La dignidad de la persona como fundamento del ordenamiento constitucional español*. León, Universidad de León, 293 p.
- NALINI, J.R. 1999. *Ética geral e profissional*. 2ª ed., São Paulo, Revista dos Tribunais, 262 p.
- PÉREZ-LUÑO, A.E. 1984. *Derechos humanos en la sociedad democrática*. Madrid, Tecnos, 180 p.
- PEW FORUM ON RELIGION & PUBLIC LIFE. 2011. The Future of the Global Muslim Population: Projections for 2010-2030. Available at: <http://pewforum.org/The-Future-of-the-Global-Muslim-Population.aspx>. Accessed on: April 13, 2011.
- RAWLS, J.B. 2001. *O direito dos povos*. São Paulo, Martins Fontes, 239 p.
- RODLEY, N.S. 2002. The Evolution of United Nations' Charter-based Machinery for the Protection of Human Rights. In: F. BUTLER (ed.), *Human Rights Protection: Methods and Effectiveness*. Dordrecht (Netherlands), Kluwer Law International, p. 187-196.
- SALDAÑA, J. 1999. Notas sobre la fundamentación de los derechos humanos. *Boletín Mexicano de Derecho Comparado*, Universidad Nacional Autónoma de México, México, 96:949-968.
- SARLET, I.W. 2005. As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídico-constitucional necessária e possível. In: I.W. SARLET (org.), *Dimensões da dignidade: ensaios de filosofia do direito e direito constitucional*. Porto Alegre, Livraria do Advogado, p. 13-44.
- SARLET, I.W. 2001. *Dignidade da pessoa humana e Direitos Fundamentais na Constituição Federal de 1988*. Porto Alegre, Livraria do Advogado, 308 p.
- SHESTACK, J.J. 2000. The Philosophical Foundations of Human Rights. In: J. SYMONIDES, *Human Rights: Concepts and Standards*. London, UNESCO, p. 31-68.
- SOUZA, I.M.L.; KRETSCHMANN, Â. 2003. A universalidade dos direitos humanos no discurso internacional: o debate continua. In: L.S. ROCHA; L. STRECK, *Anuário do Programa de Pós-Graduação em Direito: Mestrado e Doutorado*. São Leopoldo, Unisinos, p. 117-142.
- TARLO, E. 2010. *Visibly Muslim: Fashion, Politics, Faith*. New York, Oxford, 282 p. <http://dx.doi.org/10.2752/9781847888624>
- THE GUARDIAN. 2011. London, March 3. Available at: <http://www.guardian.co.uk/world/2011/mar/03/niqab-ban-france-muslim-veil?INTCMP=SRCH>. Accessed on: March 28, 2011.
- THE NEW YORK TIMES. 2011. New York, April 11. Available at: http://www.nytimes.com/2011/04/12/world/europe/12france.html?_r=1. Accessed on: April 11, 2011.
- UNESCO. 1973. *Human Rights: Comments and Interpretations: A Symposium*. New York, Columbia University Press, 367 p.
- UNITED NATIONS. 1948. *Universal Declaration of Human Rights*. Available at: <http://www.un.org/en/documents/udhr/>. Accessed on: April 6, 2011.