

Responsabilité, fraternité et développement durable en droit:

Une conférence en mémoire de l'honorable Charles D. Gonthier

Responsibility, Fraternity, and Sustainability in Law

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Face-covering, Fraternity and the Veil Debate

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Fraternity and the Debate regarding the Face-Veil:
France, Belgium, and Quebec in Comparative Perspective

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I. Introduction

The idea put forward in this essay is a modest one, namely that the concept of fraternity as articulated by the late Justice Charles D. Gonthier is useful to understand the extent to which the Muslim face-veil for women, or *niqab* or *burka*,¹ should be accommodated in Canadian society. While Justice Gonthier himself did not have occasion to comment on the debate regarding the face-veil, the concept of fraternity that he elucidated allows for the accommodation of the religious practice of covering the face, but also serves to limit the practice in the interests of ensuring a safe, functional, and vibrant public sphere. An exclusively rights-based discourse is insufficient to address all of the competing issues that arise from the wearing of the face-veil.

The concept of fraternity was one of the central pillars of Justice Gonthier's legal philosophy. In his principal essay on fraternity in the law, Justice Gonthier made the following comment about the general concept of fraternity:

In my view, fraternity is simply the forgotten element of democracy which, although rarely identified, is nevertheless present throughout our legal system. It is the glue that binds liberty and equality to a civil society. It is intuitive. It is the forging element of a community. It advances goals of fairness and equity, trust and security, and brings an element of compassion and dedication to the goals of liberty and equality. It bonds individuals who share similar values and goals not only to their current neighbours, but also provides a sense of continuity with the past and the future.²

Justice Gonthier's elucidation of the concept of fraternity in the constitutional context was dualistic: both facilitating the realization of liberty and equality, and tempering the individualistic tendencies of those constitutional rights. The former is exemplified in Canadian constitutional law by positive obligations of inclusion, the examples given by Justice Gonthier

¹ A *niqab* is a piece of clothing that covers the face except the eyes, while a *burka* denotes the entire garment that covers a woman's body from head to toe, including her face, except the eyes or having a mesh for the eyes.

² C.D. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 McGill L.J. 567 at 569 [footnote omitted, hereinafter "Liberty, Equality, Fraternity"].

being the duty of hospitals to provide additional services specific to the disability of deaf litigants or the obligation to include sexual orientation in human rights codes.³ The tempering function of fraternity is manifested in the role of s. 1 of the *Canadian Charter of Rights and Freedoms* in delimiting the scope of equality and liberty in the *Charter* in order to achieve certain collective goals.⁴ As Justice Gonthier explained,

Perhaps most importantly, the *Charter* imports notions of fraternity through the use of section 1. Section 1 permits limitations on liberty and equality rights in a manner that is demonstrably justified in a free and democratic society. Our constitutional rights are not absolute. On occasion, the government may well be justified in placing reasonable limits on some forms of liberty in order to advance a community goal, or what Chief Justice Dickson described in *R. v. Oakes* as “the realization of collective goals of fundamental importance.”

Those collective goals, and fundamental values, were described by the Chief Justice as being “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

Here we find fraternity. All of the elements of fraternity outlined in the contextual framework can be located in this one, brief passage of *Oakes*. Fraternity involves the advancement of shared values and identities to form a community [í]⁵

In Justice Gonthier’s view, without fraternity as an underlying value in the law, democracy cannot properly function on the concepts of liberty and equality alone. His understanding of fraternity’s relationship with liberty and equality is essential in the analysis of the accommodation to be given to the face-veil given that it is liberty and equality that underpin the demand that the face-veil be accommodated in society:

Liberty and equality are, in a way, antithetical to fraternity. Whereas liberty and equality emphasize the rights of the individual, fraternity

³ *Ibid.* at 577.

⁴ *Ibid.* at 577-578.

⁵ *Ibid.* at 577-578, the passages cited from Chief Justice Dickson’s reasons in *R. v. Oakes* [1986] 1 S.C.R. 103 appear at page 136 of the latter judgment.

emphasizes the rights of the community. Whereas liberty protects the right to live free from interference, fraternity advances the goals of commitment and responsibility, of making positive steps in the community. Greek philosophers challenged notions of liberty because of this subversive effect on fraternity and civic identity. However, at the same time, fraternity is essential to the well-being of liberty and equality, because only with shared trust and civic commitment can one advance these goals of liberty and equality. Further, the goal of fraternity is to work together to achieve the highest quality of individual existence. In short, liberty and equality depend on fraternity to flourish. At the same time, fraternity may be seen to be dependent upon liberty and equality for the fullness of its expression.⁶

While Justice Gonthier saw a tension between fraternity, on the one hand, and liberty and equality, on the other hand, he considered the concept of fraternity to be essential for the fruition of liberty and equality:

Fraternity is the necessary adjunct of liberty and equality that imports these values into a community. To be free amongst equals means nothing outside of a community. The concepts of community and fraternity are interrelated. Communities are not simply the result of individuals pursuing rational self-interest. Nor are they just a means of providing collective goods. Communities exist, in no small part, because of a desire to belong to a family. Fraternity is an expression of brotherhood and sisterhood - of shared interests and beliefs.⁷

The present essay posits that Québec's bill regarding the accommodation of the face-veil, the *Act to establish guidelines governing accommodation requests within the Administration and certain institutions* (Bill 94),⁸ and more specifically sections 5 and 6 of Bill 94, enshrine Justice Gonthier's understanding of the concept of fraternity in striking an appropriate balance between the constitutional requirement to accommodate the religious practice of wearing the face-veil, on the one hand, and the need to give effect to societal interests in seeing people's faces, on the other hand. Bill 94 does not ban the face-veil, but rather sets down certain limits to the religious

⁶ *Ibid.* at 570 [footnote omitted].

⁷ *Ibid.* at 573.

⁸ Bill 94, *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, 1st Sess., 39th Leg., Quebec, 2010. At the time of writing, Bill 94 was still in the legislative review process at the National Assembly, and more specifically, was before the Committee on Institutions.

freedom to wear the face-veil where it would conflict with other values. This balancing of competing interests is more conducive to fostering fraternity in society. In contrast, the legislative response in France and Belgium providing for a total ban on the face-veil in the public sphere, while accompanied by a philosophical legislative deliberation referring to, among other things, the concept of fraternity, is inconsistent with Justice Gonthier's conception of fraternity since no genuine regard is given to the constitutional right to practise one's religion. The essay does not purport to be an exhaustive review of all of the arguments surrounding the notion of reasonable accommodation, nor does it seek to canvass all of the possible weaknesses of Quebec's Bill 94 regarding accommodation requests.⁹

A central argument put forward in the present essay is that the face-veil is a religious clothing that is qualitatively different from any other religious garment or symbol worn by adherents. No other piece of religious clothing interferes with a primordial feature of human interaction: the need to see an interlocutor's face. It is this particular aspect that is arguably at the root of the public debate and the legislative responses to the face-veil. The usefulness of the concept of fraternity is that it can serve both to restrain any tendency to curtail the religious freedom to wear the face-veil, and also to safeguard other values that would justify limiting that freedom in particular contexts.

⁹ For example, on a certain interpretation, Bill 94 arguably creates a reverse burden in respect of accommodations, requiring the claimant to establish that the requested accommodation is reasonable rather than requiring the institution to establish that the requested accommodation creates undue hardship (see s. 5). Another possible weakness is that under s. 4, the right to gender equality and the principle of religious neutrality of the State seemingly have a certain precedence over other rights guaranteed by the Quebec *Charter of human rights and freedoms*, R.S.Q. c. C-12, whereas the Quebec *Charter* itself arguably does not indicate such a hierarchy. See the criticisms of ss. 4 and 5 made by the *Commission des droits de la personne et des droits de la jeunesse* in its *Mémoire à la Commission des institutions de l'Assemblée nationale* (May 2010) at 9-14 regarding Bill 94.

According to Justice Gonthier, fraternity is composed of a set of values, which he considered to be fundamentally moral values.¹⁰ He described them as follows:

[...] fraternity advances a number of core values in pursuit of forming a community. These values include: empathy, cooperation, commitment, responsibility, fairness, trust, and equity. These are not so much independent elements of fraternity as they are interrelated threads weaving the cloth of fraternity.¹¹

Very relevant to the subject-matter at hand, Justice Gonthier was careful not to define fraternity in such a way as to create divisions based on group identity:

The first value of fraternity recognizes that there are certain people within this community who require special protection and to whom we have a commitment. [í] In one respect, this imports to a liberal democracy a notion of **empathy**. In another respect, this aspect of fraternity informs our understanding of equality: the State may be discriminating against individuals by failing to accommodate their special needs. [í] This aspect of fraternity: that of **inclusion** is essential for the proper functioning of a polyethnic state such as Canada.¹²

In addition to the values of empathy and inclusion, Justice Gonthier also considered cooperation to be a value underpinning fraternity:

The difference between liberty and equality, on the one hand, and fraternity on the other, is that the former values promote the free *association* of individuals, whereas the latter promotes the *cooperation* of individuals in the community. Cooperation is inspired by the commonality of interests and gives rise to the pooling of resources in pursuit of a common goal. Association *per se* connotes a simple fact: people are connected with one another. Cooperation connotes something more: people who are connected can work together to advance common interests. However, fraternity connotes cognizance of the common good sought by the cooperation, and a desire to arrive at that common good.¹³

In an essay on law and morality,¹⁴ Justice Gonthier argued,

¹⁰ *Ibid.* at 573.

¹¹ *Ibid.* at 572.

¹² *Ibid.* at 574 [emphasis in original, footnote omitted].

¹³ *Ibid.* at 574-75 [emphasis in original].

¹⁴ C.D. Gonthier, "Law and Morality" (2003) 29 *Queens L.J.* 408. While this essay does not explicitly refer to fraternity, other than in a citation of the French 1958 Constitution (at para. 14), the essay's theme of morality as a

Our Charter uses a framework of rights to control certain government actions. However, individuals must be prepared to fulfill certain duties and responsibilities if our community is to develop positively. If there is no commitment to the fulfillment of duties, we are left simply with authority as the only basis for compliance with the law. [í] Perhaps it is time to start thinking about a Charter of Duties if we are to be better to promote the dignity of the person in society. Should we not look at rights in terms of corresponding obligations, and freedoms in light of their related responsibilities?¹⁵

Fraternity is important because it gives a reason other than state compulsion to have regard for others. To Justice Gonthier's reasons for the importance of fraternity and duties to others, I would add that fraternity is particularly important when there are economic and social tensions in society. A pluralistic society that has cultivated a true fraternal spirit may avoid the group-based conflict that can engulf pluralistic societies in difficult times. In contrast, a society whose members are obsessed only with their own rights and which is devoid of true fraternity may give rise to mutual suspicion, misunderstandings, and civil strife.

II. Application of the concept of fraternity to the face-veil debate

The argument put forth in this essay is that the concept of fraternity as articulated by Justice Gonthier is useful in establishing the extent to which the face-veil should be accommodated. An exclusively rights-based discourse, whether for or against the face-veil, provides an incomplete way of addressing the various issues that arise.

France and Belgium are two European jurisdictions that have passed legislation and proposed a bill, respectively, prohibiting the wearing of the face-veil in public. Fraternity is often invoked as one of the values supporting such a ban. However, this is a form of forced fraternity and therefore not genuine fraternity at all. It will certainly not elicit a feeling of fraternity on the part

basis for the law has a strong affinity with his elaboration of the concept of fraternity. It was arguably that concept that he was referring to when he asked the question in his essay, "are individuals more like atomistic entities having minimal interaction with their surroundings, or are they more a part of a community fabric?" (at para. 42).

¹⁵ *Ibid.* at para. 41.

of the Muslim woman who sincerely believes that she must cover her face as a religious practice and yet is told that this is against the penal law of the country. It is argued here that such a conception of fraternity is inconsistent with the one articulated by Justice Gonthier.

A. *The French legislative response*

The French bill prohibiting the face-veil in all public areas in France and for all public services was passed in October 2010. It is called *Loi no 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*. The French prohibition on the face-veil is clear and simple:

*Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage.*¹⁶

The prohibition is penal in nature and punishable by a fine of €150 and/or the imposition of a citizenship course in which the values of the equality of the sexes, human dignity, and the obligations entailed by living in society will be taught.¹⁷ It also prohibits imposing the covering of the face on someone else through threats, violence, duress, abuse of authority or abuse of power, by virtue of that person's sex. Such coercion is punishable by one year imprisonment and a €30,000 fine. If the victim is a minor, the maximum punishment is doubled.¹⁸

One of the texts explaining the rationale for the prohibition is the *Exposé des motifs* appearing at the beginning of the bill filed in the French Assemblée nationale on May 19, 2010. The *Exposé des motifs* was presented by the Minister of Justice on behalf of the Prime Minister and both signed it.

¹⁶ *Loi no. 2010-1192* at art. 1.

¹⁷ *Projet de loi interdisant la dissimulation du visage dans l'espace public : étude d'impact* (mai 2010) at 19.

¹⁸ *Ibid.* at art. 4.

At the outset of the *Exposé des motifs*, the values of the French Republic are invoked: liberty, equality, and fraternity. The *Exposé des motifs* immediately draws the connection between those values and the values ostensibly at issue with the face-veil:

*Ces valeurs sont le socle de notre pacte social; elles garantissent la cohésion de la Nation; elles fondent le respect de la dignité des personnes et de l'égalité entre les hommes et les femmes.*¹⁹

The *Exposé des motifs* asserts that the face-veil constitutes a rejection of French values and amounts to the rejection of a sense of belonging to society and constitutes no less than a form of symbolic and dehumanizing violence that offends the social body, *õle corps socialö*.

The *Exposé des motifs* rejects the approach proposed in Quebec's Bill 94, discussed further below; namely, dealing with the face-veil on a case-by-case basis. This is dismissed because of purported difficulties in its application and is deemed to be an insufficient, indirect, and misguided response to the *õrealö* problem :

*L'õdiction de mesures ponctuelles a été évoquée, qui se traduiraient par des interdictions partielles limitées à certains lieux, le cas échéant à certaines époques ou à l'usage de certains services. Une telle démarche, outre qu'elle se heurterait à d'extrêmes difficultés d'application ne constituerait qu'une réponse insuffisante, indirecte et détournée au vrai problème.*²⁰

After explaining why a case-by-case approach is unsatisfactory, the *Exposé des motifs* proceeds to explain all the reasons why a complete prohibition on the face-veil in public spaces and for public services is justifiable:

- Fundamental requirements of living together in French society (*õexigence fondamentale du vivre-ensemble dans la société françaiseö*);
- Public order: which is not to be understood as being limited to the preservation of peace, health, or security, but also as prohibiting behaviour that is incompatible with essential rules of the republican social contract, which are said to be the basis for French society;

¹⁹ *Exposé des motifs* at 3.

²⁰ *Exposé des motifs, projet de Loi no 2520 (19 mai 2010)* at 3.

- Fraternity: covering the face in public does not satisfy the minimal requirement of civility that is necessary for social relationships;
- Dignity of the individual, even if this practice of public seclusion is voluntary or accepted: dignity of the individual is to prevail over the exercise of a fundamental freedom, of which the wearing of a face-veil might be seen as an example;
- Dignity of others: those who share a public space with a person wearing the face-veil are effectively treated by the latter as people against whom one must protect oneself through the refusal of all exchanges, even solely visual ones;
- Gender equality: it is only women who wear the face-veil;
- Social contract: this prohibits members of society from closing in on themselves and isolating themselves from others all the while living among them;
- Public safety.²¹

Another document accompanying the French bill presented to the Assemblée nationale in May 2010 and setting out the justifications for the prohibition is the *Étude d'impact*. Out of all the values that the face-veil is considered to violate, the *Étude d'impact* leads with the value of living together in society. The *Étude d'impact* states that since the act of covering the face in public undermines one of the foundations of French society, there is a need for a global and coherent reaffirmation of republican values. The first section of the report is entitled: «Le constat : la dissimulation du visage dans l'espace public, un défi lancé au «vivre-ensemble»». ²²

The first paragraph of the report is a crisp statement on what is seen as a basic rule of free and democratic societies:

Dans les sociétés libres et démocratiques prévaux en principe, la règle, implicite mais élémentaire que nul échange entre les personnes, nul vie sociale n'est possible, dans l'espace public, sans réciprocité du regard et

²¹ *Ibid.* at 3-5.

²² *Étude d'impact* at 3.

*de la visibilité : les personnes se rencontrent et entrent en relation à visage découvert.*²³

What is intriguing about the statement is its unequivocal nature both as to its generalization across all free and democratic societies, conveniently disregarding the fact that the legislative preoccupation with the face-veil does not figure as prominently among Anglo-Saxon countries as it does among countries of continental Europe, as well as its disregard for the competing value in a free and democratic society, namely freedom of religion, equality, and freedom from State interference regarding something as private as one's own clothing.

Later in the *Étude d'impact*, in the second section of the report regarding the objective of reducing the practice of covering the face in order to preserve social cohesion, the report acknowledges the need for a democratic society to accommodate diverse symbols expressing cultures, sensibilities, convictions, and beliefs that are different. However, it adds the caveat that that accommodation should not undermine the foundations of the social contract, which unites each individual to the surrounding collectivity:

*Toute société repose sur un ensemble de signes qui exprime la nature particulière du pacte social qui unit chaque individu à la collectivité qui l'entoure. Une société démocratique se caractérise par sa capacité à articuler un nombre croissant de signes exprimant des cultures, des sensibilités, des convictions, des croyances différentes, sans que soient remis en cause les fondements de son pacte social.*²⁴

The *Étude d'impact* sets out four values that are ostensibly violated by the face-veil: 1) the notion of *œvivre-ensemble*, which is understood as constituting the basic rule of sociability; 2) dignity of the individual; 3) equality of the sexes; and 4) public order.²⁵

²³ *Ibid.* at 3.

²⁴ *Ibid.* at 11.

²⁵ *Étude d'impact* at 5-7.

The *Étude d'impact* elaborates on the notion of *«vivre-ensemble»* as being the elementary rules of sociability expressed through exchanges, glances, and speech, all of which are premised on a reciprocal exposure of faces:

*Les règles élémentaires de sociabilité passent par l'échange, le regard, la parole et suppose, en toute hypothèse, l'exposition réciproque des visages.*²⁶

In contrast, the report says, covering the face amounts to a negation of the self and others and prevents the creation of relationships between individuals. The report concludes on this point by saying that the practice is, on its own, a form of symbolic violence that destabilizes the social contract.²⁷

The *Étude d'impact* characterizes the face-veil as being a harm caused to others and therefore a violation of art. 4 of the French *Déclaration des droits de l'homme et du citoyen* which provides that freedom consists of doing anything that does not harm others. The reason it is considered a harm to others is because, according to the *Étude d'impact*, it says to others that they are not worthy, pure, or respectable enough for the wearer of the face-veil to show her face.²⁸

The *Étude d'impact* states that the face-veil is a form of symbolic distinction that has the effect of rejecting the majority that does not cover its face and manifests a will to isolate oneself from the rest of society.²⁹ It therefore constitutes a serious rejection of others, who are considered too different to be considered eligible to see the person's face.

²⁶ *Étude d'impact* at 5.

²⁷ *Ibid.* at 6.

²⁸ *Ibid.* at 6.

²⁹ *Ibid.* at 6.

The second value invoked, dignity of the individual, is seen as being undermined by the face-veil because it constitutes, according to the *Étude d'impact*, a form of self-effacement.³⁰ This self-effacement is considered dehumanizing. According to the *Étude d'impact*, human dignity is connected to the necessity of showing and maintaining one's own identity. Dignity is seen as an essential value of the social contract and the *Étude d'impact* cites the first sentence of the preamble of the French constitution of 1946 to the effect that all human beings, without distinction of race, religion or belief, possess inalienable and sacred rights. The *Étude d'impact* then cites the French *Conseil constitutionnel*'s decision of 27 July 1994³¹ to the effect that safeguarding the dignity of the individual against all forms of servitude and degradation is a principle of constitutional importance.³²

Dignity is a fraught and slippery concept in this context. For French legislators, women walking around with their faces covered is undignified, but sexual objectification of women in public images and the existence of strip clubs somehow do not trigger the same concerns about the dignity of women, at least not to the same point of passing penal legislation in respect of those practices. For certain Muslim women wearing the face-veil, the concerns about dignity go in the other direction: covering the face is seen as a safeguard against objectification and harassment while public tolerance for the sexualized images of women or revealing clothing and the existence of strip clubs is itself indicative of a state of indignity and inequality for women.

³⁰ *Ibid.* at 7.

³¹ No. 343 DC.

³² *Ibid.* at 6.

The third value invoked is the equality of the sexes. The *Étude d'impact* asserts that the principle of equality is at the foundation of the French Republic.³³ The *Étude d'impact* cites art. 1 of the French *Déclaration des droits de l'homme et du citoyen*, *«Les hommes naissent et demeurent libres et égaux en droit»*. The face-veil, according to the *Étude d'impact*, would be diametrically opposed to this principle because only men would be worthy of living with their faces uncovered while women would be condemned to be enclosed in clothing that separates them from the external world, effectively prohibits them from playing a social role.³⁴

The fourth value invoked is public order. The face-veil is considered by the *Étude d'impact* as constituting a concrete disturbance of the proper functioning of social life.³⁵ The *Étude d'impact* gives examples of situations in society where it is necessary to identify individuals: when the school day ends and a parent comes to get her child, in post-offices for sending a document, in voting offices, or for purchases in a commercial establishment. Within the context of public order, the *Étude d'impact* also mentions the problems of public security raised by the act of covering the face.

The *Étude d'impact* characterizes the bill as an attempt to safeguard Islam itself from regressive practices, rather than being a restriction on religious liberty:

*Cette démarche doit être menée dans le souci de ne pas stigmatiser les personnes de confession musulmane. Le constat selon lequel le port du voile intégral n'est pas représentatif de l'islam est très largement partagé. Comparer de cette question ne doit donc pas être perçue comme une restriction de la liberté religieuse mais témoigne, au contraire, du fait que la société française refuse précisément d'assimiler l'islam à des pratiques rétrogrades.*³⁶

³³ *Ibid.* at 7.

³⁴ *Ibid.* at 7.

³⁵ *Ibid.* at 7.

³⁶ *Ibid.* at 11.

The French legislative process addressed the issue of freedom of religion based on an *a priori* substantive determination that the face-veil is simply not part of the customary practice of the Muslim religion. As the report says:

*De l'avis des spécialistes, le port du voile intégral n'est nullement une exigence de l'islam. Cette coutume d'origine moyen-oriental, récemment apparue sur le territoire national, est très éloignée de la pratique habituelle de la religion musulmane.*³⁷

Anyone familiar with Canadian constitutional law regarding religious freedom will immediately recognize the difference in approach. The majority of the Supreme Court of Canada in the case of *Syndicat Northcrest v. Amselem*³⁸ said that courts should not delve into the question of whether a particular purported religious practice constitutes a true tenet of the religion as long as the adherent in question has a sincere belief that it constitutes a religious requirement.³⁹

Through the definitional sleight of hand of characterizing the wearing of the face-veil as falling outside the customary practice of Islam, the *Étude d'impact* can conclude that there is no question of religious freedom being undermined by the legislative prohibition.⁴⁰ Such an approach would obviously be rejected in the Canadian constitutional context.

The *Étude d'impact* recasts the issue as one involving freedom of conscience. It then cites the European Court of Human Rights, in a case emanating from Turkey regarding a challenge to a

³⁷ *Ibid.* at 4.

³⁸ [2004] 2 S.C.R. 551.

³⁹ *Ibid.* at paras. 43-56. One of the dissenting judges, Justice Binnie, agreed religious freedom should be generously accorded (para. 191) and that it is not the function of courts to choose between the competing views of religious scholars as to the content of religious requirements (para. 190). In contrast, three of the dissenting judges, Justices Bastarache, LeBel and Deschamps, were of the view that there must be an objective element to the test in order to determine whether the practice is genuinely connected with the religion (para. 135).

⁴⁰ *Étude d'impact, supra* at 14.

Turkish law banning the Islamic headscarf in certain institutions,⁴¹ as support for the proposition that freedom of conscience does not provide legal justification for individuals to remove themselves from the application of justifiable rules. The study then asserts that the concern to preserve the essential rules of social life and to ensure the respect for the dignity of the individual are sufficiently serious reasons to justify a general prohibition on the face-veil.

Under Justice Gonthier's view, fraternity encompasses both a positive obligation of inclusion of minorities and their freedom of religion, as well as the tempering of that obligation in order to achieve certain collective goals. It is clear that the actors in the French legislative process did not see fraternity in the same way. What we see in the French legislative process is a characterization of fraternity as being in contradistinction to religious freedom and freedom of conscience. Essentially, the French conception of fraternity is one where individuals are forced to live together in a certain way, a kind of forced fraternity. In my opinion, Justice Gonthier would have considered this to be the contrary to the true spirit of fraternity.

Subsequent to the presentation of the bill, a report was prepared for the *Assemblée nationale* in June 2010 by the French *Commission des lois constitutionnelles, de la législation et de l'administration générale de la République* on the bill.⁴² The report was written by Jean-Paul Garraud, a member of the *Assemblée nationale*. The Garraud Report endorses the bill and sets out various reasons justifying the blanket prohibition on the face-veil.

⁴¹ *Leyla Sahin v. Turkey*, no. 44774/98, 10 November 2005 (E.C.H.R.).

⁴² Rapport fait au nom de la *Commission des lois conditionnelles de la législation et de l'administration générale de la République*, sur le projet de loi (no. 2520), interdisant la dissimulation du visage dans l'espace public (23 June 2010) [hereinafter "Garraud Report"].

The Garraud Report begins with a statement of principle regarding the importance of the face as the vehicle of a person's identity and uniqueness. The report asserts that it is through the face that dialogue is born and that to cover the face is tantamount to excluding oneself from the social contract that makes collective life possible:

*Il est communément admis, dans notre société, que l'on ne peut dissimuler de manière permanente son visage dans l'espace public. Le visage est le porteur de l'identité et donc de l'unicité de la personne. C'est par lui que peut naître le dialogue. Le dissimuler c'est donc s'exclure du pacte social qui rend possible la vie en commun.*⁴³

The Garraud Report says that a general prohibition is necessary in order to protect the foundations of *œvivre-ensemble* and public order, understood to mean a minimal plank (*œsocle minimal*) of reciprocal obligations and essential guarantees of living in a society. Just like the previous documents, the Garraud Report also takes pains to mention that the wearing of the face-veil is not required under Islamic law.

The Garraud Report mentions that one possible negative side-effect is that women who refuse to accept the prohibition will then be confined to their homes.⁴⁴ The report acknowledges that this may be a side-effect, however it considers it justifiable in the name of *œvivre-ensemble*. It also claims that the ban should help women forced to cover their faces by their families since the prohibition will provide a bulwark to those women who want to resist that pressure. The report mentions that if certain women who want to cover their faces are required to stay at home as a consequence of the prohibition, they will have to do so in the same way as someone who insists on walking around naked will also have to stay at home.⁴⁵

⁴³ Garraud Rapport at 7.

⁴⁴ *Ibid.* at 8. It is interesting to note that this possible isolation of such women is one of the concerns expressed by the Quebec *Commission des droits de la personne et des droits de la jeunesse* in its *Mémoire*, *supra* at 3.

⁴⁵ *Ibid.* at 8. In Canada, public nudity is a criminal offence under s. 174 of the *Criminal Code*.

While in the past such an approach may have been disregarded in Canada as being unacceptably paternalistic, in light of tragic incidents such as the murder of Aqsa Parvez in Mississauga, Ontario, where the family of the murdered girl apparently insisted, among other things, that the girl wear the *hijab* (Muslim head-scarf) even if she did not want to,⁴⁶ the role of the law in contributing to the moral climate for resisting such pressure, and ultimately violence, cannot be discounted. The question remains as to how best to provide a source of legal support for girls who feel unwarranted pressure from their families to wear clothing that they do not want to wear. The conundrum is that provincial youth protection legislation in Canada may not justify the intervention of state agencies in a family context simply on the grounds that family pressure was being applied on a girl to wear certain kinds of clothing. However, a legislative prohibition such as the one in France on coercion in the wearing of the face-veil might change the moral climate such that families in insular sub-cultures no longer think that the State does not care about the pressure that may be applied on girls regarding forms of dress.

On the other hand, it would be a serious error to assume that anyone who wears a face-veil has been forced to do so by a family member. One can find much anecdotal evidence for the opposite: where the woman chooses to wear the face-veil to the strenuous opposition by family members.

In my own extended family, there are two sisters, cousins of mine, whose decision to wear the face-veil caused much consternation and criticism from their parents as well as relatives. Their example turns the conventional wisdom on its head for other reasons as well. For example, both sisters are highly educated and achieved significant academics success over the years. In fact, they earned an admission to one of the most elite girls' private schools in Pakistan, Kinnaird

⁴⁶ See *e.g.* O. El Akkad & K. Wallace, "Teen tried to leave strict family", *Globe and Mail* (12 December 2007)

College in Lahore.⁴⁷ The reality behind a woman wearing a face-veil can be very complex and law-makers need to be cautious before making assumptions.

Returning to the Garraud Report, it also addresses the issue of whether a law is necessary in light of the marginal quantitative character of the practice of wearing the face-veil. The report takes the position that it is better to address the problem before it becomes generalized, and that the negation of *öivivre-ensembleö* is itself a reason on its own to justify a legislative response.⁴⁸ One can add to this the fact that the number of cases of public nudity is also negligible, yet there is legislation prohibiting it.⁴⁹

The Garraud Report deals with the issue of whether the prohibition would violate religious freedom guaranteed by the French Constitution and the *European Convention for the Protection of Human Rights and Fundamental Freedom*.⁵⁰ Art. 10 of the French *Déclaration des droits de l'homme et du citoyen* and art. 9 of the European Convention protect religious freedom. The report deals with the issue by saying that the prohibition is based on a balance between the general interest and religious freedom. It considers that the test to determine whether religious freedom has been violated is one of proportionality.

⁴⁷ The sociologist might argue that it is precisely because these lower middle class girls attended an elite upper class college populated mostly by members of the Westernized economic elite of Pakistan, that they would react by adhering to an extreme interpretation of Islam as a way of asserting pride in their socio-economic background when faced with the disorienting effects of a Western popular culture that they would perceive as alien and one, in any event, where they would not be able to compete with fellow students who are already well versed in that culture.

⁴⁸ Garraud Report, *supra* at 10.

⁴⁹ In Canada, see s. 174 of the *Criminal Code*.

⁵⁰ *Ibid.* at 14.

The Garraud Report specifies that the prohibition is not against the face-veil *per se*, but rather against all *ōdissimulation permanente du visage dans l'ēspace public*.⁵¹ Accordingly, it takes the position that the prohibition should be based only on the legal foundation of the notion of public order, and not the principles of secularism (*ōlaicitēō*), equality of the sexes, or safeguard of the dignity of the individual.⁵² In this respect, the commission's report is at odds with the *Exposé des motifs* and the *Étude d'impact* presented with the bill by the Prime Minister and the Minister of Justice.

The Garraud Report contains an extremely detailed discussion about the definition of public order and its various composite elements. The report considers that the material dimension of public order can provide a basis for a general prohibition on covering the face because it touches on public security, a concern invoked in other cases by the French *Conseil constitutionnel* as well as the European Court of Human Rights.⁵³

As regards the non-material or social dimension of public order, the Garraud Report states that it can be understood as constituting a minimal plank of reciprocal requirements and essential guarantees for life in a society that are so fundamental that they allow for the exercise of other freedoms. Those requirements justify setting aside, if necessary, acts that are guided by individual decisions. An implicit and lasting social contract requires individuals to show their face in public since doing otherwise would be tantamount to rejecting their sense of belonging to society.⁵⁴

⁵¹ *Ibid.* at 15.

⁵² *Ibid.* at 15.

⁵³ *Ibid.* at 16.

⁵⁴ *Ibid.* at 16.

According to the Garraud Report, the notion of a social or non-material aspect of public order has been known under different names throughout French history since the Revolution, one of them being fraternity. This notion is still found today in the republican conception articulated at art. 3 of the Constitution of 1958, in its preamble, as well as at art. 72-3 which evokes the *idéal commun de liberté, d'égalité et de fraternité*.⁵⁵

The Garraud Report considers the act of covering one's face is seen as a form of symbolic violence similar to sexual exhibitionism.⁵⁶ The report reasons that just as the prohibition on sexual exhibitionism constitutes a justifiable limit on the freedom of movement, and just as the prohibition on polygamy or incest constitutes a justifiable limit on the freedom to marry, the prohibition on the face-veil on the basis of public order constitutes a justifiable limit on the exercise of certain rights and freedoms.⁵⁷

The Garraud Report agrees with the approach of a blanket prohibition rather than a case-by-case approach. Limiting the prohibition to certain places and certain circumstances would result in a form of *pointillisme pénal*.⁵⁸ Also, having a prohibition restricted to certain places and circumstances would impose on ordinary citizens and front-line administrators the obligation to apply the law, which would be undesirable according to the report. The report makes a more fundamental point: if the prohibition is based on social public order, the prohibition must necessarily be universal given the fundamental character of the principles that are being violated by the act of covering the face.

⁵⁵ *Ibid.* at 17.

⁵⁶ *Ibid.* at 18.

⁵⁷ *Ibid.* at 19.

⁵⁸ *Ibid.* at 22.

On 7 October 2010, the French *Conseil constitutionnel* released its decision on the constitutionality of the bill regarding the prohibition on face-veils.⁵⁹ The *Conseil constitutionnel* took note that the legislature had concluded that covering the face constituted a danger for public safety and a disregard for the minimal requirements of living in a society, and that women who cover their face find themselves in a situation of exclusion and inferiority that is manifestly incompatible with the constitutional principles of liberty and equality. The *Conseil constitutionnel* concluded that the prohibition did not entail a disproportionate relationship between the safeguard of public order and the protection of constitutional rights.⁶⁰

B. *Belgian legislative response to the face-veil*

In September 2010, a bill entitled *Proposition de loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage* was presented to the Belgian *Chambre des Représentants*.⁶¹ Similar to the French legislation, this bill is penal in nature and creates a general prohibition on face-veils in the public domain, punishable by a fine and/or imprisonment. The bill is prefaced by a text prepared by the legislators who sponsored the bill, setting out the justifications for the proposed prohibition.

⁵⁹ *Décision no. 2010-613 DC du 7 octobre 2010 (Loi interdisant la dissimulation du visage dans l'espace public).*

⁶⁰ The only reservation expressed by the *Conseil constitutionnel* is that the prohibition should not be extended to public places of worship since that would constitute an excessive limitation of the constitutional right to freedom of religion.

⁶¹ DOC 53 0219/001, 1^e session/53^e légis. This was a re-presentation of bill 52 2289, 4^e sess./52^e légis., which died with the dissolution of the Belgian parliament on 6 May 2010. On the same topic, there were three other bills presented prior to the dissolution: *Proposition de loi sur l'exercice de la liberté d'aller et venir sur la voie publique* (52 2442); *Proposition de loi insérant dans le Code pénal une disposition interdisant de porter dans les lieux et espaces publics des tenues vestimentaires masquant le visage* (52 0433); *Proposition de loi interdisant de se couvrir le visage de manière excessive* (52 2495). The previous legislative committee tasked with reviewing the matter took bill 52 2289 as the *texte de base*. Bills 52 0433 and 52 2442 have also been presented again, respectively, as 53 0085 (16 August 2010) and 53 0754 (2 December 2010).

The preface to the bill is entitled *õDéveloppementö*. It begins with a discussion on the problems arising from social integration and the choice of a social model. These problems are said to arise with issues such as the wearing of head scarves to school, violence in poor neighborhoods or the status of women in certain communities. The *õDéveloppementö* connects all these questions to the issue of *õvivre ensembleö*.

The *õDéveloppementö* acknowledges the value of diversity in Belgian society but warns against the transformation of that diversity into a radicalization of identity (*õradicalisation identitaireö*).⁶² This radicalization is considered dangerous because it can lead to the stigmatization of others and a confrontation between differences. The position of the authors of the Bill is that if cultural diversity is to provide opportunities for everyone, it must be accompanied by a notion of living together in society, or *õvivre ensembleö*:

*Si la diversité culturelle constitue avant tout une chance pour tous, elle se doit d'être accompagnée par les pouvoirs publics vers les chemins d'un « vivre ensemble » respectueux de tous et de chacun.*⁶³

The authors of the *õDéveloppementö* then proceed to canvass two social models of the accommodation of cultural differences: multiculturalism and interculturalism.

Multiculturalism is described as a model where the individual is seen primarily as a member of a community characterized by a culture, religion, or ethnic origin. According to the authors of the bill, this model is based generally on cultural relativism and reasonable accommodations, principles presented as the unconditional assertion of the equivalence of systems of thought and the justification of the differentiation of rights.⁶⁴

⁶² *Développement* at 3.

⁶³ *Ibid.* at 3.

⁶⁴ *Ibid.* at 4.

The authors reject that model for two reasons. The first is that the multicultural model, as characterized by the authors, does not meet their conception of society as a coherent whole given that under such a model, differences are said to have priority over participation in a common project. For the authors, multiculturalism leads to an accentuation of differences of identity leading to sectarianism and a kind of “Babelization” of living together, as well as the emergence of legal castes. This right to isolation generates a mutual ignorance and fear of the other, and social tensions.

The second reason given for rejecting multiculturalism is that the division of society and cultural relativism lead to the negation of principles of equality and free choice. The example given is that a husband should not be able to object to the medical care for his wife on the basis that the doctor is a man and that his religious beliefs prohibit such a medical practice. For the authors, giving in to the demands of the husband would be tantamount to refusing a fundamental right to his wife. The example sets up a straw man. The issue of medical consent and whether there should be an accommodation of religious sensitivities (or feminist sensitivities for that matter, which the Belgian legislators seem to ignore) in the context of a male doctor treating a female patient, is irrelevant to the issue of whether to institute a complete ban on the face-veil.

The competing model canvassed by the authors of the bill is one styled as “*interculturalisme*.”⁶⁵ According to the authors, this model makes the individual prevail over his cultural, philosophical, or religious ties such that the rights and obligations of the citizen under this model are not a function of his communal loyalties or ethnic origins. For the authors, it is this model that posits that a society cannot be built and cannot integrate everyone if the citizens do not share

⁶⁵ *Ibid.* at 4-5.

a common patrimony of fundamental values such as the right to life, freedom of conscience, democracy, equality of the sexes or the separation of church and state.

For the authors, these fundamental values accompanied the rise of democratic societies and are universal. These values are considered to be essential for any state that seeks the emancipation of all of its members. Under the model of *interculturalisme*, cultural diversity is valued by the state only insofar as the various cultures respect fundamental values of the state.

The authors of the bill state that under the model of *interculturalisme*, the face-veil must be prohibited. They state that the prohibition is not based only on considerations of public order but also social considerations that are indispensable for living together in a society, *õvivre-ensembleö*, a society which is liberating and protective of the rights of everyone.

What also emerges from the discussion of the models of multiculturalism and *interculturalisme* is that the Belgian authors of the bill have essentially caricatured the multiculturalism model, at least from the Canadian perspective. The principal author of the Canadian policy of multiculturalism, Prime Minister Pierre Trudeau, did not conceive of the model as facilitating a fractured and communal society. Rather, he saw it as allowing for the integration of immigrants to facilitate their participation in and contribution to Canadian society.⁶⁶

⁶⁶ It can be argued that Trudeau's model of multiculturalism was itself intended to foster fraternity within society through acknowledging cultural and religious differences while increasing minorities' sense of belonging to mainstream Canadian society. Trudeau's model found expression in the *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.), which was the statutory culmination of the policy enunciated by Trudeau in 1971. The statute itself was enacted by the Conservative government of Brian Mulroney in 1988. It is clear from the Act that its purpose is to encourage integration and not existence in silos, so to speak. For example, the Act specifically provides for participation of all in Canadian society:

3(1) It is hereby declared to be the policy of the Government of Canada to [í] (c) promote the full and equitable participation of individuals and communities of all origins in the continuing evolution and shaping of all aspects of Canadian society and assist them in the elimination of any barrier to that participation.

Having dismissed multiculturalism in favour of so-called *interculturalisme*, the authors set out two positive reasons said to justify the proposed ban. The first reason given by the authors as justifying a prohibition on the face-veil is public safety, which they seem to equate with public order. The second reason invoked by the authors is the notion of *œvivre-ensembleö*. They cite the philosopher Emmanuel Levinas in support of the assertion that it is through the face that we express our humanity.

They then quote a presentation by Élizabeth Badinter to the French *Assemblée nationale* regarding the face-veil in France:

*Je tiens enfin à souligner combien le port du voile intégral est contraire au principe de fraternité ó ce principe fondamental auquel on a si peut souvent l'occasion de se référer ó et, au-delà, au principe de civilité, du rapport à l'autre. Porter le voile intégral, c'est refuser absolument d'entrer en contact avec autrui ou, plus exactement, refuser la réciprocité : la femme ainsi vêtue s'arroge le droit de me voir mais me refuse le droit de la voir.*⁶⁷

The authors conclude by saying that in a society where it is an indispensable prerequisite to living together, a meeting between everyone and an elaboration of a common citizenship contract, it is not possible to disregard the principle of recognizing others in order to know them, *œreconnaître pour connaîtreö*.⁶⁸

Missing from the French and Belgian deliberations are the religious rights of the woman who feels compelled by her religious adherence to wear the face-veil. There is an underlying assumption that such women are duped or forced into wearing it, and if they say they wear it willingly, they must surely be suffering from false consciousness (to use Marxist parlance). As I

Whatever criticisms one may make of the Canadian policy of multiculturalism, it can hardly be said that the intention was to fracture society and create a kind of Babel where individuals are essentially characterized by a culture, religion or ethnic origin or where there is no interaction between communities.

⁶⁷ As cited in *Développement* at 6.

⁶⁸ *Ibid.* at 7.

mentioned above, the reality behind a woman's decision to wear the face-veil may be far more complex than the French and Belgium legislators acknowledge.

In an article entitled "Montréal, Paris, Bruxelles" ⁶⁹ a columnist for *Le Devoir*, Christian Rioux, argued that it was not surprising that three jurisdictions to have reacted to the face-veil were francophone, where "on cultive la convivialité". In contrast, Rioux argued, the reaction in Anglo-Saxon countries has been muted because the policy of multiculturalism has engendered a practice among minority groups to live in separate communities.

Given Rioux's invocation of "convivialité" and its affinity with the concept of fraternity, can it be said that francophone societies are more geared than Anglo-Saxon societies to promoting fraternity and, therefore, have legislated varying levels of prohibition regarding the face-veil? As set out above, it is difficult to characterize the French and Belgian approach as being truly fraternal or "convivial" given that it essentially ignores the religious freedom of the Muslim woman who feels compelled to wear a face-veil as a requirement of her religious faith. Also, there are alternative and more compelling explanations for the divergent francophone and Anglo-Saxon approaches, such as the differences between the civil law and the common law traditions, and differing views on the proper role of the State. More importantly, as explained below, one cannot really lump the French, Belgian, and Quebec legislative approaches to the face-veil under one category, and therefore it is difficult to say that the reaction of these three jurisdictions to the face-veil is indicative of a common trait of "convivialité".

C. Quebec's legislative response

⁶⁹ C. Rioux, "Montréal, Paris, Bruxelles" *Le Devoir* (9 April 2010) at A3.

In 2010, the Quebec government introduced Bill 94, which sought to establish guidelines governing accommodation requests in the context of services in the public and para-public sectors in Quebec. The purpose of the legislation was described as follows:

1. The purpose of this Act is to establish the conditions under which an accommodation may be made in favour of a personnel member of the Administration or an institution or in favour of a person to whom services are provided by the Administration or an institution.

1. La présente loi a pour objet d'établir les conditions dans lesquelles un accommodement peut être accordé en faveur d'un membre du personnel de l'Administration gouvernementale ou d'un établissement ou en faveur d'une personne à qui des services sont fournis par cette administration gouvernementale⁷⁰ ou cet établissement.

The relevant provisions on accommodations are the following:

1. [para. 2] An adaptation of a norm or general practice, dictated by the right to equality, in order to grant different treatment to a person who would otherwise be adversely affected by the application of that norm or practice constitutes an accommodation.

1. [al. 2] Constitue un accommodement l'adaptation, dictée par le droit à l'égalité, d'une norme ou d'une pratique d'application générale faite en vue d'accorder un traitement différent à une personne qui, autrement subirait des effets préjudiciables en raison de l'application de cette norme ou de cette pratique.

4. An accommodation must comply with the Charter of human rights and freedoms (R.S.Q., chapter C-12), in particular as concerns the right to gender equality and the principle of religious neutrality of the State whereby the State shows neither favour nor disfavour towards any particular religion or belief.

4. Tout accommodement doit respecter la Charte des droits et libertés de la personne (L.R.Q., chapitre C-12), notamment le droit à l'égalité entre les femmes et les hommes et le principe de la neutralité religieuse de l'État selon lequel l'État ne favorise ni ne défavorise une religion ou une croyance particulière.

5. An accommodation may only be made if it is reasonable, that is, if it does not impose on the department, body or institution any undue hardship with regard to, among other considerations, related costs or the impact on the proper operation of the department, body or institution or on the rights of others.

5. Un accommodement ne peut être accordé que s'il est raisonnable, c'est-à-dire s'il n'impose au ministère, à l'organisme ou à l'établissement aucune contrainte excessive eu égard, entre autres, aux coûts qui s'y rattachent et à ses effets sur le bon fonctionnement du ministère, de l'organisme ou de l'établissement ou sur les droits d'autrui.

6. The practice whereby a personnel member of the Administration or an institution and a person to whom services are being provided by the Administration or the institution show their face during the delivery of services is a general

6. Est d'application générale la pratique voulant qu'un membre du personnel de l'Administration gouvernementale ou d'un établissement et une personne à qui des services sont fournis par cette administration ou cet établissement aient le visage

⁷⁰ The word "gouvernementale" was added during the legislative review process.

practice.

découvert lors de la prestation des services.

If an accommodation involves an adaptation of that practice and reasons of security, communication or identification warrant it, the accommodation must be denied.

Lorsqu'un accommodement implique un aménagement à cette pratique, il doit être refusé si des motifs liés à la sécurité, à la communication ou à l'identification le justifient.

The Administration is defined widely, and it generally includes all government departments, bodies, corporations, and agencies.⁷¹ Institutions are defined to include public school boards as well as private schools that receive public subsidies, universities, most health and social services, agencies and institutions, and subsidized child care centres.⁷²

While France and Belgium have chosen the path of seeking to eliminate the face-veil in the public sphere through prohibitive legislation, Quebec has chosen a more balanced approach through s. 6 of Bill 94 by setting out three discrete criteria to be applied case by case which would require a denial of the accommodation of the face-veil by public institutions: security, identification, and communication. As an omnibus, residual provision, s. 5 of Bill 94 confirms the continued application of the concept of undue hardship (the examples in s. 5 being cost, impact on operations, and rights of others) constituting a general limit on the accommodation of minority practices. The approach set out in sections 5 and 6 is consistent with Justice Gonthier's articulation of the concept of fraternity in that there is an attempt to balance religious freedom with certain collective goals.

III. Fraternal justifications for imposing certain limits on the face-veil

The different approaches to legislating in respect of the face-veil arguably represent the implementation of different forms of fraternity. France and Belgium have adhered to what may be referred to as forced fraternity whereby the Muslim woman who wishes to wear the face-veil

⁷¹ Bill 94, s. 2.

⁷² Bill 94, s. 3.

must compromise her conscience and religious freedom for the sake of subscribing to the prevailing norms regarding social participation. This will not elicit a sense of fraternity in that Muslim woman. The French and Belgian approach entails an evisceration of the kind of fraternity conceptualized by Justice Gonthier which expressly includes respect for cultural and group identity.

In contrast, Quebec has enshrined a notion of fraternity in Bill 94 which is more nuanced and genuine: on the one hand, Bill 94 allows for the freedom to practise one's religion as one sees fit and equal treatment regardless of religious adherence but, on the other hand, it tempers that individualistic dimension by limiting accommodations where there would be undue hardship (s. 5) on the body concerned and, more specifically in the context of face-veils, by giving effect to collective goals of security, identification, and communication (s. 6).

The notions of security, identification, and communication necessarily involve the interaction between people, and serve to remind the individual of certain collective features that make societies function properly: the ability to communicate freely with others, the ability to identify others, and the ability to ensure the security of the members of society. In this respect, the criteria set out in s. 6 of Bill 94 for limiting the practice of wearing the face-veil are fraternal in character.

The aspect of fraternity underlying Bill 94 which gives effect to collective goals is worth preserving. A basic feature of human interaction is the ability to connect (or disconnect) with others through facial expressions. That basic feature continues to exist in modern society. The smile between passing strangers, the look of invitation by a sitting passenger to a standing passenger offering the latter her bus seat out of generosity, these are the fraternal building blocks of a healthy civil society and are expressions of a common humanity that transcend linguistic and

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cultural barriers. In the world of commercial transactions, it is common for businesspeople to travel across the world to meet face-to-face with partners and counter-parties, even in the age of ready access to videoconferencing. Why do individuals take the trouble to do this? The answer must be that there is something irreplaceable about the direct, face-to-face human contact.⁷³ This reality must inform the scope to be given to the right to wear the face-veil when balancing that right against concerns of security, identity, and communication.

The face-veil is qualitatively distinct from any other religious symbol or clothing in that it is the only piece of religious clothing that interferes with a basic form of human interaction, namely face-to-face contact. That form of human interaction is essential for a fraternal society. However, a truly fraternal society will guard against suppressing religious freedom in the name of face-to-face contact since that suppression will itself entail a loss of fraternal feeling, at least among those whose religious freedom is being suppressed.

To provide a personal anecdote, I drop off my seven-year old daughter at school every morning. In the commotion of the morning ritual, parents negotiate their way on the sidewalks with their children, making eye contact with other parents while smiling and nodding. This is a process of establishing trust among strangers who share a common objective, the protection of their children. A woman who covers her face in this context cannot contribute to that common trust, and is likely to undermine it as it will be impossible for other parents to know if she is smiling at them or scowling, or even if she is the same person as the one accompanying the child on another day.

⁷³ While a comparison between the face-veil and visually impaired people is a topic for another essay, suffice it to say that visually impaired people find other ways of connecting with those around them. For example, it is common to see visually impaired people ask passers-by that their arm be held as they cross the street or negotiate some other challenging terrain. Such physical contact, when the passer-by is a male, would be anathema for the Muslim woman in a *niqab* or *burka*.

That being said, there must be a balancing of competing interests and rights. While an environment of common trust is desirable around a school, freedom of religion as a constitutional right must also be respected. The French and Belgian approach would sacrifice the constitutional right in order to achieve the socially desirable objective of having that common trust. It is an approach that ignores the distinction between socially desirable behaviour and behaviour that can be legally mandated.

For example, the common trust among parents dropping off or picking up their children is composed of, among other things, the ability to smile and greet each other. However, it is also composed of the expectation that their children will be secure from ill-intentioned adults. The latter is far more important than the former. A generally cheerful environment around a school is socially desirable, but cannot be legally mandated. In contrast, a secure environment around a school can and should be legally mandated. Bill 94 reflects this difference in importance by preserving the constitutional right of the woman who wants to wear the face-veil, at the risk of undermining a less important component of the common trust between parents, while safeguarding the more important component of that trust by requiring her to remove the face-veil if there is any concern about security or identification when she picks up a child from school. Such an equilibrium fostered by Bill 94 is consistent with Justice Gonthier's concept of fraternity.

Why is fraternity important as a legal concept? Where members of a society cannot communicate with each other in the most basic way that human beings have communicated throughout history, face to face, mutual suspicion and misunderstanding may arise along group lines. In times of economic and social difficulties, the suspicion and misunderstanding may lead to outright social conflict. Fraternity serves as a bulwark against that conflict in difficult times.

Why is fraternity important in the context of public services? In a rights-based society, it is easy to forget about the importance of public institutions in ensuring the stability of society so that rights can actually be exercised. Public institutions in democracies should be seen as belonging to the people, not adversarial to them. As Prof. Fabien Gélinas has pointed out in an essay honouring the legal philosophy of Justice Gonthier, *«Une proclamation de la liberté et de l'égalité des êtres humains prend son sens, au premier chef, au sein d'une communauté.»*⁷⁴

Public-sector services themselves manifest a fraternal spirit. Groups of previously excluded people have struggled in the past to achieve many of the rights, benefits, and services Canadians now take for granted, whether it be the right of women to vote or financially accessible higher education.

It may be that one of the reasons for the social reaction against the face-veil is that it goes against the inclusiveness that has been struggled for by women over the centuries. The face-veil originates from societies where women do not generally participate in the public sphere. Furthermore, the private sphere of those societies is often divided along the lines of religious and kinship identities. In such societies, the interactions mentioned above such as the chance encounter between men and women, the cordial acknowledgment of the opposite-sex passerby with a *«hello»*, are interactions that are seen with an eye of suspicion lest those interactions lead to prohibited forms of gender relationships. The very purpose of the face-veil is to ensure that such interactions remain extremely limited.

In contrast, such interactions are encouraged in countries with robust civil societies like Canada.

It is through such interactions that one may learn of an unwelcome development proposal in the

⁷⁴ F. Gélinas, *«Une justice fraternelle: éléments de la pensée de Charles Doherty Gonthier»* (2010) 55 McGill L.J. 357 at 361.

neighbourhood, or the latest theory in quantum physics. Canadian society takes it as axiomatic that problems that beset a society must and can be solved. Fatalism is not a feature of Canadian society. To this end, all of the resources available to solve problems must be deployed, and unhindered interaction between the sexes is a resource for a society interested in the cultivation of ideas. Societies that do not practise gender segregation through the face-veil and other means will arguably always be societies that are more dynamic and productive than societies that do practise gender segregation, everything else being equal.

As adverted to by the *Étude d'impact* in France, the face-veil arguably communicates a presumption of bad faith, *i.e.* a man looking at a woman is presumed to be in bad faith. In segregated societies, this presumption of bad faith dovetails with the larger ethos of suspicion and control regarding all interactions between men and women.

In a society like Canada, the presumption arguably inherent in the face-veil is contrary to the prevailing ethos. Canadian society presumes good faith in the interactions between strangers. Certainly Québec's civil law tradition presumes good faith in the dealings between individuals.⁷⁵ Those who allege bad faith against their adversaries in litigation have a heavy burden of proof. Societies function better and in a more fraternal manner when people are presumed to be in good faith.

However, the challenge posed by the above examples of the virtues of face-to-face interactions between men and women is distinguishing between that which is socially desirable and that which ought to be legally mandated. In the same way that the earlier example of the common

⁷⁵ See *e.g.* art. 6 of the *Civil Code of Québec*: "Every person is bound to exercise his civil rights in good faith."

trust among parents around school premises required an exercise of distinguishing between the desirable and the obligatory, so too with the above more general examples.

It may be socially desirable to have opposite-sex strangers able to interact with each other so that the possibility of resolving problems in society and cultivating ideas is maximized. It may be socially desirable not to have women who project the message, whether intended or not, that they consider the men around them to be in bad faith.

However, socially desirable objectives such as these cannot be legally mandated, which is essentially what the French and Belgian approach seeks to do through its prohibition on the face-veil. In contrast, the socially obligatory objective of having properly functioning public services can be legally mandated, and to the extent that the wearing of the face-veil interferes with that, a limitation can be imposed. This is the balancing act that is done within Justice Gonthier's concept of fraternity, the "contextual framework" for the "advancement of shared values and identities to form a community."⁷⁶

Bill 94 adverts to what is socially desirable by stating that showing one's face in the context of the delivery of public services is a "general practice" (s. 6, para. 1). This is the stipulation of a social norm. However, instead of enforcing that social norm through a blanket prohibition like the French and Belgian approach,⁷⁷ Bill 94 allows for individuals to step outside that norm within certain limits consonant with important values. This balanced approach has a better chance of promoting fraternity as it seeks to include an individual minority religious practice

⁷⁶ "Liberty, Equality, Fraternity," *supra* at 578.

⁷⁷ It is beyond the scope of this paper to consider the division-of-powers issues that may arise from provincial legislation that seeks to impose a total ban on certain forms of clothing.

while at the same time limiting it for the sake of certain collective goals for the proper functioning of society.

The specific limits set out in s. 6 of Bill 94 for face-veils are justifiable from the point of view of the concept of fraternity and, moreover, constitute a codification of the caselaw that has evolved on the accommodation of religious beliefs. The three criteria are security, communication and identification. These criteria can be found in the current caselaw.

In *Multani v. Commission scolaire Marguerite-Bourgeoys*,⁷⁸ the Supreme Court of Canada canvassed the argument that the concern for safety can serve to limit a religious right.⁷⁹ It is always important to remember that the concern for safety cannot be used to ban the face-veil under Bill 94, but rather it is to be used as a criterion to require the removal of the face-veil in the particular context of public services where there is a genuine and reasonable basis to be concerned about safety. The executive decision in any given scenario will necessarily be subjected to the test set out by the majority of the Supreme Court in *Multani*, namely that “the existence of concerns relating to safety must be unequivocally established for the infringement of a constitutional right to be justified.”⁸⁰

In the context of the face-veil, concerns for security are not unfounded. In England on 21 July 2005, there were four attempted bomb attacks on London’s public transportation system. One of the suspects was caught on security cameras wearing a *burka* with a handbag over his arm,

⁷⁸ [2006] 1 S.C.R. 256.

⁷⁹ *Ibid.* at paras. 56-67.

⁸⁰ *Ibid.* at para. 67.

fleeing from London to Birmingham a day after the incident.⁸¹ The accused in question admitted that he was the one wearing the *burka*.

Bill 94's communication criterion is also valid in justifying the restriction on the face-veil. For example, for a language teacher to be effective, he/she needs to be able to see the mouth of the student in order to assist the student in mastering pronunciation. More importantly, the criterion of communication is particularly relevant when there is a need to assess credibility.

This issue was addressed recently by the Ontario Court of Appeal in *R. v. N.S.*,⁸² where the Ontario Court of Appeal dealt with a case involving a Muslim complainant alleging sexual assault against her uncle and her cousin. The complainant wanted to testify during the preliminary inquiry with her face-veil on. The preliminary inquiry judge required her to remove her face-veil during her testimony. The Court of Appeal concluded that the preliminary inquiry judge did not conduct a proper inquiry into the complainant's religious freedom claim. Accordingly, his order directing her to remove her face-veil while testifying was quashed and the matter was sent back to the preliminary inquiry judge for a determination according to the guidelines set down by the Court of Appeal. The Supreme Court of Canada has granted leave to appeal.

The Court of Appeal made a distinction between testimony at a preliminary inquiry and testimony at a trial on the merits. The accused's right to make full answer and defence was clearly a concern where a Crown witness had her face covered:

Where the case turns on the witness's credibility, it must be conceded that the jury will lose some information relevant to the witness's

⁸¹ BBC News, "Jury sees 21 July burka escapee", online: <http://news.bbc.co.uk/2/hi/6378863.stm>, accessed on 27 February 2011.

⁸² 2010 ONCA 670. Leave to appeal to the Supreme Court of Canada granted on 17 March 2011.

credibility if the witness is allowed to wear her niqab. [í] Where the credibility of the witness is virtually determinative of the outcome, denying the jury full access to that witness's demeanour could be seen as detracting from the accused's right to trial by jury.⁸³

In addition to the accused's right to make full answer and defence, the Court also referred to society's interest in a transparent justice system:

There is also a societal interest pointing against a witness wearing a niqab when testifying. Society has a strong interest in the visible administration of criminal justice in open courts where witnesses, lawyers, judges and the accused can be seen and identified by the public. [í] Allowing the witness to testify with her face partly covered affords the witness a degree of anonymity that undermines the transparency and individual accountability essential to the effective operation of the criminal justice system.⁸⁴

The Court of Appeal pinpointed the ways in which a face-veil may interfere with the fact finding process:

Covering the face of a witness may impede the cross-examination in two ways. First, it limits the trier of fact's ability to assess the demeanour of the witness. Demeanour is relevant to the assessment of the witness's credibility and the reliability of the evidence given by that witness. Second, the witnesses do not respond to questions by words alone. Non-verbal communication can provide the cross-examiner with valuable insights. The same words may, depending on the facial expression of the witness, lead the questioner in different directions.⁸⁵

Bill 94 obviously does not and cannot apply to criminal procedure. Nonetheless, the example serves to highlight the importance of the criterion of communication in the context of public services where the assessment of credibility may be important.

The last criterion under s. 6 of Bill 94 is identification. The Supreme Court of Canada dealt with this criterion in *Alberta v. Hutterian Brethren of Wilson Colony*,⁸⁶ which concerned a religious

⁸³ *Ibid.* at para. 99.

⁸⁴ *Ibid.* at para. 82.

⁸⁵ *Ibid.* at para. 54.

⁸⁶ [2009] 2 S.C.R. 567.

objection to having one's photograph taken and a regulation requiring photos for all Alberta drivers' licences. The majority of the Court concluded that the regulation was justified under s.1 of the *Charter*, the minimization of the risk of identity theft being a goal of pressing and substantial importance justifying the limitation of the religious right in question. The negative impact on the freedom of religion of the individuals in question was not considered to outweigh the benefits associated with the universal photo requirement.

The benefit identified by the Supreme Court of Canada in *Hutterian Brethren* of the enhancement of the security or integrity of the drivers' licensing scheme is of course very relevant to the larger context of public services. Public services in general are based on an identification regime where a right to a service is contingent on the claimant's ability to establish his or her identity. It is obviously not the mere presentation of a Medicare card that gives the holder a right to free medical treatment. Rather, it is the correspondence between the identity of the holder and the identity stated on the card which gives access to free treatment. The justification for this criterion in s. 6 of Bill 94 is obvious and exists already in the caselaw.⁸⁷

The fact that s. 6 of Bill 94 does not impose any parameter different from the existing caselaw is not a reason to refrain from legislating. There is a usefulness in having accessible guidelines for front-line managers who are able to consult the statutory provision themselves. Caselaw, with its multiple decisions, discursiveness and reasoning, is less accessible to the layperson than a single statute with its pithy stipulations.

IV. Conclusion

⁸⁷ It is interesting to note that there was a federal private member's bill in Parliament requiring an uncovered face when voting in federal elections, see Bill C-623, *An Act to amend the Canada Elections Act (voting with an uncovered face)*. The bill died when Parliament was dissolved on 26 March 2011.

The face-veil is unique among religious symbols and clothing in its interference with a primordial form of human communication. It is for this reason that it provokes such a vociferous reaction in societies that are used to face-to-face interactions between men and women. Those face-to-face interactions are important building blocks for a fraternal society. Fraternity is an important pillar of society since, among other virtues, it acts as a bulwark against mutual suspicion and strife between groups.

Justice Gonthier's concept of fraternity complements an exclusively rights-based discourse that conceives of individuals in society in confrontational terms. It is arguable that his view of fraternity would safeguard the religious right of Muslim women to wear the face-veil, but at the same time circumscribe that right in light of collective goals. In that vein, the outright ban on face-veils in French law and Belgian proposed legislation is inconsistent with Justice Gonthier's view of fraternity. In contrast, Quebec's Bill 94, with a case-by-case approach governed by specific criteria and confined to public services, is more consistent with the balance that Justice Gonthier sought between the rights of the individual and the collective goals of society.

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Biographical note

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