

« Banning Burqas »

Public order v. Individual freedom ?

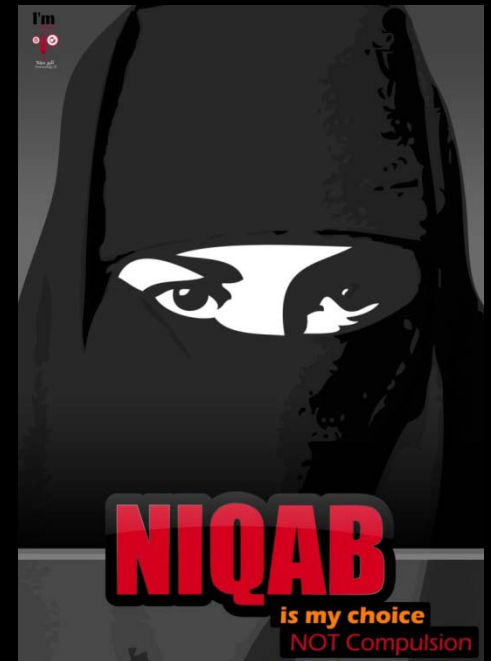
François H. BRIARD

Supreme Court Attorney

France

A lecture sponsored by THE FEDERALIST SOCIETY

On April 11th, 2011, face concealment in French public space will be a criminal offense





Five preliminary requirements

1. The French respect and protect religious freedom;
2. The new law is related to face concealment, not to religion;
3. The law was almost unanimously approved;
4. The law has nothing to do with secularism which is a duty for the Government only;
5. BRIARD is respectful to individual freedom and beliefs.





BADIA

NAJLAA

SALIMA

LIVING TOGETHER
WITH MUSLIMS



Where does the statute come from ?

What does it say ?

Where does it go ?



Why such a law ?



French Islam or Islam in France ?

- 5-6 million, about 10% of the population;
- very related to North African immigration and rebuilding of France in the Sixties;
- high fertility rate;
- 99% integrated and feeling French citizens;
- 1900 women (+/-) wearing full veil;
- most of them very young and recently converted.





**99% of the French Muslims are moderate-modern
and well integrated**

The different veils





Daily life in France ?

Lyon, 2010



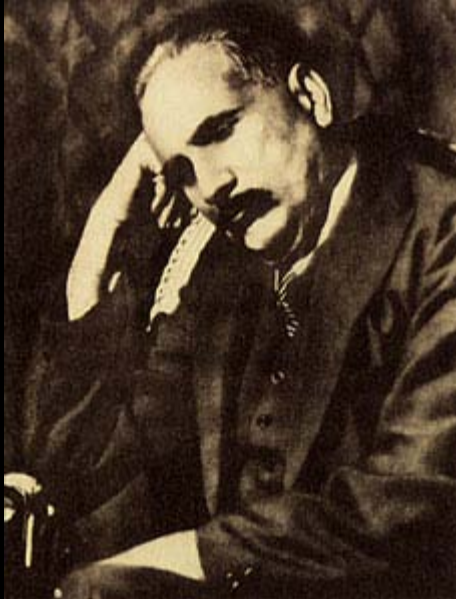
The Burqa is not welcome in France

Nicolas SARKOZY

June 2009



« Full veil is religious pathology... a subjective radicalization of The Qur'an, a wrong reading of Sourat 24, 30-31 »



Abdennour BIDAR, Muslim, Philosopher, 35, specialist of Muhamad IQBAL, Muslim poet and philosopher (1873-1938)

Declaration to the French Parliament

« *Risky way* » says the Conseil d'Etat



Jean-François COPE
leader on the ban



No one in public space is allowed to be dressed in a way to conceal the face



“Parliament has felt that such practices are dangerous for public safety and security and fail to comply with the minimum requirements of life in society”





Calendar 2009-2010 for the face concealing ban

*The law will become enforceable on
April 11, 2011*

Step 1: special mission to investigate and hearing, June 2009;

Step 2: legal opinion of the Council of the State:
*quite against general ban but thought mainly
to public order as a possible way, March 2010;*

Step 3: unanimous vote of the French Parliament
in favor of Republican values, May 2010;

Step 4: debate and vote of the law: **general ban**, June 2010;

Step 5: green light of the Constitutional Court, except
for places of worship. October 2010.



WHAT DOES THE LAW SAY ?

- ❖ No one shall hide his-her face in public space, i.e public ways and all premises open to the public or used for government purposes;
- ❖ Some legal exceptions;
- ❖ Punishment: fine (150 Euros) and-or citizenship training;
- ❖ Very pedagogic and moderate intructions given by the Prime Minister to enforce the law.

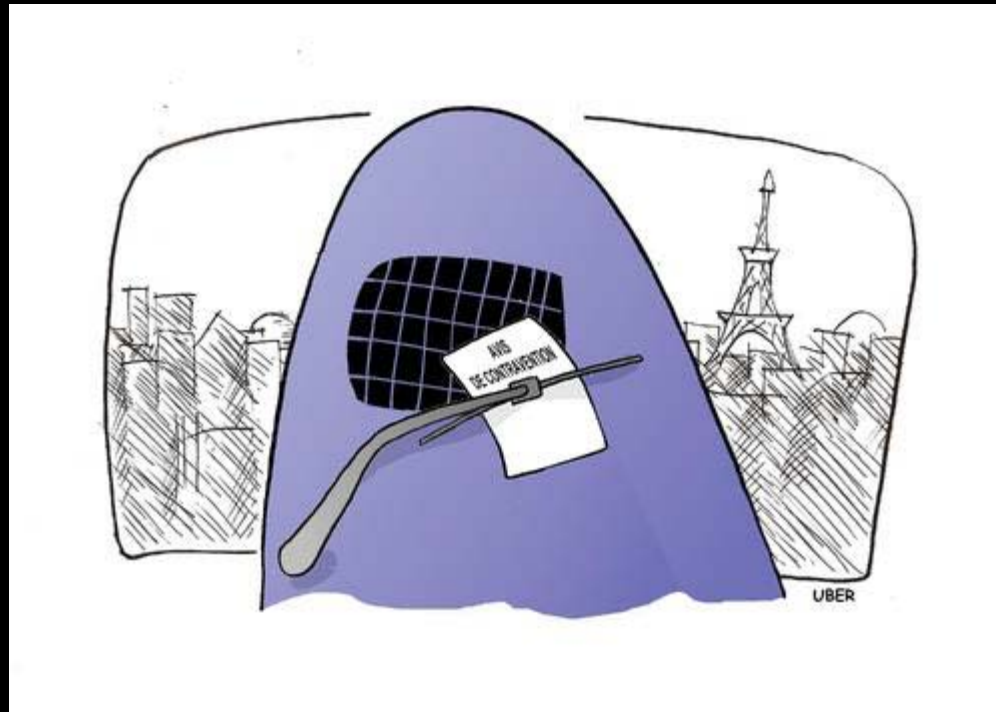


No face concealing in public space



The law is generic: not about religion, not about Islam, it is about security,
public order and minimum requirements to live together
Masks, Christian mantillas, hogs, burqas...will be treated the same way





Simple fine, 150 €uros
and-or public service duty,
no custody

30.000 Euros fine and 1 year in jail

for anyone forcing a person to hide the face





Pedagogy and softness....





The French have a “*Republican vision of social life*” as said Prime Minister FILLON. We spent centuries to make unity on our land, see MICHELET and RENAN.

We are a “*holist*” nation and not an individualist one (cf. the distinction made by René DUMONT between individualism and holism”).

The soul of FRANCE is Liberty, Equality
and FRATERNITY





Public order is two:

- material public order, security and safety;
- non material public order, i.e minimum requirements of an acceptance of the community

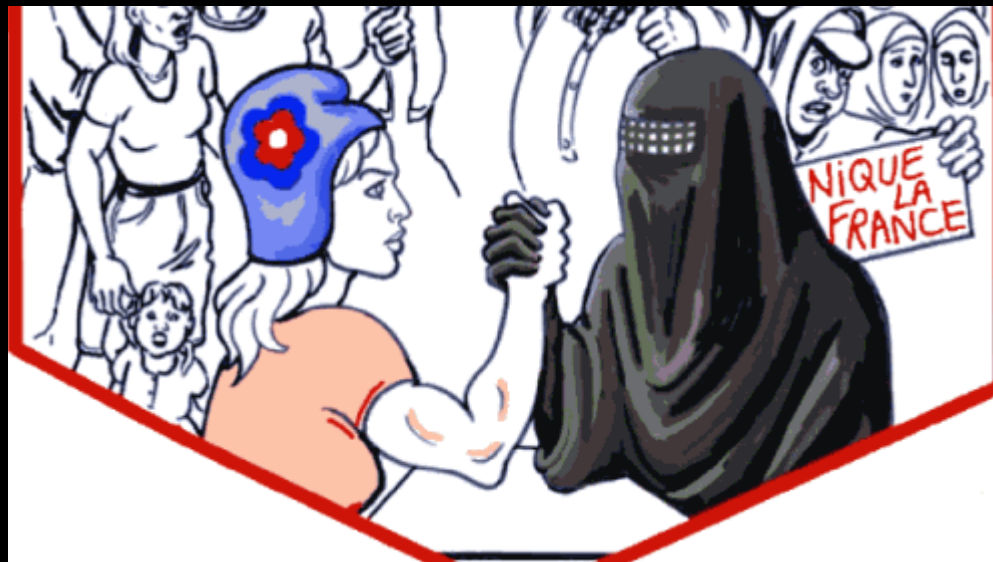
The name of this is « fraternity »

Americans replaced « **fraternity** » by « **The pursuit of the happiness** »

The French do not want that kind of fight: not only security and safety justify the law but mainly the idea of a social contract. We cannot live in peace with people exhibiting sex in public, with people disrespecting the dead, with people insulting national symbols, with people excluding themselves from the community by hiding their face, denying the society they belong to.

Face concealing is beyond free speech.

Banning face concealing is related to peace and “living together”





Public order ?

The French would not accept
this...





**Face concealment prohibition
in the US....**

What about the Constitution ?





1/The law is generic and about face concealment: not a matter of religious freedom, free speech, privacy, secularism or dignity;

2/ Article 4 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims : "*Liberty consists in being able to do anything which does not harm others: thus the exercise of the natural rights of every man has no bounds other than those which ensure to other members of society the enjoyment of these same rights. These bounds shall be determined solely by the law*".

3/ Article 5 of the same Declaration proclaims: "*The Law shall prohibit solely those actions which are harmful to society. Nothing which is not prohibited by law shall be impeded and no-one shall be compelled to do that which the law does not prescribe*".

Article 10 proclaims: "*No one shall be harassed on account of his opinions and beliefs, even religious, on condition that the same do not disturb public order as determined by law*".

Lastly, paragraph 3 of the Preamble to the Constitution of 1946 provides: "*The law shall guarantee women equal rights to those of men in all spheres*".



The Constitutional Court of France in October 2010

“In view of the purposes which it is sought to achieve and taking into account the penalty introduced for non-compliance with the rule laid down by law, Parliament has enacted provisions which ensure a conciliation which is not disproportionate between safeguarding public order and guaranteeing constitutionally protected rights”.

About European law ?



The principles which should save the French law at the ECHR

➤ public order and protection of community freedom:

the Court does admit such restrictions (cf. ECHR November 10th, 2005, Leyla Sahin, n° 44774/98) if they are proportionate and especially when the law does not mention any belief in particular (ECHR September 24, 2004, n° 65501/01). The ECHR does promote the idea of a **duty** on European Governments to make no judgment on the people's belief and the people's expression (1), **but also to take measures to make living together possible** (2), i.e to make pluralism possible in a peaceful society protecting not only individual rights but the "*rights of others*".

➤ margin of appreciation:

➤ regarding the relationship between European Governments and the expression of faith or beliefs, which are related to national traditions, the Court of Strasbourg does give priority to subsidiarity, i.e to the "*margin of appreciation*" of every State, especially for religious signs (ECHR Gorzelik.....; Murphy v/ Irland, ; Leila Sahin; it means that even if the French law was regarded as restricting freedom of religion (that we do not think), we would have serious ground to win before the ECHR by pleading that the law is justified and proportionate. As you may know in Kaduraman v/ Turkey, May 3d, 1993, n° 16278/90 (CHR quoted by ECHR in Leila Sahin, n° 111), the Council of Europe admitted that **Turkey could legally prohibit Islamic veil in public universities to avoid any pressure from radical Muslims on students**

The LAUTSI case n°1 (2009)

(Crucifixes in Italian State-School
classrooms)

“The Court considers that the compulsory display of a symbol of a particular faith in the exercise of public authority in relation to specific situations subject to governmental supervision, particularly in classrooms, restricts the right of parents to educate their children in conformity with their convictions and the right of schoolchildren to believe or not believe”.



**« Nobody, and certainly not a European ideological Court
will succeed in killing our identity »**

The Italian Prime Minister about the first opinion « LAUTSI »

“The Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.”

“The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools (see paragraphs 26-28 above) speaks in favor of that approach”

ECHR in LAUTSI case n°2, Grand Chamber, March 18th, 2011





Claude LEVI-STRAUSS

From its very beginning, France is an open society

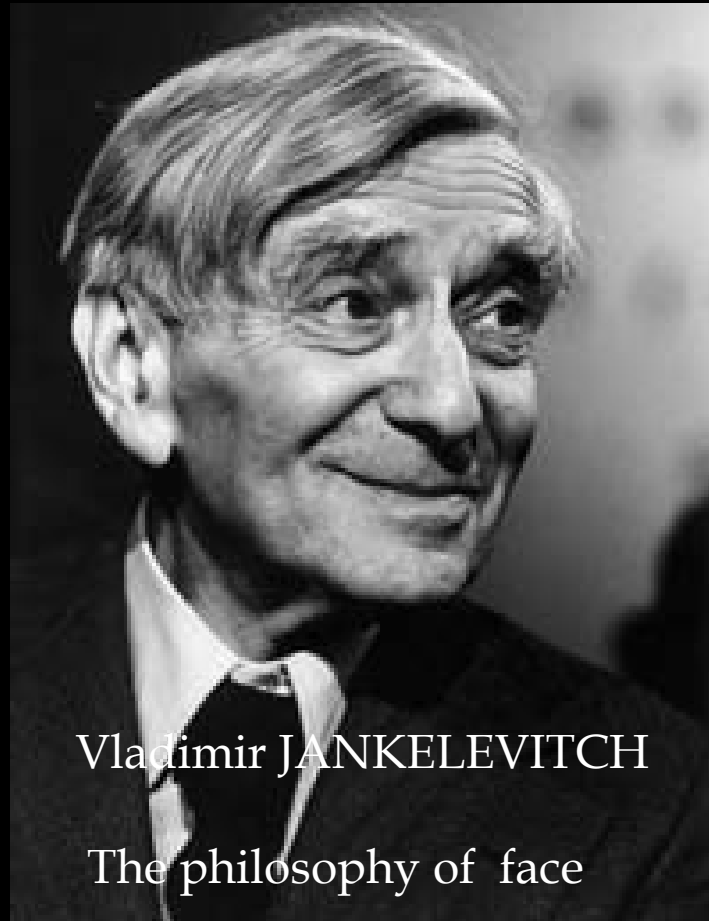
Cultural exchange make human groups alive

But they need to resist and to keep their own culture

to have something to exchange

« In the western civilization there is no clothes for the face »

Elisabeth BADINTER



Vladimir JANKELEVITCH

The philosophy of face

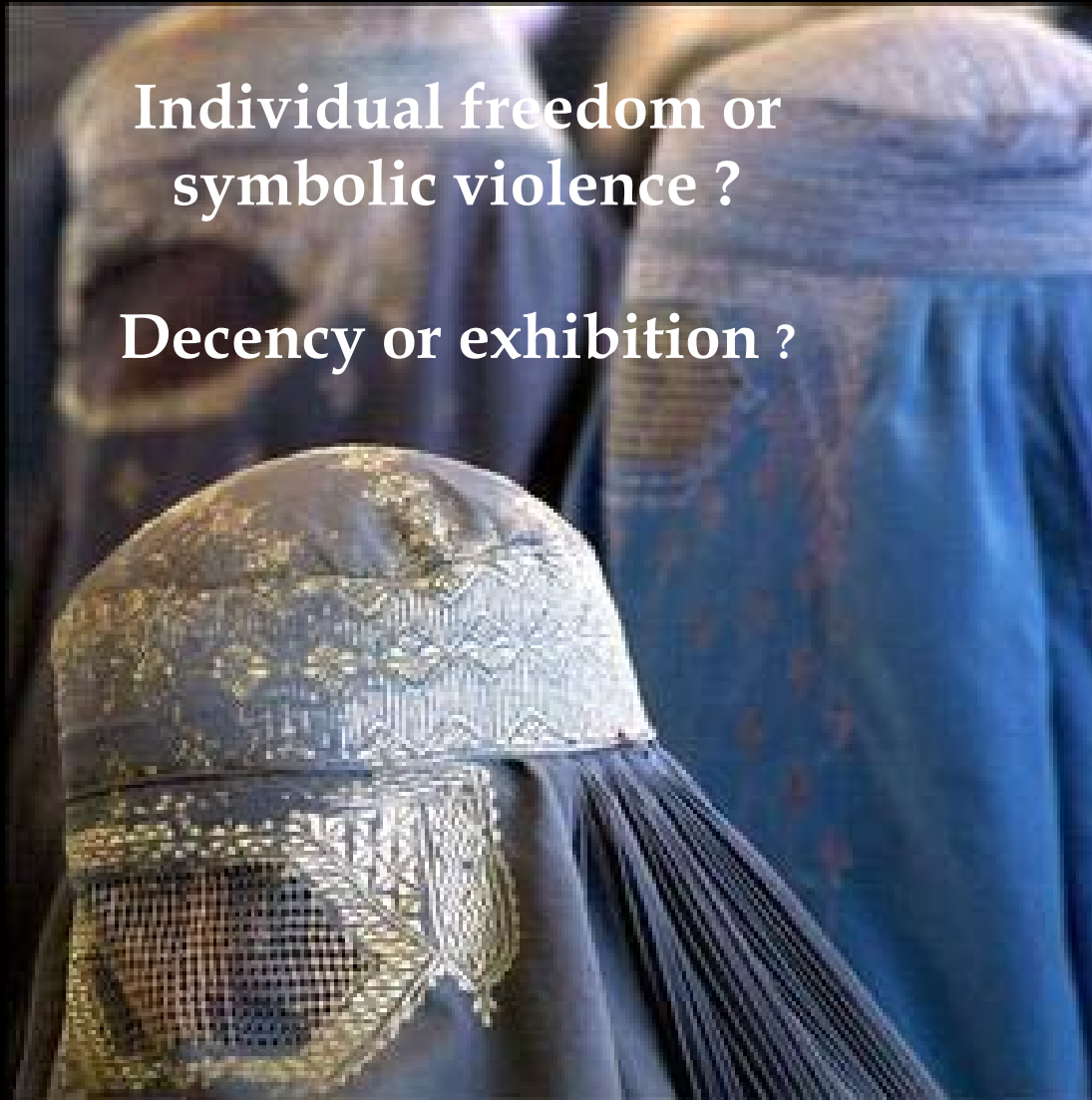


We need visible
face to live
together
and to
communicate



Individual freedom or
symbolic violence ?

Decency or exhibition ?



The French do believe
in the role of face



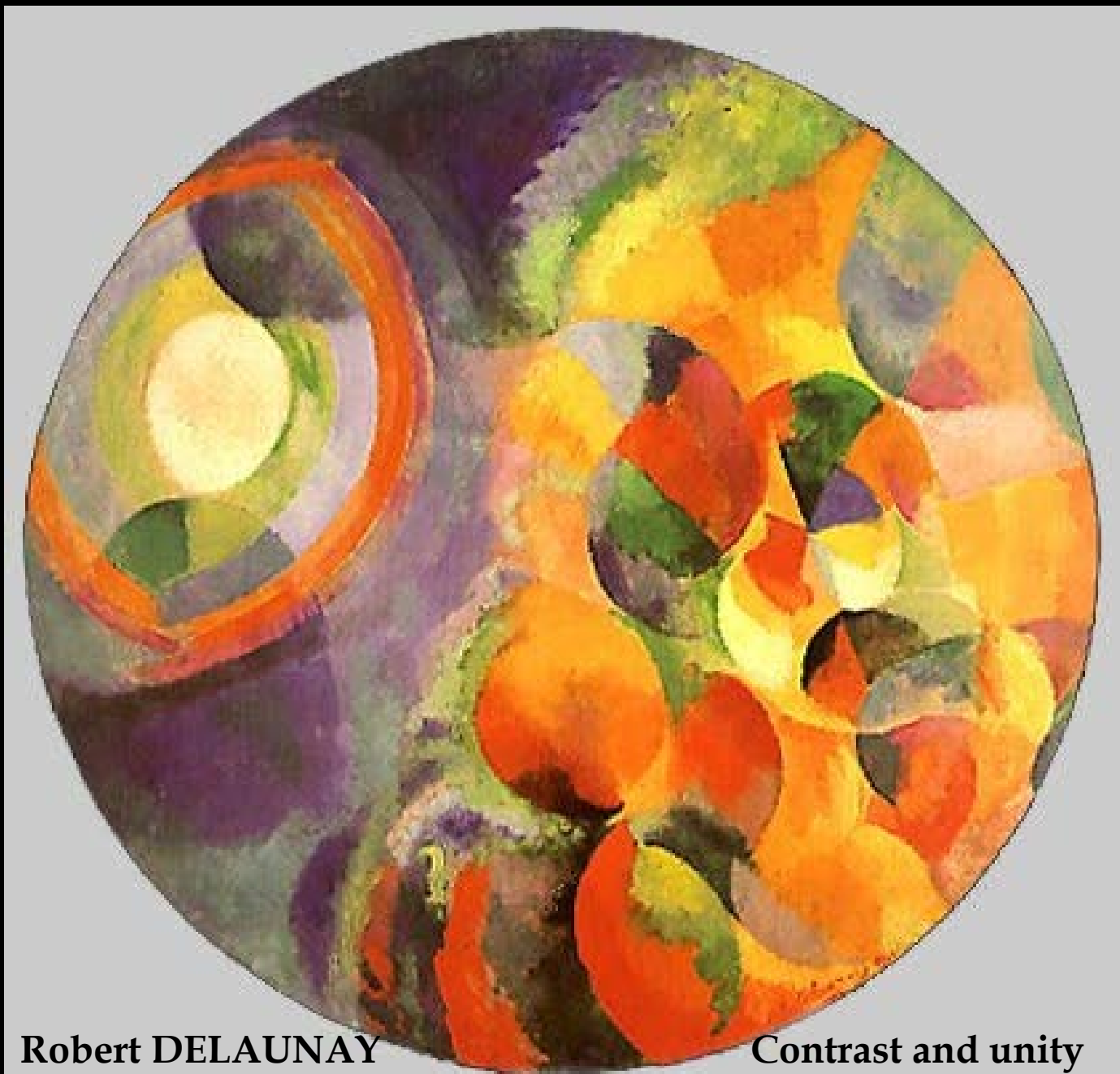
to civilize the world

« The face is the mirror of the soul »

Emmanuel LEVINAS, French Philosopher



Egypt, 2500 B.C



Robert DELAUNAY

Contrast and unity