

Is the Law Empowering or Patronizing Women? The Dilemma in the French *Burqa* Decision as the Tip of the Secular Law Iceberg

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Abstract

The article analyses a French seminal legal award which served as a stepping stone in the recent French debate concerning the legislation banning women from wearing the *Burqa* headscarf in public. Under this wording—*Burqa*—a special style of the *hijab*—a scarf donned by Muslim women—is being targeted. It represents a more extreme form of covering: The *Burqa* is worn by the Pashtun women of Pakistan and in Afghanistan and covers the body from head to toes in a continuous piece of fabric, whereas the veil banned in France also includes the *niqab* which may or may not cover the entire body, and allows visibility of the eyes but not the entire face. In the relevant debate, gender equality has been the banner hoisted by court and parliamentarians purporting to protect women against the unsettling impact of the *Burqa*. This article represents a critical study of this claim. The article describes and analyses the ambivalent tenor of the *Burqa* Decision and arrives at two main conclusions. First, having distinguished two key values addressed (directly and indirectly) by the Conseil d'État—equality and freedom—the article concludes that although hailed as defying gender discrimination, the judgment must also be construed as contributing to inequality among women. The award remains just as unclear in regards to the protection of freedom of religious expression suggesting that women equality offers only one among other explanations for this ruling. Second, the article's analysis applies several feminist approaches to the *Burqa* Decision and finds that the pluralist feminist discourse results in different and inconsistent potential resolutions to the case. The upshot is that the *Burqa* Decision, which was taken as a strong condemnation of a practise said to be symbolising the subjugation of the female to male domination, was confirming a view espoused largely by Western secular women. In doing so, and given the approval by France's mainstream society, the award appears to have empowered this particular segment in the female population. At the same time however, the tribunal also stated the obvious namely, that gender equality has been serving as a powerful tool in the adjudicative struggle between secularism and religion. While women's struggle for gender equality, especially in politics and the economy, has been protracted and not yet fully achieved, the comparatively brief and hurried commitment to gender equality at the intersection of religion and secularism, suggest that gender equality was not the only priority on the adjudicator's mind, hence is not necessarily the ultimate winner of this award.

Keywords

Islamic full veil; gender equality; religion; human rights; French law; jurisprudence

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I. Introduction

“The principle of the equality of the sexes is not negotiable,” declared Valérie Pécresse,¹ France’s Minister of Higher Education, following the Conseil d’État’s decision (*Burqa Decision*).² The appellate court declined a Moroccan woman’s request for French naturalization on the grounds of “incompatibility with the essential values of the French community”.³ Pécresse’s sentiment was echoed by both right and left wing quarters in France.⁴ It represented one link in a longer chain of developments which would a year later, in 2009, see a special parliamentary commission formed by President Nicolas Sarkozy, tasked with the study of the compatibility of the Muslim *Burqa* (female headscarf) with French secular culture and constitutional principle of *laïcité* separating State and Church.⁵ The principle—a three-prong idea—corresponds with the law of 9 December 1905, on the separation of Church and State and guarantees the freedom of conscience and the free exercise of faith subject only to the restrictions necessary to safeguard the public order and the neutrality of the Republic, which itself is devoid of any faith.⁶ While coined in a law, *laïcité* is first and foremost an idea, and only secondarily a legal concept; it confirms the division between the private realm wherein the individual person is free in the pursuit of spiritual and religious choice, on the one hand, and the state, which is neutral, assiduously refrains from any interference in such matters, on the other hand. Accordingly, the rights of the believer and of the agnostic or atheist are equally secured. This concept constitutes an essential element of the French social contract.⁷

¹ ‘Port (Bearing) of the burqa: Pécresse approves the refusal of nationality’, *nouvelobs.com*, 13 July 2008, <nouvelobs.com>, 3 April 2009.

² Décisions du Conseil d’État, Séance du 26 mai 2008, Lecture du 27 juin 2008, No 2B679B, <http://www.conseil-etat.fr/cde/fr/base-de-jurisprudence/>, 25 April 2009.

³ ‘Port (Bearing) of the Burqa’, *supra* note 1. The French values referred to in the tribunal’s decision note specifically essential values of the French community which in the case in point are the principles of gender equality (“valeurs essentielles de la communauté française, et notamment avec le principe d’égalité des sexes;” Conseil d’État, 2008). Throughout the article, ‘French values’ are understood to represent the values enshrined in the French civil culture notably in the August 1789 revolutionary Declaration of the Rights of Man and Citizen which affirms, among others, the right to freedom of religion. This aspect of secularism was further developed, culminating in the coining of the term *laïcité* in 1905, during the 3rd Republic, in the law separating Church and State, and has been recognised as a French value.

⁴ Anciberro, Jérôme, ‘Pratique radical au Conseil d’État’, *Témoignage chrétien 2006*, 1 July 2008, <http://www.temoignagechretien.fr>, 2 May 2009.

⁵ ‘Le port du voile intégral bouscule la tradition laïque française’, *Le Monde*, 22 June 2009.

⁶ Éric M. Raoult, *Rapport d’information fait en application de l’article 145 du Règlement au nom de la mission d’information sur la pratique du port du voile intégral sur le territoire national*, 2010. Paris, Assemblée Nationale, no. 2262, 26 January 2010, <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf>, 30 March 2011.

⁷ *Ibid.*

The 2010 report of the commission (*Burqa Report*)⁸ was adopted by the lower house⁹ in July 2010 in a vote of 335 in favour, 1 against,¹⁰ and in September 2010 by the upper house in a 246 to 1 vote.¹¹ In October 2010, the law, which stipulates fines of EUR 150 for women who breach it, and EUR 30,000 and a one-year prison term for men who force their wives to wear the *burqa*, was proclaimed legal by France's constitutional watchdog, the *Conseil constitutionnel*.¹² The rule's legality is expected to be challenged before the European Court of Human Rights (ECtHR), the decision of which is binding.¹³

At this background, the article sets out to examine the *Burqa Decision*, which represents a *judicial* stepping stone in the progression from the legislative act of 2004,¹⁴ forbidding the manifestation of religious symbols in public education institutions, and the 2010 legislation of the *Burqa* law. It is reasonable to expect that many of the issues discussed in this article will arise in the legal challenges to the new law.

The *Burqa Decision* was taken as a strong condemnation of a practise said to be symbolising the subjugation of the female to male domination. It was thus initially celebrated as a crucial act of empowerment for women in France but has also resonated across a Europe troubled by cultural and religious tensions associated with the steady growth in the Muslim population since World War II. The *Burqa Report*¹⁵ addresses the issue of the Muslim veil as debated in Europe, noting similar parliamentary debates in Belgium,¹⁶ The Netherlands,¹⁷ and Spain.¹⁸

⁸ *Ibid.*

⁹ *Projet de Loi interdisant la dissimulation du visage dans l'espace public*. Assemblée Nationale, no. 2520, 19 May 2010, <<http://www.assemblee-nationale.fr/13/projets/pl2520.asp>>, 1 April 2011.

¹⁰ 'Loi sur la burqa: vers un débat moins passionné', *Nouvel Observateur*, 6 July 2010, <<http://tempsreel.nouvelobs.com/index.html>>, 14 September 2010.

¹¹ 'French Senate Votes to ban Islamic Full Veil in Public', *BBC News Europe*, 14 September 2010, <<http://www.bbc.co.uk/news/world-europe-11305033>>, 1 April 2011.

¹² Décision n° 2010–613 DC (Loi interdisant la dissimulation du visage dans l'espace public), Le Conseil constitutionnel, 7 octobre 2010, <<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>>, 1 April 2011.

¹³ 'French Senate Votes...', *supra* note 11.

¹⁴ Loi n° 2004–228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics. Paris: (1) NOR: MENX0400001L, Version consolidée au 01 septembre 2004, <<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977>>, 29 April 2009.

¹⁵ Raoult, *supra* note 6.

¹⁶ On 29 April 2010, Belgium's lower house of parliament approved a ban on Islamic face-covering veils with an overwhelming majority. 'Divided Country Finds Consensus on Islamic Veils', 04/30/2010.

¹⁷ In return for Geert Wilders Freedom Party's parliamentary support, two centre-right parties hoping to establish a minority government, agreed on 30 September 2010 to ban the burqa in the Netherlands. Reuters news, 30 September 2010.

¹⁸ On 23 June 2010, the Spanish Senate approved a motion to ban the *burqa* and the Parliamentary Assembly called on the Council of Europe to outlaw "any usage, custom or discriminatory practice that limits the freedom of women". SpiegelOnline 06/24/2010.

The issue features also in debates outside Europe, for instance, in Canada,¹⁹ Turkey,²⁰ Egypt,²¹ and Syria (which recently promulgated a law prohibiting students and teachers from wearing the niqab).²²

The article dissects the judicial award in order to ascertain the validity of the claim concerning the empowerment of French women and women in general. It finds that although guided by the well-intentioned imperative of ‘protecting’ women, the tribunal misjudged the values at play thus producing consequences that outweigh the original intention of securing gender equality. The article further suggests that despite the strong assertions to the contrary by various actors—both ‘feminists’ and others—gender equality represented only one part of the broader goal the *Burqa* Decision sought to address. That article submits that the goal—of weakening the tension between immigrants and people of French stock, and integrating immigrants within the French culture of *laïcité*—would be more adequately decided in the French public debate and by the legislature rather than in the courtroom. Indeed, that is where it has subsequently been played out. However, even there the *Woman* has been featuring as the linchpin symbolizing the ‘other’, in an endeavour to explicitly articulate the French collective identity.

The article opens with a description of the *Burqa* Decision. This is followed by an analysis of the decision, focusing on the values and human rights principles raised therein. Next, the award is scrutinized against the socio-political, adjudicative, and legislative contexts wherein gender relations have been pivotal. This examination will show that what appears as a *prima facie* gender equality judgment may concurrently operate as an emasculating ruling.²³

¹⁹ In Canada, the issue of the Muslim veil has figured as one among several issues concerning freedom of religion—the Sikh ceremonial dagger known as the *kirpan*, and polygamy in a special Christian fundamentalist sect in Bountiful, British Columbia—which have been referred to court adjudication rather than attracted parliamentary debate. The *Globe & Mail*, 18 March 2011. Cf. note 14 *supra* for the *Shari’a* debate in Canada.

²⁰ The famous European Court of Human Rights (ECtHR) *Sahin* case exemplifies the complexity of the issue in the context of the Turkish polity and society.

²¹ Over the past several years, the wearing of the *niqab*, especially in schools, has been hotly and widely debated in Egypt, reaching also the Egyptian courts to determine whether to uphold the Education Ministry’s ban over the *niqab*. Edward Yeranian, ‘Veil Ban: Why Syria Joins Europe in Barring the Niqab’, *Christian Science Monitor*, 20 July 2010, <<http://www.csmonitor.com/World/Middle-East/2010/0720/Veil-ban-Why-Syria-joins-Europe-in-barring-the-niqab>>, retrieved 30 March 2011.

²² In an attempt to preserve its traditional role as the ‘Middle East’s bastion of secularism’, Syria joined the trend in some European countries in banning the *niqab* on 18 July 2011. The *Christian Science Monitor*, 20 July 2010. See also Albert Aji, Elizabeth A. Kennedy, ‘Syria Bans Full Islamic Face Veils at Universities’, *Associated Press*, 19 July 2010, <<http://www.freerepublic.com/focus/f-news/2555452/posts>>, 1 April 2011.

²³ See Kennedy for a framework exposé of several issues addressed in my article including human rights and gender equality, choice and submission, the role of the court, cost and benefits of the gender equality case, power distributions, the Western idea and realities of equality and freedom (or emancipation), etc. David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’, 6 *European Human Rights Law Review* (2001), p. 245.

II. What is the *Burqa* Decision?

In 2005, the French administrative immigration tribunal rendered a decree declining Mrs. Faiza M. (M) French citizenship on the ground of “failure to assimilate”.²⁴ That year, M filed an appeal challenging the denial of naturalization. In 2008, the Conseil d’État upheld the original award based on Articles 21–2 and 21–4 of the French Code Civil. Article 21–2 stipulates that a foreigner marrying a French national may after two years of uninterrupted marriage acquire French citizenship by declaration provided the French spouse maintains French citizenship.²⁵ Article 21–4 authorises the French Government to oppose the declaration should the Conseil d’État find and decree a “failure of assimilation other than linguistic”²⁶ on the part of the foreign spouse. In M’s case, the tribunal noted that although mastering the French language, M had nevertheless “adopted a radical religious practice, incompatible with the essential values of the French community, notably the principle of gender equality”.²⁷ This was considered sufficient justification to deny her citizenship. The emphases in the tribunal’s decree are worth noting. Accordingly, the original decree of 2005 had neither the object nor the effect of undermining the freedom of religion of M and consequently, did not infringe either the French constitutional principle of freedom of religious expression nor Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).²⁸

The media’s attention was drawn to the case both by the tribunal’s words as well as its silence. Specifically the wording—“*radical* religious practice”²⁹—was as important as the tribunal laconic notation of “radical”.³⁰ This left ample room for speculation to fill in the missing details obtained from interviews with government officials. Consequently, most media reports suggested that M was in the habit of wearing a *Burqa*³¹ covering her entire body and face, a detail of

²⁴ Conseil d’État 2008, *supra* note 2.

²⁵ *Ibid.*

²⁶ *Ibid.* (author’s translation).

²⁷ *Ibid.*

²⁸ *Ibid.*; Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms [Rome 4.XI.1950] as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13*, Registry of the European Court of Human Rights September 2003, <<http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>>, 16 September 2010.

²⁹ Conseil d’État 2008, *supra* note 2.

³⁰ *Ibid.*, (author’s translation).

³¹ “Covered by the garment of women in the Arab peninsula, a long gown up to the feet, a veil hiding the hair, the front and the coat all in one piece of fabric hiding the face.” Ségolène de Larquier, ‘Elle porte la burqa, la nationalité française lui est refusé’, *Le Point*, 17 July 2008, <LePoint.fr>, 29 April 2009. This was refuted by an NGO reporting to have interviewed M after the award was handed down, and specifying she used to wear a niqab (a head and face cover leaving the eyes visible). Bernard Fischer, ‘Arrêt du Conseil d’Etat concernant le refus d’octroi de la nationalité : Entretien du CCIF avec les membres de la famille’, Collectif contre l’islamophobie en France, *Agence de presse L’accueil*, 23 Juillet 2008, <<http://www.islamophobie.net/>>, 29 April 2009.

great significance especially ever since the promulgation of the 2004 law prohibiting the wearing of any religious insignia of any religion in public education institutions.³²

No less important was the tribunal's juxtaposition of the said radical religious practice with the French "principle of equality of the sexes".³³ Similar to the first part of the award, the tribunal remained lip-sealed also here. And again, it was the media which provided the details. M was identified as a thirty-two year old mother of three children. Described as a person who prior to her landing in France (from Morocco) was not in the habit of wearing a *burqa* but once in France, and along with her husband, subscribed to Salafism thus professing a literal interpretation of the Koran. M was portrayed as completely submissive to the men in her family, a condition she appeared to find normal; was reclusive and isolated from French society, and ignorant of secularism and her right to vote.³⁴

Known as the "*Burqa* case", the decision was hailed across France as a victory to feminists—both native French and immigrants. Fadela Amara, then French Secretary of State for Urban Policies and former president of the organisation *Ni Putes Ni Soumises* (Neither Whores Nor Doormats), welcomed the decree. To her—a long time feminist activist—the Islamic veil (regardless of style) symbolised women's oppression by men, not a true believer's religious practice, and M—a victim of that oppression.³⁵ This opinion was shared also by France's Minister of Higher Education and Research since 2007, Valerie Pécresse.³⁶

III. Essence of the *Burqa* Decision

The plain words of the decision reveal more than the eye meets, raising issues concerning French community values, religion and religious practice, freedom of religious expression, freedom of choice, principle of gender equality, and human rights and fundamental freedoms. Projected through the lenses of current French and Western public discourse, and interpreted in their socio-political and cultural contexts, they acquire further meaning. Thus, contrary to the celebratory 'feminist' tenor, the award was also understood as targeting specifically persons of Islamic faith and Islam³⁷ rather than addressing women rights. Consequently, at

³² Loi n° 2004–228 2004, *supra* note 14.

³³ Conseil d'État 2008, *supra* note 2 (author's literal translation).

³⁴ 'Burqa Le Conseil d'État et les femmes', *Actualités du droit*, 11 July 2008, <Actualités du droit.htm>, 29 April 2009.

³⁵ Cyriel Martin, 'Voile et burqa, même combat pour Fadela Amara', *Le Point*, 16 Juillet 2008, <Le Point.fr.>, 29 April 2009.

³⁶ 'Port (Bearing) ...', *supra* note 1.

³⁷ Anciberro, *supra* note 4; François de Lacoste Lareymondie, 'La burka at l'ordre publique', *Decryptage*, Fondation de service politique, 18 Juillet 2008, <www.libertepolitique.com>, 4 April 2009.

the backdrop of the immigration related tensions, the *Burqa* Decision itself has become a veil hiding rather than uncovering the core of the controversy.

Intrinsically, the *Burqa* question is about the notion of hierarchy of principles of justice governing the basic structure of society when faced with competing moral and religious convictions of society's citizens, a choice between right and good.³⁸ To address this challenge, the tribunal would have required legislation instructing it as to the French national conceptualization of 'good' and the 'associated rights', a law unequivocally applicable to the changing demographical, social, cultural, political, and religious circumstances in France. In the absence of such law, the tribunal was left with the uncomfortable choice of deferring judgment and calling upon the legislature to fill the gap, or interpreting the extant law and making the best out of an impossible situation. The tribunal opted for the second alternative, likely following two misled assumptions. First is the 'rights' assumption common to liberals and communitarians, avoiding passing judgment on the content of the goals of the rights in question.³⁹ This arises clearly from the award.

Second is the assumption of considering the rights as being equal, belonging on the same ontological level. Accordingly, gender equality has a uniform meaning implying a unitary set of consequences. However, while gender equity laws now exist in developed countries and internationally, compliance and implementation remain outstanding. And furthermore, 'feminism' is not monolithic as various feminist streams⁴⁰ have been competing for intellectual and activist leadership. A consequence of this 'potpourri' is the 'paradox dilemma'. Because many women rights are defined by women's subordination, when conceptualising women's identity, a tendency to overlook other possible conditions emerged. Consequently, appreciating women's identity runs the risk of being trapped in the absurdity of perpetuation.⁴¹ Undoubtedly, this reflects precisely the other challenge the tribunal was facing.

I now turn to discuss the following questions: Is the award concerned with gender issues? With equality? Religious faith and freedom of religious expression? Freedom of choice? Human rights and fundamental freedoms?⁴²

³⁸ Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1998).

³⁹ *Ibid.*

⁴⁰ A very rough sketch comprises of liberal, Marxist and dependency, and inter-sectional feminist theories, which correlate with the evolutionary path of feminist theory and its branching out into various streams. For an excellent review, see Celestine I. Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?', 41(2) *Harvard International Law Journal* (2000), p. 382. For feminist literature concerning religion and gender, see Tom Lewis, 'What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation', 56 *International and Comparative Law Quarterly* (2007), p. 395.

⁴¹ Wendy Brown, 'Suffering the Paradoxes of Rights', in Wendy Brown and Janet Halley (eds.), *Left Legalism / Left Critique* (Durham & London: Duke University Press, 2002), p. 420.

⁴² It is however reasonable to presume that French community values are compatible with the values

A. Equality: The Award and Gender Issues

‘Liberty, equality, fraternity’, the slogan of the 1789 French Revolution, is a French national maxim. The *Burqa* Decision focuses on equality, specifically gender equality. Practising the Islamic strict Salafist⁴³ interpretation was deemed incompatible with gender equality, a failure to assimilate.

To be sure, the French practice concerning gender equality remains still wanting. Since enfranchisement in 1944, French women have continued to enjoy only limited access to representative political participation.⁴⁴ This might explain the favourable public acceptance of the *Burqa* Decision. Concurrently, however, one might question whether the protection of gender equality is served by excluding women of a certain faith from French naturalisation. Wouldn’t tackling the manifestations of gender inequality as applicable universally to *any* woman be more conducive to gender equality?

The (perceived or real) distinction between women of different cultures—of juxtaposing Western with non-Western, and ‘white’ with ‘non-white’, women—features as a normative dilemma in feminism.⁴⁵ The *Burqa* Decision is a concrete example in which the unsettled dilemma renders the award incoherent. If practising Salafism conflicts with French values, then the conflict would apply not only to foreigners but also to French citizens. What would the legal implications be with regard to *French* women observing Salafism? In M’s case, what message did the tribunal send to any daughter born to M in France (hence citizen)? From this perspective, the award is discriminating between women based on their religion; it does not contribute to the safeguarding of gender equality *per se*, nor does it empower French women of Salafist faith.

Liberal feminism originated in the different treatment of women and men and has served as the common denominator linking all subsequent feminist approaches and theories. Accordingly, Salafism as the award’s only source of conflict with

and principles mentioned above, which form part of contemporary Western and universal values. After all, the French Revolution was their major articulator and promoter.

⁴³ A section of the *Burqa Report* is devoted to the description of the *Salafist* movements in Islam, deriving from the teachings of the Sunni Muslim legal school of known *hanbali* which originated from the teachings of Ahmed Ben Hanbal. It preaches a literalist and purist reading and practise of Islam, namely a ‘*salafi*’ interpretation which means the truthful and the pure. Founded in Egypt in 1928 by Hassa al Banna, the *Muslim Brotherhood* political movement represents the first organisation to espouse the *salafi* teaching. It also represents an anti-European colonial expression, challenging what its adherents consider to be a moral decadent European influence. This influence can be countered only through Islamic revival and purification and rebirth, following the historic model of the Seventh Century Islamic Caliphate. In this pursuit, the various groups practising *Salafism* operate independently but share a missionary zeal wherein the veil (*Burqa* or *niqab*) is designed to separate the Muslim community from the rest of society. (*Burqa Report*, 52–67)

⁴⁴ Joan Wallach Scott, ‘The Politics of the Veil’, *Conversations with History*, 2009. Institute for Advanced Studies, UC Berkeley, online (9 March) at: <http://www.youtube.com/watch?v=MrknwN18184>. Accessed: 2 May 2009.

⁴⁵ Susan Moller Okin, ‘Feminism, Women’s Human Rights, and Cultural Differences’, 13(2) *Hypatia* (1998), p. 32.

French values must apply to women *as well as* to men, all persons enjoying legal equality. Absurdly however, the *Burqa* Decision leaves M's husband, a Frenchman practising Salafism, legally shielded in the religious practice the ruling deems radical and antagonistic to gender equality. Indeed, in a prior appellate decision, the same tribunal reversed a negative naturalisation award in the case of a Tunisian man married to a French woman, both observing a strict stream of Islam.⁴⁶

Over time, sensitivity to real conditions in different cultures resulted in a pluralist feminism providing for various understandings of patriarchy and subordination. The *Burqa* Decision reflects this developmental stress: Had patriarchy and submission figured as the key concern, then the marital relationship in M's family, not M's religious practice alone, would have been examined in further depth and compared with the corresponding French culture. Had the tribunal been cognizant of this pluralism it might have served gender equality by refraining from addressing religious practice, or alternatively, instructing both husband and wife to cease the practice (an impossible option under the circumstances).

B. Freedom

Freedom, the other value in the French Revolution's motto, is literally absent from the *Burqa* Decision. However, since it was raised in the evidence filed with the court, the award's silence speaks volumes to the interpretation of freedom—freedom of expression, freedom of religion, and freedom of choice.

Three freedoms, so cherished in the liberal and democratic State, represent the political choice of a Europe ravaged by religious wars. To balance these freedoms and contain the threat of religion, the freedoms were allocated to two domains: Religious freedom came under the purview of the Church and the private sphere; freedom of choice and freedom of expression—subordinate to the public realm, the preserve of the State. In France, this separation is reflected in the republican idea of *laïcité*. However, neither political secular formula nor uniqueness of *laïcité*, have guaranteed an easy 'compartmentalisation'.⁴⁷ To be sure, freedom of religion represents a particular type of freedom of thought and expression. Religious faith may be known only to the practising person; communicated to others in the private realm; or manifested in public. This tripartite quality of religion underlies the difficulty in reconciling one's practice of faith with freedom of choice and expression for religion is both private and concurrently intrinsically public, connecting the individual with a living community. Article 9 of the European Convention on Human Rights⁴⁸ settles the dilemma by subjecting the right of religious freedom to legal democratic provisions in the interest of the public:

⁴⁶ 'Burqa Le Conseil d'État et les femmes', *Actualités du droit*, 11 July 2008, <Actualités du droit.htm>, 29 April 2009.

⁴⁷ Dawn Lyon and Debora Spini, 'Unveiling the Headscarf Debate', 12 *Feminist Legal Studies* (2004), pp. 335–336.

⁴⁸ *Supra* note 28.

Freedom to *manifest* one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁴⁹

This liberal approach invokes respect for the religious *person* and *personal* dignity as associated with the capacity to choose, not respect for any religion and its content.⁵⁰

The Conseil d'État maintained a similar view as the award's explicit reference to Article 9 suggests. Notably, the tribunal followed the European Court of Human Rights (ECtHR) rulings concerning the Muslim veil.⁵¹ Avoiding the question of “why religious freedom is valued in the first place”,⁵² and exploring “[t]he philosophical underpinnings”⁵³ of religious freedom, it instead chose to focus on the secondary issue of religious practice. Compared, for example, with judgments on freedom of political expression or private consensual sexual conduct,⁵⁴ this pattern in both ECtHR jurisprudence and *Burqa* Decision conveys a sense of legal uncertainty.

1. *The Award, Religion, and Freedom of Religious Expression*

By declaring M's radical religious practice as the key ‘deficiency’, the tribunal turned directly to the issue of freedom of religious expression, skipping consideration of the place of religion in society or in relation to immigration. Although the French republican and secular judge is authorised to determine the confines of religion and set limits to religious practise,⁵⁵ *how* a tribunal determines the threshold beyond which a practice transcends acceptable limits and turns radical, is certainly material. This question remains unanswered in the *Burqa* Decision.

Two facts in the government's submission to the tribunal proved critical: (a) The visible factor: M's religious dress code interpreted as the external manifestation of (b) her total and undisputed submission to the men in her family.⁵⁶ M was also found ignorant of her civil rights.⁵⁷ In France, these elements epitomise cultural conduct typical of an unequal gender relationship.⁵⁸ Because the tribunal kept silent on the case's factual details, it is possible to only speculate that the award was intended to uphold the private—public divide, thus reaffirm the supremacy of the French republican and secular ethos. Consequently, but for being a case on immigration, the award resulted in delimiting M's freedom of

⁴⁹ *Ibid.* Emphasis added.

⁵⁰ Sandel, *supra* note 38, p. xii.

⁵¹ Lewis, *supra* note 40.

⁵² *Ibid.*, p. 396.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*; Sandel, *supra* note 38.

⁵⁶ De Larquier, *supra* note 31.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

religious expression in spite of purporting not to have rendered judgment on her *faith*.⁵⁹

Were the tribunal to engage in an intersectional analysis, a different judicial outcome would not have necessarily been guaranteed. Possibly, an intersectional approach might have assisted the court in exploring the complexity of religion and gender. Engaging in an in depth subjectivity analysis of M might have lead it to consider whether the observance of any certain faith's practice could be understood in terms of 'choice', and to what extent.⁶⁰ After all, M was situated in a particular (minority) context—an immigrant to France from a Muslim country, apparently comfortable in her culture, and married to a Muslim French citizen who was freely practising what the tribunal deemed a radical religious practice. Theoretically, true to French culture, and if mindful of intersectionality, the tribunal might have offered an interventionist award respecting M's agency. For instance, M could have been given the very difficult choice between education and government support while assimilating to French secularism as a condition of citizenship, or maintaining her religious practice with the consequences of forfeiting naturalisation. Thus, M would have been exposed to the French notion of gender equality, rather than being denied this opportunity.

2. *The Award and Freedom of Choice*

The 2004 prohibition of public wearing of religious insignia was designed to protect the public against intrusion by the private caused by the manifestation of one's faith in public educational institutions. The *Burqa* Decision reinforces this legislative trend which places religious freedom and freedom of choice on the same ontological level. The government investigation found M's submission to the men in her family and her religious practise to be wilful and independent. The tribunal seems to have accepted this as evidence of her personal and free choice. It did not *query* whether M's submission represented an act of free choice or whether it was coerced; whether M observed her religion voluntarily yet was forced to submit to the men in her family; or vice versa. Considering French language proficiency as the key indicator to infer voluntary choice, but ignoring the possibility that unawareness of her civil rights might be attributed to conditions other than language and beyond M's control, reflects a selective judicial approach. Expanding the scope of inquiry might have disclosed whether, on the contrary, M *lacked* freedom of choice. While pursuing such adjudicative exploration might have necessitated further intrusion into M's privacy (perhaps illegal) and proven excessive, contending with the succinct observation that in spite of her knowledge of French, M *nevertheless* adopted a radical practise of religion,⁶¹ tilted

⁵⁹ 'Port (Bearing) . . .', *supra* note 1.

⁶⁰ Anastasia Vakulenko, '“Islamic Headscarves” and the European Convention on Human Rights: An Intersectional Perspective', 16(2) *Social & Legal Studies* (2007), p. 182.

⁶¹ Raoult, *supra* note 6.

the award to the opposite extreme, suggesting a presumption rather than reliance on sufficient factual grounds. Therefore, appraised from an intersectional perspective, the award cannot be construed as protecting gender equality on the basis of a woman's agency.

Freedom of choice is antecedent to freedom of religion only where the latter results from an individual's *choice* of religion and its practice. Accordingly, freedom of religion denotes a person's liberty to maintain any faith and observe it in any form, at least in private. Restrictions upon that freedom are hence akin to those placed on other freedoms (for instance, the prohibition of homicide for religious rituals grounded in the supremacy of the right to life and protection against bodily harm, which pre-empt the right of individual freedoms). However, where religious faith is pursued not out of 'rational' choice, religious freedom is ontologically different from freedom of choice. Religious observance is often "a constitutive end",⁶² essential to the believer's sense of good and identity.

What makes a religious belief worthy of respect is not its mode of acquisition—be it choice, revelation, persuasion, or habituation—but its place in a good life, or the qualities of character it promotes, or [from a political point of view] its tendency to cultivate the habits and dispositions that make good citizens.⁶³

From this perspective, freedom of choice looks quite different from religious freedom. This renders the tribunal's line of argumentation and finding of failure in M's assimilation efforts irrelevant. Indeed, the Conseil d'État ignored the fact that M owed duties she might have been unable to both choose and renounce, "even in the face of civil obligations that may conflict".⁶⁴

3. *The Award and Human Rights and Fundamental Freedoms*

The *Burqa* Decision should remind gender equality protagonists that the human rights "safety net" does have holes. Since 1948, human rights and fundamental freedoms have been codified in various international and regional documents.⁶⁵ In 1980, France became party also to more specific human rights treaties.⁶⁶

⁶² Sandel, *supra* note 38, p. xii.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, p. xiii.

⁶⁵ United Nations Universal Declaration of Human Rights (UDHR) December 10, 1948 and as amended, November 1, 1998, <<http://www.un.org/Overview/rights.html>>, 15 September 2010; ECHR, *supra* note 28; Convention for the Protection of Human Rights and Fundamental Freedoms [Rome 4.XI.1950] as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13, Registry of the European Court of Human Rights September 2003, <<http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>>, 16 September 2010.

⁶⁶ Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, GAOR Res. 2200A (XXI) of 16 December 1966, <<http://www2.ohchr.org/english/law/ccpr.htm>>, 1 April 2011; *International Covenant on Economic, Social and Cultural Rights*, *ibid.* and; *Optional Protocol to the International Covenant on Civil and Political Rights*, *ibid.*

A signatory to the ECHR,⁶⁷ France is bound especially by four articles relevant to the *Burqa* Decision: Article 8—Right to respect for private and family life, Article 9—Freedom of thought, conscience and religion, Article 10—Freedom of expression, and Article 14—Prohibition of discrimination. Except for Article 14, a party's duty to protect these rights depends on its national interpretation.

The *Burqa* Decision refers only to Article 9. Grounding the objection to M's naturalization in her inability to integrate into French society and placing the burden of integration solely on her; and justifying the decision as an expression of France's commitment to gender equality as per Article 9, ignores the strict duty to non-discrimination stipulated in Article 14. This puts in question the award's compliance with France's international obligations. A brief examination of the award's compatibility with the international human rights and fundamental freedoms regime⁶⁸ raises the following issues:

(a) Universalism

The liberating effect of the award is diminished when seen from the angle of the feminist conceptualisation of human rights and development. Notably, can there be a universalist approach to gender equality when women (and men) of different cultural, social, and religious backgrounds are lumped together in the ontology of *human* rights? In other words, is it possible to re-conceptualise human rights without losing sight of women's rights? How? To be sure, feminists, who have coined the well-known slogan "women's rights are human rights", have identified an array of scenarios and contexts in which the universalist presumption of a single comprehensive interpretation of gender relations as a human rights issue has run afoul. For instance, in the majority of judicial procedures similar to M's, rulings were adopted by male judges and reflected gender bias and the marginalisation of women's perspectives.⁶⁹ Often, the distinction between women of different cultures played a decisive role; routinely, two types of women were juxtaposed—Western/European against the Oriental/migrant.⁷⁰ Not unlike these cases, the *Burqa* Decision as well, at least implicitly, "berate[s] Muslim women for failing to conform to a Western image of how women should behave".⁷¹ This judicial tendency has been criticised for masking an imperialistic approach clothed in militant secularism.⁷² Appropriating gender equality for purposes of

⁶⁷ A member of the Council of Europe and the European Union, France may be bound in 'first international order' to the European legal *acquis* (heritage), including the ECHR.

⁶⁸ For an interesting account and analysis of the French 2004 law and the *Burqa* Report and the question of whether they accord with French international legal treaty commitments, see Saxena.

⁶⁹ Lyon and Spini, *supra* note 47.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, p. 339.

⁷² I am indebted to one of the anonymous reviewers for this comment.

justificatory human rights rhetoric⁷³ (deliberately or ignorantly) perpetuates discrimination and oppression of women albeit in alternate ways and contexts.⁷⁴

(b) Human Rights in General

The human rights discourse has been faulted for failing to identify abuse and disregard of women as severe human rights violations.⁷⁵ Likely culprits of such violations are family members but also political institutions including government. The two types of actors are inter-connected for where family members (men and/or women) actively engage in violating women's human rights in the private realm of a woman's home, or remain silent witnesses, an often passive government is failing in its duty to effectively intervene in the private sphere thus permitting the transgression to continue.⁷⁶ Where a woman is liberated in her home, she is more likely to participate also in the public sphere.⁷⁷ By ruling "who rightfully belongs in the public space",⁷⁸ the *Burqa* Decision reinforces M's exclusion: In addition to the *salafist* dress code designed to isolate the believer from main stream society, the denial of naturalisation which prevents her from enjoying citizenship rights further contributes to her banishment. To other women marginalised at home, the award may be sending a disappointing message.

The promotion of women's dignity advocated by both cultural relativists and intersectionalists⁷⁹ has at times muddied the 'human rights *cum* gender equality' discourse. Other feminist thought has been criticised of concealing an imperialist agenda, Islamophobia, or inadvertently colluding with governments oblivious to women rights. "Being tough on Muslims"⁸⁰ has been viewed as serving Western governments catering to the domestic electorate by mobilising national identity, while concurrently scoring points in foreign relations implicitly signalling their support in the War on Terror.⁸¹ This intra-feminist debate contributed to entrenchment of gender discrimination.⁸² Applying this analysis to the *Burqa* Decision suggests that had the tribunal cast the question of gender and religion in cultural relativist and intersectional human rights phraseology, it would have found, as it indeed did, that M's agency would more suitably be accommodated in another country more reflective of her particular subjectivity.

⁷³ Sherene H. Razack, 'The 'Sharia Law Debate' in Ontario: The Modernity/Premodernity Distinction in Legal Efforts to Protect Women from Culture', 15(3) *Feminist Legal Studies* (2007), p. 32.

⁷⁴ Lyon and Spini, *supra* note 47, p. 339.

⁷⁵ Okin, *supra* note 45.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Razack, *supra* note 73, p. 25.

⁷⁹ Vakulenko, *supra* note 60.

⁸⁰ Razack, *supra* note 73, p. 25.

⁸¹ *Ibid.*

⁸² Oonagh Reitman, 'Cultural Relativist and Feminist Critiques of International Human Rights—Friends or Foes?' 100(1) *Statsvetenskaplig Tidskrift* (1997), p. 100.

(c) Human Rights Law and Development

A frequent argument in the feminist discourse notes the disjunction separating the human rights and development approach from the respective legal discipline.⁸³ Although intrinsically universal, human rights' practical protection is entrusted in the hands of individual national governments. This has not been lost on the CEDAW⁸⁴ drafters who, in an effort to bolster state accountability and compliance, urged states to eradicate gender discriminatory customs and practices.⁸⁵ France ratified the CEDAW in 1984, and the proponents of the *Burqa* Decision may well be contending with the legal act as proof of France's compliance with its international duty to protect women and gender equality.

(d) Human Rights as Culturally Conditioned

Another approach to women rights as human rights has sought to supplement the exclusive focus on national and international human rights legislation with a sociological/anthropological cross-cultural dialogue.⁸⁶ Deploring "the troubling way rights discourse not only reinforces the fiction of a monolithic subject but potentially regulates us through that monolith",⁸⁷ the cultural discourse might potentially effect a breakthrough by advocating interaction and dialogue. Being less formalistic, it attempts to incorporate gender equality within human rights by accommodating a woman's needs and wants as forming part of her local cultural environment while safeguarding her enjoyment of benefits gained from international and national legal achievements. The cross-cultural dialogue approach is in the early stages of practice by community-based groups.⁸⁸ Had it been available to the tribunal to consider, M's case might have been decided differently.

IV. What Can We Take from the *Burqa* Decision?

The *Burqa* Decision represents an episode symptomatic of the so-called 'clash of civilization'. The contact between different cultural groups has seen tension mounting and spanning across Europe and beyond.⁸⁹ In this context, the perceived

⁸³ Nyamu, *supra* note 40; Brown, *supra* note 41.

⁸⁴ United Nations Convention on the Elimination of All Forms of Discrimination Against Women, New York 18 December 1979, GAOR Res. 34/180, <<http://untreaty.un.org/cod/avl/ha/cedaw/cedaw.html>>, 16 September 2010.

⁸⁵ Nyamu, *supra* note 40.

⁸⁶ *Ibid.*

⁸⁷ Brown, *supra* note 41, p. 429.

⁸⁸ *Ibid.*

⁸⁹ Elaine Sciolino, 'Britain Grapples with Role for Islamic Justice', *New York Times*, 19 November 2008; Vakulenko, *supra* note 60; Lieve Gies, 'What Not to Wear: Islamic Dress and School Uniforms', 14 *Feminist Legal Studies* (2006), p. 377; Razack, *supra* note 73; Lewis, *supra* note 40; and Ed Husain, *The Islamist* (London: Penguin Books, 2007).

threat to national identity has unfolded, among others, also in the form of strong anti-Muslim immigrant sentiment sweeping throughout Europe. It is against this backdrop that the *Burqa* Decision was decreed.

Gender relations, in fact, the *Woman*, have once again become the paramount symbol articulating the social and political tension and representing one of the chief outlets for the pent up stress. Displayed in confrontations at schools and hospitals, where secular public institutions' 'standard operation procedures' have been challenged by religious demands,⁹⁰ tension had more than once escalated into physical violence. This became exposed in the disgruntled French *banlieues*,⁹¹ in racial violence in British cities, violent attacks on foreigners in Germany, hostility toward distinctly 'ethnic foreign' neighbourhoods in Italy, to name a few. A significant threshold was crossed as the friction escalated beyond verbal dispute over to violent outburst, with the 2004 assassination of Dutch film maker Theo van Gogh by the Dutch citizen Mohammed Fahmi Bouyeri. The same year, the tension produced the promulgation of the 2004 French 'veil law'.⁹²

It is against this backdrop that the Conseil d'État chose to strike a new 'balance of rights'. Consequently, reaffirming secularism's supremacy over religion came at the expenses of the M's right to non-discrimination. What this is re-affirming is that also in France, similar to other cultures and regardless of socio-political context, religion, or political regime, the legal status of women figures as a pivotal concern, serving as a political axe to grind other—not gender related—power rivalries. The *Burqa* Decision is one example among many (and an important one for it is judicial hence authoritative) of struggles between social and political forces seeking to transform (or preserve) the balance (or imbalance) of power in the relationship of State and Church. Similar to past struggles, in the current

⁹⁰ In Canada, an initiative to formalise legal recognition of Sharia law in Ontario resulted in the decoupling of any religious adjudication from the State's legal realm, (Mariam Pal, 'Faith-based Arbitration in Canada and Beyond: Recent Developments and Future Prospects', presented to the BCCBA ADR Section, Vancouver, and the Institute for Transborder Studies, Kwantlen Polytechnic University, 24 and 25 January 2006 (notes filed with the author); Margaret Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion. Submitted to the Attorney General of Ontario, December 2004*, <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>> , 2 May 2009; Razack, *ibid.*) and in Quebec, the struggle to come to terms with Muslim migration is being debated in the legislature as well as adjudicated in an attempt to define the scope of 'reasonable accommodation' (Graeme Hamilton, 'Unveil, Quebec says', *National Post*, 25 March 2010; Marian Scott, "Niqab heats up rights controversy row over veil; Woman refused to uncover face in French class", *The Gazette*, 3 March 2010).

⁹¹ Noemi Gal-Or and Bernhard Kiotus, 'Urban Justice and Sustainability', presented at Conference on the Sociology of Urban and Regional Development, University of British Columbia, 22–25 August 2007, Vancouver, BC, Canada, August 2007 (filed with author).

⁹² This inter-faith stress surpasses Christians versus Muslims tension and is running within Christian communities as well, for instance, within particular Christian communities in Canada, concerning polygamy. Susan Drummond, 'A Marriage of Fear and Xenophobia. Our Criminalization of Polygamy Isn't about Protecting Women', *Globe and Mail*, 6 April 2009; Petti Fong, "'Bountiful" Sect Leaders Charged with Polygamy', *Toronto Star*, 8 January 2009 <<http://www.thestar.com/article/563546>>, 8 January 2009), and in similar situations in Utah, Idaho and Arizona in the United States.

round as well, women have continued to furnish the conspicuous bone of contention.

Consequently, court decisions addressing gender issues must not be taken at face value. As submitted here, the *Burqa* Decision is not primarily about empowering women and securing gender equality. It is first about competing worldviews and political institutional, ideological, cultural, and religious power contests. Only in second place is the award concerned with promoting or preserving the legal status of women as embedded in those worldviews. Thus, if women are being empowered, it is generally as a by-product, and where they are so, the support benefits only certain women and not others. Furthermore, and at the same time, the *Burqa* Decision suggests that even where the road to gender equality is paved with good intentions, the opposite result might ensue: Women may still be patronised due to myopia in distinguishing freedom of choice from freedom of conscience.

V. Conclusion

As this article is being written, the French government finds itself in the midst of a collective soul searching enterprise designed to tackle the ‘*Burqa*’ issue. In preparation for the 11th of April, 2011, the date of entry into force of the *Burqa* ban, the government has been distributing some 100,000 handbills and 400,000 pamphlets to remind the population of the ban.⁹³ Posters in public places have been announcing the “Republic’s seeing itself with an uncovered face” (“*La République se vit à visage découvert*”),⁹⁴ a message reinforced on a government website entitled identically and with a similar URL,⁹⁵ which provides also a Q&A section. Law enforcement authorities have been instructed to administer the law by summoning veil-wearers to the police station to ask them, out of the public eye, to remove the veil for identification purposes, and required them to keep it off. Should the wearer refuse to comply, a fine of up to 150 EURs will be charged.⁹⁶ At the same time, as part of his 2012 election campaign, President Sarkozy has been putting special emphasis on the role of Islam in a secular society.⁹⁷ And less than five months before the entry into force of the *Burqa* law, two judicial decisions—one

⁹³ Bruce Crumley, ‘New Info Campaign Tells French Citizens How to Be Burqa Vigilantes’, *GlobalSpin*, 3 March 2011, <<http://globalspin.blogs.time.com/2011/03/03/new-info-campaign-tells-french-citizens-how-to-be-burqa-vigilantes/>>, 30 March, 2011.

⁹⁴ ‘Ce que dit la loi sur l’interdiction du port du voile intégral’, *L’Express.fr*, 3 March 2011, <http://www.lexpress.fr/actualite/societe/ce-que-dit-la-loi-sur-l-interdiction-du-port-du-voile-integral_968254.html>, 30 March 2011.

⁹⁵ <http://www.visage-decouvert.gouv.fr/index.html>.

⁹⁶ ‘Ban on Wearing Face Veils to Come into Effect April’, *France 24*, 3 March 2011, <<http://www.france24.com/en/20110303-ban-wearing-full-islamic-veils-enforced-april-burqa-niqab-france-law>>, 30 March 2011.

⁹⁷ *Ibid.*

in a labour dispute concerning a nursery teacher who refused to remove her full veil while at work, the other dealing with a fully veiled person while driving—have ruled against the petitioners.⁹⁸ To be sure, this is the tip of the iceberg in France's search for ways to sustain its *laïcité*, its national identity, and protect itself against real or perceived threats. Moreover, it is reasonable to expect that France will not feature as the only scene where the repercussion of its *Burqa* ban will be played out. If experience offers any indication, the law's enforcement stands to be challenged at the ECtHR.

This article has shown that the *real* primary dilemma underlying the *Burqa* Decision consists in the re-conceptualisation of the separation of State and Church 'à la French'. Sandel's insights provide some guidance; his objections to "liberalism conceived as a political conception of justice"⁹⁹ are instructive about the pitfalls inherent in this pursuit.

Here is what the debate should address if it is to avoid the scandalous and the "abstract and decorous",¹⁰⁰ and elicit what is essential and moral for the French, and for that matter, liberal democratic society. It requires (a) to strike a choice concerning which of the contending moral or religious doctrines is true, (b) to acknowledge that while political liberalism endorses pluralism as a foundation of its structure of justice, morality and religion are not pluralistic, and (c) to consider that the political liberal ideal of public *reason* excludes moral and religious idealism and is thus unduly restricting and impoverishing the political discourse.¹⁰¹

The other issue prompted by the *Burqa* Decision—on its face its primary concern, but as argued here, in fact, only of secondary importance—is gender equality. Not only is the *Burqa* Decision concealing a larger and more profound cultural (and racial and religious) tension; not only is it ambivalent with regards to women's rights; but through the discourse within which it has been couched, and which it has subsequently elicited, it has served also to amplify the tensions within the feminist discourse. To be sure, the award remains just as ambivalent when addressed from the various feminist theoretical perspectives.

This article set out to critically study the empowerment of women's legal status via the jurisprudential route, and in course of the research found it to be caught in a theoretical paradox.¹⁰² The conundrum of 'freedom of choice versus religious freedom, cum human rights, gender equality paradox' in the feminist discourse requires compromise. Feminist thought, which has always been intertwined with

⁹⁸ Joseph Bamat, 'Islamic Veil Trials Illustrate Challenges of Upcoming Ban', *France 24*, 14 December 2010, <<http://www.france24.com/en/20101214-burqa-ban-france-islamic-veil-trials-nantes-mantes-muslims-rulings-society-islam>>, 30 March 2011.

⁹⁹ Sandel, *supra* note 38, p. 196.

¹⁰⁰ *Ibid.*, p. 216.

¹⁰¹ *Ibid.*

¹⁰² Brown, *supra* note 41.

feminist activism, faces the option of either negotiate, strategise, and adhere to a provisional ‘main stream’ feminist approach until such time when the conditions ripen for a change of course, or risk struggling with the uncontrolled consequences flowing from the perpetuation of the paradox.

In conclusion, placed within the larger Western context of the headscarf debate, the *Burqa* Decision accomplished the following feats: While encouraging secular women, it also stated the obvious—that gender equality masks the political struggle between secularism and religion, nationalism and immigration. While serving a most powerful tool, gender equality does not necessarily figure as the ultimate goal. In such context, relaxing the tension and doing justice to gender equality is a matter for any country’s public debate and its legislature, not the court.

