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RECONCEPTUALIZING INTERSECTIONALITY IN JUDICIAL INTERPRETATION: MOVING BEYOND FORMALISTIC ACCOUNTS OF DISCRIMINATION ON ISLAMIC COVERING PROHIBITIONS

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Monika Zalnieriute and
Catherine Weiss*

Abstract

This article analyzes the United Nations Human Rights Committee's (HRC) consideration of legal prohibitions on Islamic face-coverings in Yaker v. France and Hebbadj v. France, and argues that the HRC's recognition of discrimination at play represents a significant departure from the judicial trend of accepting such prohibitions in Europe. We contend that the HRC's limited interpretation of intersectionality in the cases elides the full extent of harms and violations arising from such legislation. However, we suggest that judicial understanding of discrimination can be enhanced by drawing on a modified UN concept of harmful traditional practices, which allows an understanding of Islamic face-covering as one among many global patriarchal practices. Decolonizing jurisprudence on intersectional discrimination in this way allows

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an explicit recognition and articulation of how an exclusive focus on prohibitions of practices of members of minority groups, without attention to majority patriarchal practices, contributes to legitimating sexist and racist targeting of minority groups – and entrenches sexism against women more broadly.

INTRODUCTION

Political and legal tensions as well as public controversies concerning Muslim women's covering[1] have been widespread in Europe over the last three decades.[2] Against a background of rising anti-Muslim racism and a refugee crisis, many national and local governments have enacted laws regulating the wearing of face-coverings. France, Belgium, Italy, Switzerland, Russia, Germany, Spain, Bulgaria, the Netherlands, Denmark, and Austria,[3] as well as states in other parts of the world, have established various forms of such prohibitions.[4]

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1 We are aware of differences between forms of Muslim covering. In this article, the term "Islamic covering" refers both to garments that cover the face, and garments that cover the head, leaving the face visible. *See* A, Moors, *The Dutch and the Face-Veil: The Politics of Discomfort*, 17 SOCIAL ANTHROPOLOGY/ANTHROPOLOGIE SOCIALE 393 , 402 (2019) (arguing that the use of the term 'burqa' in much political discourse to refer to face-covering garments is intended to conjure up images barbarism through its association with the Taliban regime.)

2 For example, in France, the controversies over Islamic headscarves in schools began in 1989. *See* BRONWYN WINTER, HIJAB AND THE REPUBLIC: UNCOVERING THE FRENCH HEADSCARF DEBATE 129 (2008); JOAN WALLACH SCOTT, THE POLITICS OF THE VEIL 35 (2007).

3 A summary of such measures can be found in *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), http://www.bbc.com/news/world-europe-13038095 [https://perma.cc/AK8D-EQM6].

4 A number of Muslim-majority African states have introduced various prohibitions on face covering, including Chad, parts of Niger, Cameroon (Muslim-majority in the region the burqa was banned), and Gabon,. David Blair, *Why West Africa's Muslim-majority states are banning the burqa,* TELEGRAPH (May 2, 2016), https://www.telegraph.co.uk/news/2016/05/02/west-african-states-with-181-million-muslims-support-banning-the/ [https://perma.cc/65U5-NJBC]. All 15 member states of the Economic Community of West African States (ECOWAS) have also officially endorsed a prohibition on clothing that prevents the clear identification of persons. *ECOWAS Leaders Seek to Ban*

In this context, on 23 October 2018, the United Nations Human Rights Committee (HRC or Committee) delivered groundbreaking opinions in *Yaker v. France* and *Hebbadj v. France*, finding that France violated two Muslim women's rights to freedom of religion and non-discrimination under the *International Covenant on Civil and Political Rights* ('ICCPR')[5] by fining them for wearing niqab, a garment covering the face.[6] These decisions present a significant departure from the judicial precedent set by the European Court of Human Rights ('ECtHR'), which upheld the same French law, and has recently reinstated its legitimization of face-covering bans in cases concerning Belgium.[7] The 2018 HRC decisions also sit in contrast to the stances of other UN treaty bodies, such as the committees on the *Convention on Elimination of All Forms of Racial Discrimination* ('CERD')[8] and on the *Convention on Elimination of All Forms of Discrimination Against Women* ('CEDAW'),[9] which have

Wearing of Hijabs, AFRICAN SUN TIMES (Dec. 17, 2015), http://africansuntimes.com/2015/12/ecowas-leaders-seek-to-ban-wearing-of-hijabs-full-face-veils/ [https://perma.cc/E9JS-42BF]. However, we argue that such prohibitions present different problems for analysis than those in those in European countries, in which Muslims generally constitute small minorities usually from immigration from former colonies. That is, analysis of prohibitions on face-covering should be sensitive to the context of power relations in which they operate.

5 G.A. Res. 2200A (XXI) (Dec. 16, 1966), https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.

6 *See* UNHRC, *Yaker vs. France,* VIEWS ADOPTED BY THE COMMITTEE UNDER ARTICLE 5(4) OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT IN CIVIL AND POLITICAL RIGHTS, CONCERNING COMMUNICATION NO. 2747/2016, 17 October 2018, CCPR/C/123/D/2747/2016 (hereinafter '*Yaker*'); UNHRC, *Hebbadj vs, France,* VIEWS ADOPTED BY THE COMMITTEE UNDER ARTICLE 5(4) OF THE OPTIONAL PROTOCOL, CONCERNING COMMUNICATION NO. 2747/2016, 17 October 2018, CCPR/C/123/D/2807/2016 (hereinafter '*Hebbadj*').

7 *See SAS v. France,* 2014-III Eur. Ct. H.R. 341; *see also Dakir v. Belgium,* App. No. 4619/12 (Eur. Ct. H.R. July 11, 2017); *Belcacemi and Oussar v. Belgium,* App. No. 37798/13 (Eur. Ct. H.R. July 11, 2017).

8 INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION, adopted on 21 December 1965 entered into force 4 January 1969.

9 UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW), adopted on 18 December 1979 by the United Nations General Assembly; entered into force as an international treaty on 3 September 1981.

failed to question the legitimacy of the French measures.[10] The latest HRC opinions therefore have important implications for the future of legislation governing face-covering, for the jurisprudence of the ECtHR and opinions of other UN treaty-bodies, and for human rights law and legal theory more generally.

In this article, we analyze the *Yaker* and *Hebbadj* decisions with a focus on the development of *intersectionality* jurisprudence*,* and suggest that the HRC's recognition of discrimination in such cases is a significant departure from a judicial trend of acceptance of face-covering prohibitions. However, we argue that the judicial approach to intersectionality in *Yaker* and *Hebbadj* elides the extent of harms and violations arising from the French legislation on Islamic covering on women and girls of Muslim cultural background.[11] Relying on a socio-legal interdisciplinary approach,[12] and grounded in anti-racist and decolonial radical feminist theory,[13]

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10 See CERD, CONCLUDING OBSERVATION REGARDING FRANCE, 18 APRIL 2005, CERD/C/FRA/CO/16 AT PARA 18; CEDAW, CONCLUDING OBSERVATION REGARDING FRANCE, 8 April 2006, CEDAW/C/FRA/CO/6 at para 20, 21.

11 The reference to '*Muslim cultural background'* is a translation of the phrase "de culture musulmane", which is commonly used by anti-prohibition activists in France to include women and girls whose heritage or ancestry is from regions in which Islam is dominant, but who may be of another religion, atheist or non-practicing. Members of this group may be affected by anti-Muslim racism because they are assumed to be Muslim due to their name, physical appearance, residence or other factors. See, for example, the use of this term by the association Lallab, which works to make Muslim women's voices heard: F. Bent, *Mariame Tighanimine : l'empowerment par le business,* LALLAB MAGAZINE, 20 March 2017, Paris. http://www.lallab.org/mariame-tighanimine-lempowerment-par-le-business/ (last visited 10 February 2019). See also the talk organised with prominent activists and academics in this area : PARTICIPATION POLITIQUE ET CIVIQUE DES FEMMES DE CULTURE MUSULMANE EN FRANCE ET EN GRANDE-BRETAGNE, Réseau Français des Instituts d'Etudes Avancées, 18 May 2011, Paris. http://rfiea.fr/evenements/participation-politique-et-civique-des-femmes-de-culture-musulmane-en-france-et-en-grande (last visited 10 February 2019).

12 *See* R. COTTERRELL, THE SOCIOLOGY OF LAW: AN INTRODUCTION (1992). On the relationship between feminist theory and critical legal studies, *see* C. *Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School*" 38 JOURNAL OF LEGAL EDUCATION 61 (1988), and on feminist methods, *see* H. BARNETT, 'FEMINIST LEGAL METHODS' *SOURCEBOOK ON FEMINIST JURISPRUDENCE* 111–138 (2012).

13 The anti-racist framework is developed with the experiences of women of color at the center of analysis. See, for example, the work of Black feminists

we recommend that courts and treaty bodies enhance their understanding of intersectionality by reference to a modified concept of "harmful traditional practices,"[14] which allows the understanding of Islamic coverings as one among many patriarchal practices globally. We argue that future development of jurisprudence around intersectional discrimination should explicitly articulate how an exclusive focus on practices of oppressed minority groups, without attention to related patriarchal practices engaged in by the majority, contributes to legitimating sexist and racist targeting of minority groups – and in certain circumstances entrenches sexism against women more broadly.

FACTUAL AND LEGAL BACKGROUND

Laws regulating face-covering in European states are generally framed in religion- and gender-neutral terms, such as 'the covering of the face', but it is widely acknowledged by members of the public, politicians, scholars and judiciary alike that they target

in the U.S., e.g. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1993); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1982); Audre Lorde, *The Uses of Anger*, 9(3) WOMEN'S STUDIES QUARTERLY 7 (1981). The decolonial approach is the framework used by many activists and academics critical of France's head-covering laws. *See, e.g.*, Houria Bouteldja, *Race, Classe et Genre: L'intersectionalité, entre Réalité Sociale et Limites Politiques*, PARTI DES INDIGÈNES DE LA RÉPUBLIQUE (24 Jun. 24, 2013), http://indigenes-republique.fr/race-classe-et-genre-lintersectionalite-entre-realite-sociale-et-limites-politiques/ [https://perma.cc/5W93-B3T6]. For more general decolonial feminist scholarship, see Ochy Curiel, *Critique postcoloniale et pratiques politiques du féminisme antiraciste*, 51 MOUVEMENTS: SOCIÉTÉS, POLITIQUE, CULTURE 119 (2007). For radical feminist work, see CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM (Janice Raymond & Dorchen Leidholdt, eds., 1990).

[14] The phrase "harmful traditional practices" is language originally drawn from the UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), *FACT SHEET NO. 23, HARMFUL TRADITIONAL PRACTICES AFFECTING THE HEALTH OF WOMEN AND CHILDREN*, August 1995, No. 23 at http://www.refworld.org/docid/479477410.html (hereafter 'UN Factsheet').

Muslim women.[15] France was the first European country to enact nationwide legislation on full-face coverings, prohibiting their wearing in public spaces in 2010.[16] France passed this legislation in a wider historical context of campaigns against religious symbols from the public sphere in the name of "laïcité," a form of secularism. Laïcité refers to a system of separation of religion and the state, encoded in the French Law in 1905.[17] In 2004, France enacted a law amending the Education Code prohibiting ostentatious wearing of religious symbols or garb in public schools.[18] French lawmakers claimed the measure aimed to promote secularism and sexual equality.[19] The UN treaty bodies found that the prohibition was permissible as long as France could ensure that it did not entail discriminatory effects in education,[20]

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15 *See generally* A. Akram, *Your Liberation, My Oppression: European Violations of Muslim Women's Human Rights*, 5 INDONESIAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 427 (2018); R. BARKER, OF BURQAS (AND NIQABS) IN COURTROOMS: THE NEGLECTED WOMEN'S VOICE' RESEARCH HANDBOOK ON LAW AND RELIGION (2018); R. Michaels, *Banning Burqas: The Perspective of Postsecular Comparative Law*, 28 DUKE J. COMPARATIVE & INT'L L. 213 (2017); Stephanie Fehr, *Intersectional Discrimination and the Underlying Assumptions in the French and German Headscarf Debates: An Adequate Legal Response?*, *in* D. SCHIEK AND A. LAWSON (EDS.), EUROPEAN UNION NON-DISCRIMINATION LAW AND INTERSECTIONALITY: INVESTIGATING THE TRIANGLE OF RACIAL, GENDER AND DISABILITY (2016). For an example of an acknowledgement from a government official, see Rachael Pells, *Islamic face veil to be banned in Latvia despite being worn by just three women in entire country*, THE INDEPENDENT (Apr. 21 2016), https://www.independent.co.uk/news/islamic-muslim-face-veil-niqab-burqa-banned-latvia-despite-being-worn-by-just-three-women-entire-a6993991.html [https://perma.cc/RTX8-G8PY].

16 LOI 2010-1192 DU II OCTOBRE 2010 INTERDISANT LA DISSIMULATION DU VISAGE DANS 1'ESPACE PUBLIC [LAW 2010-1192 OF OCT. 11. 2010 PROHIBITING THE CONCEALMENT OF THE FACE IN PUBLIC], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANQAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], OCT. 12, 2010, P. 18344 ('Nul ne peut, dans l'espace public, porter une tenue destinée a dissimuler son visage'); Conseil constitutionnel [CC] [Constitutional Court] decision No. 2010-613DC, Oct. 7, 2010, J.O. 18345 (Fr.).

17 *French Law of 1905, JO 11 December 1905*; *see generally J. Foyer, La Genèse de la loi de séparation* (2005) 48 ARCHIVES DE PHILOSOPHIE DU DROIT 75; J. Rivero, *La notion juridique de laïcité* (1949) RECUEIL DALLOZ 137.

18 Loi no 2004–228 of 15 March 2004, JO 17 March 2004, 5190.

19 Loi no 2004–228 of 15 March 2004, JO 17 March 2004, 5190.

20 See CERD, CONCLUDING OBSERVATION REGARDING FRANCE, 18 APRIL 2005, CERD/C/FRA/CO/16; CEDAW, CONCLUDING OBSERVATION REGARDING FRANCE, Apr. 8, 2006, CEDAW/C/FRA/CO/6.

and European Court of Human Rights (ECtHR) upheld the law in 2009.[21]

The 2010 French law restricted covering within the wider public sphere. Specialists and the general public alike imagined that it would not survive the scrutiny of the ECtHR.[22] However, in *S.A.S. v. France* (2014)[23] – as well as in the more recent cases *Dakirv v. Belgium* (2017)[24] and *Belcacemi and Oussar v. Belgium* (2017)[25] – the ECtHR upheld the total prohibition of face covering, holding that national laws limiting individuals' rights to freedom of religion were permissible as long as they were based in law and proportionately served a "legitimate aim." Interestingly, the "legitimate aim" of the French law that the ECtHR accepted in *S.A.S.* was not the maintenance of national security. Instead, the Court accepted the French government's claim to the legitimate aim of maintenance of public order along with its proposed underlying value of "living together" (le "vivre ensemble").[26] According to the French government, the prohibition of face covering was essential for France's multiracial society to "live together."[27]

In many ways, the conclusion in *S.A.S.* was not unexpected, given the ECtHR's reluctance over the last 20 years to find violations of

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21 *Kervanci v France* 31645/04 and *Dogru v France* 27058/05, RTD civ (2009) 1049–52.

22 M. Hunter-Henin, *Why the French Don't Like the Burqa: Laïcité, National Identity and Religious Freedom*, 61 INT'L & COMPARATIVE L. QUARTERLY 613 (2012).

23 *SAS v. France,* 2014-III Eur. Ct. H.R. 341.

24 *Dakir v. Belgium,* App. No. 4619/12 (Eur. Ct. H.R. July 11, 2017).

25 *Belcacemi and Oussar v. Belgium,* App. No. 37798/13 (Eur. Ct. H.R. July 11, 2017).

26 The phrase "living together" originates from an argument presented by the French Government in 2010. For scholarly critiques of the judicial acceptance of the concept of 'living together', see, e.g, Hakeem Yusuf, *SAS v France: Supporting "Living Together" or Forced Assimilation?*, 3 INT'L HUMAN RIGHTS L. REV. 277–302 (2014); E. Howard, *SAS v France: Living Together or Increased Social Division*? (2014), EJIL-TALK; J. Marshall, *S.A.S. v France: Burqa Bans and the Control or Empowerment of Identities*, 15 HUMAN RIGHTS LAW REVIEW 377 (2015). For a critique of French government's use of the 'living together' argument in introducing the 2010 law, see S. Mullally, '*Civic integration, migrant women and the veil: at the limits of rights?*' 74(1) THE MODERN LAW REVIEW (2011).

27 *SAS v. France,* 2014-III Eur. Ct. H.R. 341, para 25.

Article 9 of the ECHR.[28] When considering complaints concerning restrictions on religious clothing in schools, the Strasbourg Court has either declared that these complaints were inadmissible, or found that the measures were justifiable under Article 9(2) of the ECHR.[29] The exception to this pattern was *Ahmet Arslan v. Turkey*, in which the ECtHR found the conviction of (male) members of a religious group for wearing religious garments in public violated Article 9.[30] The 2010 French ban was similar to the prohibition of religious garments in public spaces considered in *Ahmet Arslan*, but the ECtHR distinguished that case from *S.A.S.* on the basis that the *Ahmet Arslan* prohibition did not concern the covering of the face.

In this legal context, the HRC received two separate complaints in 2016 from two women who had been convicted in France in 2012 for wearing niqab in public: *Yaker v. France* and *Hebbadj v France*. The HRC is one of the nine UN treaty bodies, each of which are a committee of experts established to monitor governments' implementation of specific human rights treaties.[31] All State parties, such as France, are legally obliged to submit regular reports to the HRC on how the ICCPR is being implemented in the domestic

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28 The first violation of Article 9 was found in 1993. *See Kokkinakis v Greece*, App. No. 14307/88 (Eur. Ct. H.R., May 25, 1993) (concerning proselytism). The latest Council of Europe statistics (2017) record only 71 findings of violation of Article 9 during the period 1959–2017. Council of Europe, ECHR Overview 1959–2017 at https://www.echr.coe.int/Documents/Overview_19592017_ENG.pdf (last visited 18 December 2018). Compare, with 1300 violations of Article 8 ECHR (right to private life), and 700 violations of Article 10 ECHR (freedom of expression). *Id.*

29 *See e.g.,* Dahlab v Switzerland, Application No. 42393/98 (ECHR 15 February 2001); *Leyla Şahin v. Turkey,* Aapplication No.44774/98 (ECHR 10 November 2005); *Kurtulmus vs Turkey,* Application No 65500/01, (ECHR 1169, 24 January 2006); *Dogru v France,* Application no. 27058/05 (4 December 2008); *Ranjit Singh v. France,* Application No 27561/08 (Inadmissibility Decision, 30 June 2009).

30 *Ahmet Arslan and Others v. Turkey* – 41135/98 Judgment 23 February 2010.

31 List of nine UN treaty bodies is available at UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 'Monitoring Complaince with Human Rights Treaties, https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx, accessed 06th October 2019.

context.[32] The HRC examines country reports and produces recommendations in the form of "Concluding Observations." In addition to this reporting procedure, UN treaty bodies can consider and issue decisions regarding inter-state or individual complaints.[33] While such decisions are not generally considered binding on States, they constitute a reasoned interpretation of the relevant treaty to which the States parties have agreed to be legally bound.[34] As France has acceded to the individuals' complaints mechanism under the ICCPR by ratifying its First Optional Protocol, the HRC was authorized to issue a decision on France's compliance with its ICCPR obligations.

OPINION OF THE HRC IN *YAKER* AND *HEBBADJ*

On October 23, 2018, the HRC found in *Yaker* and *Hebbadj* that the 2010 French legislation under which the women had incurred criminal convictions for wearing of niqab in public disproportionately harmed the petitioners' right to manifest their religious beliefs and thus violated ICCPR Articles 18 and 26, which secure rights to freedom of religion and non-discrimination.[35] As the UNHRC's reasoning in both cases is identical, the analysis here refers to the Committee's reasoning in *Yaker*.

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32 *See* UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, 'Human Rights Treaty Bodies - General Comments' https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx, accessed 06th October 2019.

33 Individual complaints are established under the First Optional Protocol, which requires state consent to bring this type of case. *See* Optional Protocol to the International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9, https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx.

34 See INTERNATIONAL JUSTICE RESOURCE CENTER, 'UN Human Rights Treaty Bodies' , https://ijrcenter.org/un-treaty-bodies/, accessed 6th October 2019.

35 ICCPR, art. 18 and 26, 999 U.N.T.S. 171

Freedom of Religion

The Committee first addressed Article 18 of the ICCPR, which concerns the right to freedom of thought, conscience and religion. In particular, Article 18 of the ICCPR states:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In interpreting the freedom of a person "to manifest his religion or belief in worship, observance, practice and teaching," under Article 18(1), the Committee first recalled one of its official statements on interpretation of the provisions of the ICCPR, known as "general comments."[36] General comment No. 22 establishes "[t]he freedom to manifest religion or belief may be exercised 'either individually or in community with others and in public or private'" and

[36] Every human rights treaty body publishes their interpretation of the provisions of particular treaty in the form of "general comments" or "general recommendations." U.N. Human Rights Office of the High Commissioner, Human Rights Treaty Bodies - General Comments, https://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx [https://perma.cc/C2V4-FF77].

"include[s] not only ceremonial acts, but also such customs as . . . the wearing of distinctive clothing or head coverings . . . ."[37]

Having found the French law constituted an interference under Article 18(1), the Committee considered whether such interference was permitted under Article 18(3). In this regard, the Committee emphasized that:

> Paragraph 3 of Article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.[38]

The French government argued that this right is not absolute, and that the 2010 law was a legitimate limitation of the right to religious freedom because it was aimed at "protecting public safety" and the "rights and freedoms of others."[39] The Committee acknowledged that States could require individuals to show their faces in specific circumstances for identification purposes with regard to pursuing the legitimate aim of securing public safety and order.[40] However, it found that France failed to explain "why covering the face for certain religious purposes—i.e., the niqab—is prohibited, while covering the face for numerous other purposes, including sporting, artistic, and other traditional and religious purposes, is allowed."[41] The Committee further observed that France had not described any context, or provided any examples, in which there was a specific and significant threat to public order and safety that would

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37 *See* General comment No. 22 on Article 18 (CCPR/C/21/Rev.1/Add.4), para. 4.
38 *Id.* at ¶ 8.4.
39 *Id.* at ¶ 8.6.
40 *Id.* at ¶ 8.7.
41 *Id.*

justify such a blanket ban on full-face covering.[42] Even if such interference could be qualified as necessary, the Committee stated that a general ban on the niqab would be disproportionate to pursuing that legitimate aim.[43]

Weighing France's assertion of the importance of the "protection of rights of others," the HRC found the concept of "living together" to be inadequate justification. It acknowledged that a State might have an interest in the promotion of sociability and mutual respect among individuals in its territory, and "that the concealment of the face could be perceived as a potential obstacle to such interaction,"[44] However, the Committee held that protecting "the fundamental rights and freedoms of others requires identifying what specific fundamental rights are affected, and the persons so affected."[45] In this regard, the concept of "living together" failed the specificity requirement because France was presented the concept in "very vague and abstract" terms.[46] The HRC also noted that, because the ICCPR does not protect the "right to interact with any individual in public and the right not to be disturbed by other people wearing full-face veil[,]" these rights cannot provide the basis for permissible restrictions under Article 18(3). The Committee held that even if such a vague objective of "living together" could be considered legitimate, a blanket criminal ban would not be considered proportionate to it.[47] On this basis, the Committee found that imposing the law on Muslim women who choose to wear niqab as part of their religion is in violation of Article 18 of the ICCPR.[48]

42 *Id.*
43 *Id.* at ¶ 8.8.
44 *Id.* at ¶ 8.9.
45 *Id.* at ¶ 8.10.
46 *Id.*
47 *Id.* at ¶ 8.11.
48 *Id.* at ¶ 8.12.

Cross-Discrimination: Sex and Religion

The Committee went further and observed that the French ban, despite being drafted in facially neutral terms, did stipulate exceptions for most contexts of face covering in public, such as for sports, carnivals and health reasons, "thus limiting the applicability of the ban to little more than the full-face Islamic veil," and noted that the Act was "primarily enforced against women wearing the full-face veil."[49] The HRC therefore focused on Article 26 of the ICCPR, which sets out a principle of equality and addresses discrimination on prohibited grounds:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[50]

It recalled General comment No. 22 on the wearing of distinctive clothing or head coverings being protected as a freedom of religion under ICCPR, and emphasized the concern for and suspicion of "any tendency to discriminate against any religion or belief for any reasons, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility by a predominant religious community."[51] The Committee noted that "a violation of article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate."[52] However, not every differentiation on the

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49 *Id.* at ¶ 8.13.

50 ICCPR, art. 26, 999 U.N.T.S. 171

51 General comment No. 22 (48) (art. 18) ¶ 2, Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, U.N. Human Rights Committee, Sept. 27, 1993.

52 *See Althammer et al. v. Austria*, Communication No. 998/2001, International Covenant on Civil and Political Rights, ¶ 10.2 (Aug. 8, 2003) https://perma.cc/96MW-ARLS.

grounds listed in Article 26 amounts to discrimination, if it is based on reasonable and objective criteria,[53] in pursuit of an aim that is legitimate under the Covenant.[54]

The HRC held that France could not explain why such differential treatment of Islamic face-coverings was justified. The Committee was of the opinion that this differential treatment disproportionately burdened Muslim women and found the French ban to be "intersectional discrimination based on gender and religion."[55] The HRC noted that the ban, instead of protecting niqabi women, "could have the opposite effect of confining them to their homes, impeding their access to public services and exposing them to abuse and marginalization,"[56] and that "the Act's effect on certain groups' feelings of exclusion and marginalization could run counter to the intended goals."[57] The HRC concluded that the French government is under an obligation to provide the affected women with an effective remedy in full reparation, with financial compensation, and to prevent similar violations in the future, including reviewing the 2010 law in light of ICCPR obligations.[58]

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53 *See, e.g.*, *Broeks v. Netherlands*, Communication No 172/1984, U.N. Human Rights Committee, para. 13 (Apr. 9, 1987) https://perma.cc/2YZQ-SACY; and *Zwaan-de Vries v. Netherlands,* Communication No. 182/1984, U.N. Human Rights Committee, ¶ 13 (Apr. 9, 1987) https://perma.cc/J596-ZVJ8.

54 *See O'Neill and Quinn v. Ireland*, Communication No. 1314/2004, U.N. Human Rights Committee,
¶ 8.3 (Jul. 24, 2006) https://perma.cc/UEQ4-EJ43.

55 *Yaker*, *supra* note 6**Error! Bookmark not defined.** at ¶ 8.17.

56 *Yaker*, *supra* note 6**Error! Bookmark not defined.** ¶ 8.15.

57 *Id.*; *see also* Concluding Observations on the Fifth Periodic Report of France, ¶ 22, U.N. Human Rights Committee, Aug. 17, 2015.

58 *Yaker*, *supra* note 6 at ¶ 10.

DEVELOPING RESISTANCE TO JUDICIAL ACCEPTANCE OF DISCRIMINATION

Decisions in *Yaker* and *Hebbadj* are situated within a network of judicial and political pronouncements, such as earlier ECtHR opinions and the concluding observations of various UN treaty bodies, on the legitimacy of the face-covering measures in both France and Europe more generally. The HRC opinions are of unparalleled importance because their holdings contrast with the judicial and policy interpretative trend at the ECtHR and other UN treaty bodies over the last 20 years. Until now, this interpretative trend meant upholding the validity of restrictions—including total bans—on head- and face-covering in Europe.

In particular, it is worth recalling the history of restrictions on face-covering in the deliberations of UN treaty bodies and the ECtHR. As mentioned earlier, the decisions issued by the UN treaty bodies, such as the HRC, are not legally binding on States in a strict sense. Although they do not represent a hard precedent that other UN treaty bodies must follow, these decisions are authoritative interpretative statements on human rights treaties, and State parties, as well as other monitoring and international tribunals such as the ECtHR, do find them persuasive.

The UN treaty bodies legitimated the first French measure of 2004,[59] finding it complied with CERD and CEDAW. First, in 2005, the UN CERD Committee did not view the 2004 measure as constituting *prima facie* interference with the rights of Muslim women and girls. Therefore, they did not request that France justify the necessity and proportionality of the measure. The Committee recommended that France "should continue to monitor the implementation of the Act of 15 March 2004 closely, to ensure that it has no discriminatory effects and that the procedures followed in its implementation always place emphasis on dialogue, to prevent it from denying any pupil the right to education and to ensure that

[59] Loi no 2004–228 of 15 March 2004, JO 17 March 2004, 5190.

everyone can always exercise that right."[60] In 2008, the UN CEDAW Committee followed this approach, accepting the ban in principle while highlighting that it "should not lead to a denial of the right to education of any girl and their inclusion into all facets of French society."[61] Similarly, in 2009, the ECtHR upheld the 2004 French measure.[62]

It is remarkable that the HRC did not follow this series of decisions upholding the bans. As early as 2008, the Committee's "Concluding Observations" on France had noted the discriminatory implications of the measure and suggested that France re-examine its position in light of guarantees of freedom of conscience and religion, as well as the guarantee of equality in the ICCPR:

> The Committee is concerned that both elementary and high school students are barred by Act No. 2004/228 of 15 March 2004 from attending the public schools if they are wearing so-called "conspicuous" religious symbols. . . . Thus, observant Jewish, Muslim, and Sikh students may be excluded from attending school in company with other French children. The Committee notes that respect for a public culture of *laïcité* would not seem to require forbidding wearing such common religious symbols. (articles 18 and 26).[63]

Instead, France extended the application of the ban from educational spaces to the entirety of public space.

In *Yaker* and *Hebbadj*, the HRC additionally recognized the disproportionate impact and indirect discrimination of such bans on women from Muslim cultural backgrounds. In contrast to the

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60 Concluding Observation of the Committee on the Elimination of Racial Discrimination: France, ¶ 18, U.N. Committee on the Elimination of Racial Discrimination, Apr. 18, 2005.

61 Concluding Comments of the Committee on the Elimination of Discrimination against Women: France, ¶ 20, U.N. Committee on the Elimination of Discrimination against Women, Apr. 8, 2008.

62 Kervanci v. France (31645/04), 2008 Eur. Ct. H.R. (Sec. V); *Dogru v. France* (27058/05), 2009 Eur. Ct. H.R. (Sec. V) at 1049–52.

63 Concluding Observations on the Human Rights Committee: France, ¶ 23, U.N. Human Rights Committee, Jul. 31, 2008.

CERD and CEDAW Committee Observations on the 2004 French law, the HRC recognized that the 2010 ban interferes with the right to freedom of religion. It then placed the burden of justification on France to demonstrate that such a restriction on religious expression is necessary and proportionate to a legitimate aim.[64] Although the ECtHR also acknowledged interference with the right to freedom of religion in *S.A.S.* and the cases that followed, the HRC recognized that the interference particularly affected women from specific religious and cultural backgrounds and constituted discrimination under Article 26 of the ICCPR.[65] The opinions in *Yaker* and *Hebbadj* are consistent with the earlier HRC pronouncement on the French bans and strengthen the HRC's role and potential in future development of discrimination jurisprudence, which explicitly recognizes and engages with the concept of intersectionality.

BEYOND FORMALISTIC JUDICIAL INTERPRETATIONS OF INTERSECTIONALITY

The concept of intersectionality[66] is now widely acknowledged in international policy and legal discourse as an important tool for understanding how discrimination against women *qua* women is interlinked with discrimination on other grounds.[67] However,

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64 *Yaker*, at ¶ 8.7–.9, 8.15.

65 *Id.* at ¶ 8.15.

66 The concept of "intersectionality" was coined and introduced into legal theory by African-American legal scholar Kimberlé Crenshaw to understand the distinctive experiences of women of colour. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1283 (1991).

67 *See, e.g.*, "Gender and Racial Discrimination, Report of the Expert Group Meeting, Zagreb, Croatia" U.N. Division for the Advancement of Women, Office of the High Commissioner for Human Rights, and U.N.

intersectionality's effectiveness and implementation in practice remains fuzzy. Arguably, this blurring is demonstrated by the rhetoric and practice of the UN treaty bodies. For example, in 2010, the Committee on CEDAW acknowledged intersectionality as a "basic concept for understanding the scope of the general obligations of States parties [of the Convention]."[68] However, its own view—as well as that of the CERD Committee—on the 2004 French law suggests that despite the currency of the concept, the UN treaty bodies themselves show little ability to grasp intersectional discrimination in great depth.

In such a context, the HRC's critique of the 2004 French law in its 2008 Concluding Observations on France, and its finding of "intersectional discrimination" of gender and religion in *Yaker* and *Hebbadj* suggests that the concept of intersectionality had a stronger influence. These latest decisions—even if without explicit detailed elaboration of intersectional discrimination—are laudable solely on that ground. However, to fully honor the nuance and complexity demanded by an intersectional approach,[69] the HRC's jurisprudence should go beyond formalistic interpretations of intersectionality and identify the full extent of the violations and harms involved in the 2010 French law and its operation.

Development Fund for Women, November 21–24, 2000, 9–12, https://digitallibrary.un.org/record/440520 (discussing the intersectional subordination of women); U.N. Human Rights Committee, Integration of the Human Rights of Women and the Gender Perspective, APRIL 16, 2002; U.N. Human Rights Committee, Report to the Economic and Social Council on the Fifty-Ninth Session of the Commission, April 24, 2003; *see also* Jenny Riley, *Some Reflections on Gender Mainstreaming and Intersectionality* 64 DEV. BULL. 82 (2004); Jennifer C. Nash, *Re-Thinking Intersectionality*, 89 FEMINIST REV. 1, 2 (2008).

[68] General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, ¶ 18, U.N. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 16, 2010.

[69] *See also* Timo Makkonen, Multiple, Compound and Intersectional Discrimination: Bringing the Experiences of the Most Marginalized to the Fore (Apr. 2002) (unpublished Master's dissertation, Åbo Akademi University) (similarly critiquing legal understandings of intersectionality).

UN Treaty bodies and courts must recognize the full extent of negative effects of face covering prohibitions on women and girls of Muslim cultural backgrounds.

The HCR decisions referred to some of the negative effects of the face-covering prohibition, in particular that it could result in the confinement of niqabi women in their homes and that it might increase discrimination against this group (whether the niqab was imposed or chosen).[70] Even if French lawmakers are genuinely concerned with furthering gender equality, the law punishes the victims of the very practice it condemns.[71] The HRC in *Yaker* and *Hebbadj* highlighted this contradiction, but it might have gone further by explicitly recognizing that the potential human rights implications of the prohibition are not limited to restriction of freedom of movement. The prohibition also implicates, *inter alia,* rights to privacy, education, and employment thereby affecting the entire social and public lives of women of an oppressed minority group.[72] Such serious potential impacts were suggested by the HRC in its General Comment No. 28 of 2000:

> Regulation[s] of clothing to be worn by women in public . . . may involve a violation of a number of rights guaranteed by the Covenant, such as: Article 26, on non-discrimination; Article 7, if corporal punishment is imposed in order to enforce such a regulation; Article 9, when failure to comply with the regulation is punished by arrest; Article 12, if liberty of movement is subject to such a constraint; Article 17, which guarantees all persons the right to privacy without arbitrary or unlawful interference; Articles 18 and 19, when women are subjected to

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70 *See* Angelique Chrisafis, *France's Burqa Ban: Women are "Effectively Under House Arrest"*, GUARDIAN (Sept. 19, 2011), http://www.theguardian.com/world/2011/sep/19/battle-for-the-burqa [https://perma.cc/FT6T-Z5D3].

71 *See, e.g*, Bouteldja, *supra* note 13; Scott, *supra* note 2.

72 OPEN SOCIETY JUSTICE INITIATIVE, AFTER THE BAN: THE EXPERIENCES OF 35 WOMEN OF THE FULL-FACE VEIL IN FRANCE (September 2013), https://www.opensocietyfoundations.org/sites/default/files/after-the-ban-experience-full-face-veil-france-20140210.pdf (interviewing thirty-five women about the impact of the 2010 law and detailing the prevalence of negative effects, including decreased mobility and social interaction, and increased discrimination and violence).

> clothing requirements that are not in keeping with their religion or their right of self-expression; and, lastly, Article 27, when the clothing requirements conflict with the culture to which the woman can lay a claim.[73]

In addition to these serious violations that might be committed by the state and public institutions/bodies—which were not mentioned by the HRC in *Yaker and Hebbadj*—many broader negative effects of the face-covering ban issue from horizontal interactions among individuals and/or groups of individuals. A state-centered or vertical human rights framework, focusing largely on the relationship between the individual and the state,[74] is often unable to fully capture these broader negative effects that understandings of intersectionality articulate. In the case of France's 2010 law and the 2004 law preceding it, these negative effects may involve, for instance, increased physical and verbal violence towards the group it targets (women wearing Muslim head-coverings) or an increased tolerance of such violence. This may occur partially because the law has legitimizing effects.[75] The law normalizes popular prejudice, making some individuals or groups feel more justified in engaging in violence towards women wearing Islamic head-coverings than they would if the government had not officially singled out these garments as unacceptable. For example, following the enactment of the 2010 law, in many cases when women wearing Muslim head-coverings were physically

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73 U.N. Human Rights Comm., CCPR General Comment No 28: The Equality of Rights between Men and Women (Article 3) adopted at its Sixty-Eigth Session, 29 March 2000, CCPR/C/21/Rev.1/Add.10, General Comment No 28.

74 *See* JohnH. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 1-2 (2008).

75 The power of law to normalize, legitimize and justify social phenomena is widely discussed in legal theory, *see, e.g.,* Akram, *supra* note 15 at 459–60; JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (1994); RONALD DWORKIN, *LAW'S EMPIRE* (Cambridge : Harvard University Press 1986); *see also* Colin Tatz, *Racism, Responsibility and Reparation: South Africa, Germany and Australia* 31 AUSTRALIAN J. POLITICS & HISTORY 162, 165 (1985) (discussing how the law legitimizes racist beliefs); Shelley Bielefeld, The Dehumanising Violence of Racism: The Role of Law, (D Phil thesis, Southern Cross University, 2010). ,–

attacked, perpetrators felt justified in their behavior because, according to them, such women were terrorists.[76]

In addition to physical and verbal violence, there is evidence of increased horizontal discrimination of other forms following the passing of head and face-covering laws in France. For example, in the aftermath of the 2004 law, which was restricted to public educational settings, women wearing headscarves have been refused service in banks[77] and restaurants,[78] forbidden from swimming at public pools[79] and from accessing gyms,[80] prevented

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[76] *See, e.g., 'Marseille: une jeune femme voilée agressée, accusée d'être "terroriste"*" LE PARISIEN (Paris, 18 November 2015), http://www.leparisien.fr/faits-divers/marseille-une-jeune-femme-voilee-agressee-accusee-d-etre-terroriste-18-11-2015-5289659.php (last accessed 29 May 2019) (reporting the perpetrator of a young woman assaulted her at the exit of a metro station while calling hers a terrorist); *French Girl Attempts Suicide after "Veil Attack*", FRANCE 24 (Feb. 9, 2013) https://www.france24.com/en/20130827-french-muslim-girl-veil-attack-suicide-skinheads-islamophobia-paris-police (last visited 29 May 2019) (detailing how two skinheads attacked a 16-year-old girl "with a "sharp object," ripped off her headscarf, shouted Islamphobic insults and hit her on the shoulder before fleeing by car"); S. D., *Agression Islamophobe dans un parc, une femme voilée insultée et frappée*, LA VOIX DU NORD, (June 14, 2017), http://www.lavoixdunord.fr/177921/article/2017-06-14/agression-islamophobe-dans-un- (discussing the influence of Islamophobia and Le Pen's Front National far-right political party on violence against Muslim women).

[77] *Une femme voilée interdite d'entrée dans sa banque,* LE PARISIEN (Dec. 31, 2009),http://www.leparisien.fr/seine-et-marne-77/une-femme-voilee-interdite-d-entree-dans-sa-banque-31-12-2009-760734.php [https://perma.cc/Z3CM-XUDB]; *France: Woman Wearing Hijab Denied Entry By Bank*, HUFFINGTON POST (Sept. 27, 2009), https://www.huffpost.com/entry/france-woman-wearing-hija_n_270436?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAAZyI2NvHyT4hOatDwQ5bU97DAsRMJlmYAxN5yEVUyP6pGfpt_N6e39yEMrEwcYbBHOT_hMsWga-8RBgIAreYF6kofKKgYP35Ek_kDlj2PJig5tW_dH4f1xEhg6YQJXsTocw5UlkMsyCrHyIG0NM_4iu3vefzhgndGG6zJZrE0jk [https://perma.cc/C39P-B2DY].

[78] Dounia Hadni, *Un restaurateur refuse de servir deux femmes voilées*, LIBÉRATION (Aug. 28, 2016), https://www.liberation.fr/france/2016/08/28/un-restaurateur-refuse-de-servir-deux-femmes-voilees_1475137 [perma.cc/BL4W-H8EQ].

[79] C.G., *Loire: à Lorette, les femmes voilées interdites de baignade*, 20 MINUTES (Jun. 27, 2017), https://www.20minutes.fr/lyon/2095167-20170627-loire-lorette-femmes-voilees-interdites-baignade [https://perma.cc/WV67-2JR3].

[80] Myriam B., *Musulmane, je suis privée de salle de sport à cause de mon voile. J'ai décidé de me battre* L'OBSERVATEUR (Paris, 25 March 2016), http://leplus.nouvelobs.com/contribution/1498866-musulmane-je-suis-

from accompanying their children on school field trips,[81] discriminated against in the job market,[82] fired from their jobs,[83] and ostracized from mainstream feminist groups.[84] The public has also targeted women wearing headscarves when they have expressed themselves publicly: for example, when competing in a reality TV show,[85] representing a student union,[86] and running for political office.[87]

This slippage from the precise target and context of the ban (headscarfs in schools) to other contexts is further illustrated by decisions of school teachers and authorities that girls who had attempted to wear headscarves to school should not be permitted to wear long skirts or bandanas either.[88] The 2016 "burkini affair,"

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privee-de-salle-de-sport-a-cause-de-mon-voile-j-ai-decide-de-me-battre.html (last visited 29 May 2019).

81 Julie Saulnier and Sarah Ganon, *Pas de mères voilées aux sorties scolaires* L'EXPRESS (Paris, 3 March 2011), https://www.lexpress.fr/education/pas-de-meres-voilees-aux-sorties-scolaires_968445.html (last visited 29 May 2019).

82 '*Nos voiles, nos récits: des rêves à la réalité*' LALLAB, 2016, https://vimeo.com/190527113 (last visited 29 May 2019).

83 Thomas Hubert, *French Veil Ban Upheld in Controversial Court Case*, FRANCE 24 (Nov. 27, 2013), https://www.france24.com/en/20131127-islamic-veil-baby-loup-european-court-human-rights-france-secular-muslim-burqa-niqab.

84 Christine Delphy, *Feminists are Failing Muslim Women by Supporting Racist French Laws,* THE GUARDIAN (Ju. 20, 2015) at https://www.theguardian.com/lifeandstyle/womens-blog/2015/jul/20/france-feminism-hijab-ban-muslim-women.

85 Houssem Ben Lazreg, *Singer Wows "Voice" Judges but Social Media Mob Pushes her to Quit Show*, THE CONVERSATION (Feb, 28, 2018),https://theconversation.com/singer-wows-voice-judges-but-social-media-mob-pushes-her-to-quit-show-91728 (last visited 29 May 2019).

86 Le Monde, *Polémique sur le Voile d'une Responsable de l'UNEF à la Sorbonne*, LE MONDE (Paris, 14 May 2018), https://www.lemonde.fr/societe/article/2018/05/14/polemique-sur-le-voile-d-une-responsable-de-l-unef-a-la-sorbonne_5298396_3224.html (last visited 29 May 2019).

87 Monique Dental, Ziad Goudjil, Michèle Loup & Arlette Zilberg, *Ecologistes, laïques, antiracistes et féministes!*, LE MONDE (Paris, 26 February 2010), https://www.lemonde.fr/idees/article/2010/02/26/ecologistes-laiques-antiracistes-et-feministes-par-monique-dental-ziad-goudjil-michele-loup-arlette-zilberg_1311896_3232.html (last visited 29 May 2019).

88 *See, e.g.,* Cecile Chambraud & Séverin Graveleau, *Crispation à l'école sur les jupes longues*, LE MONDE (Apr. 29, 2015), https://www.lemonde.fr/societe/article/2015/04/29/crispation-a-l-ecole-sur-les-jupes-longues_4624882_3224.html; *Des lycéennes réclament leur "droit au bandana*,20 MINUTES (Paris, 13 September

in which a number of French towns prohibited the wearing of body-covering clothing on beaches in summer,[89] measures that France's highest administrative court, the State Council (Conseil d'Etat), later found to be unlawful[90]—is a recent example of the same phenomenon of slippage from the precise targets of the 2004 and 2010 laws to different locations and items of clothing. Additionally, despite the State Council ruling, some town mayors have kept the ban in place by simply changing their bans' wording.[91]

These examples reveal how prohibitions on covering may reinforce racism, violence, and discrimination faced by women from Muslim cultural backgrounds in France. The HRC does not go far enough to address or identify the extent of this discrimination in their decisions. We argue that the full complexity of impact of the French bans cannot be fully understood and accounted for by limited judicial interpretations of discrimination based solely on sex and religion. In order to identify and address how structural racism and sexism shape the French legislation on face-coverings, we recommend drawing on a modified version of the UN concept of 'harmful traditional practices' in the future development of jurisprudence on intersectional discrimination.

2004),https://www.20minutes.fr/paris/35044-20040913-paris-des-lyceennes-reclament-leur-droit-au-bandana (last visited 29 May 2019).

89 Ben Quinn, *French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban,* THE GUARDIAN (London, 24 August 2016), https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach (last visited 29 May 2019).

90 '*Burkini: le Conseil d'Etat suspend l'arrêté de Villeneuve-Loubet'* L'OBSERVATEUR (Paris, 26 August 2016) at https://www.nouvelobs.com/societe/20160826.OBS6931/burkini-le-conseil-d-etat-suspend-l-arrete-de-villeneuve-loubet.html (last visited 29 May 2019).

91 '*Burkini : Comment certains maires continuent à l'interdire'* OUEST FRANCE (Aug. 8, 2017), https://www.ouest-france.fr/europe/france/burkini-comment-certains-maires-continuent-l-interdire-5119414 [https://perma.cc/T3NE-L94Q].

Courts and UN treaty bodies must decolonize their understanding of harmful traditional practices.

In *Yaker* the HRC noted:

> the blanket ban on the full-face veil introduced by the Act appears to be based on the assumption that the full veil is inherently discriminatory and that women who wear it are forced to do so. While acknowledging that some women may be subject to family or social pressures to cover their faces, the Committee observes that the wearing of the full veil may also be a choice — or even a means of staking a claim — based on religious belief, as in [Sonia Yaker's] case.[92]

To support its claim, the UNHRC decision cites *S.A.S. v. France*, para. 119, where the ECtHR found that "a State Party cannot invoke gender equality in order to ban a practice that is defended by women—such as the applicant—in the context of the exercise of the rights enshrined in those provisions, unless it were to be understood that individuals could be protected on that basis from the exercise of their own fundamental rights and freedoms."[93] This recognition of covering as a choice contrasts with the perspective of the French government and the UN treaty bodies that the niqab is inherently oppressive to women and that its wearing is forced, either by sanctions or by cultural constraints and conditioning. The French government and UN treaty bodies frame the issue as the imposition of oppressive clothing practices on women within patriarchal societies, while the HRC draws on the claim that if an individual woman chooses to cover, it cannot be considered as oppressive of her.[94]

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92 *Yaker*, at para. 8.15 (citing *S.A.S.*, at para. 119)

93 *Id.*

94 These two contrasting arguments follow the general outline of the debate in the social sciences as to whether structure or agency is the primary force shaping human behavior. Structure is understood as social arrangements that limit or constrain available options for individuals, while agency is understood as individuals' capacity to perceive their situation and act accordingly. *See* PATRICK BAERT & FILIPE CARREIRA DA SILVA, *SOCIAL THEORY IN THE TWENTIETH CENTURY AND BEYOND* 14 (2009) (describing how structuralism "does not simply say that structures are constraining, but that they

These two arguments appear irreconcilable.[95] In this article, we propose a third approach to move beyond this dichotomy, one that is better suited to fully capture the interlinked racist and sexist dimensions of the French law. We suggest that discrimination jurisprudence should draw on a modified version of the concept of 'harmful traditional practices' based on the work of feminist scholars Winter, Thompson and Jeffreys.[96] The concept of harmful traditional practices was elaborated by the UN in 1995 to address harms to women and children that do not easily fit into a human rights framework.[97] In line with its CEDAW mission, the UN defines harmful traditional practices as those practices that are damaging to the health of women and girls, are performed for men's benefit, create stereotyped roles for the sexes, and are justified by tradition or custom.[98] A 1995 UN Factsheet cites a number of such practices, including: female genital mutilation, son preference, female infanticide, early marriage and dowry, early pregnancy, nutritional taboos and practices related to child delivery,

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are constraining to the extent that they preclude the possibility of the individual's agency.").

95 For a different, albeit related, analysis of the role of autonomy in religious practices, see Farrah Ahmed, *The Autonomy Rationale for Religious Freedom*, 80(2) MODERN L. REV. 238 (2017),, who argues the protection currently offered to religious practices under right to religious freedom under human rights law cannot be sufficiently justified by reference to the value of autonomy.

96 Bronyn Winter, Denise Thompson & Sheila Jeffreys, *The UN Approach to Harmful Traditional Practices: Some Conceptual Problems*, 4 INT'L FEMINIST J. POLITICS 72 (2002); *see also* SHEILA JEFFREYS, BEAUTY AND MISOGYNY: HARMFUL CULTURAL PRACTICES IN THE WEST (2005). Although we have chosen to focus on the critique of harmful traditional practices developed by Winter, Thompson and Jeffreys, it should be noted that many women activists and scholars from Muslim cultural backgrounds in France have made arguments that challenge the agency/structure binary with more direct reference to the French context. This work includes, most importantly, analyses of the implications of France's colonial history in Algeria and its impacts on French attitudes towards Islamic head-coverings. *See, e.g.*, H. Bouteldja , *supra* note XX; H. Bentouhami, *Les feminismes, le voile et la laïcité à la française*, SOCIO, https://journals.openedition.org/socio/3471.

97 G.A. Res. 34/180, Convention on the Elimination of all Forms of Discrimination Against Women, FACT SHEET NO. 23 HARMFUL TRADITIONAL PRACTICES AFFECTING THE HEALTH OF WOMEN AND CHILDREN (August 1995). .

98 *Id.* at ¶ 87

and violence against women.[99] However, as Winter et al. have pointed out, apart from violence against women, the practices mentioned in the Factsheet originate in and are mostly practiced in non-Western countries.[100] They argue that this focus constitutes "Western bias" in leaving out what they call "harmful traditional/cultural practices in the West."[101] For Winter et al., such Western practices include beauty practices like cosmetic surgery, high heels, makeup, and hair removal, all of which fulfill the criteria for harmful traditional practices laid out in the Factsheet.[102] They are however careful to specify that:

> [A]lthough we are arguing that there are cultural practices harmful to women in the West, too, we are not arguing that western practices are equivalent to those identified by the UN, that female genital mutilation (FGM), say, is a kind of cosmetic surgery (Greer 1999). In arguing that there are practices in the West which also count as [harmful traditional practices], we are simply making the point that a culture of male domination exists in the West as well.[103]

The purpose of this argument thus is not to trivialize the forms of violence against women listed in the UN Fact Sheet, but simply to point out that related harmful practices exist in Western countries. Critiquing this quasi-exclusive focus on practices originating in non-Western contexts is important for two reasons. Firstly, this focus contributes to racist bias and discrimination by implying that only non-Western cultures are patriarchal. In a direct continuation of colonial discourses,[104] this focus feeds into ideas of people from

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99 *See id.*

100 *See* Winter, Thompson & Jeffreys, *supra* note 96, at 72.

101 *Id.* Winter et al. use the terms "traditional" and "cultural" interchangeably, echoing the usage in the UN FACT SHEET, *supra* note 96. This article will follow the same practice.

102 *See* Jeffreys, supra note 96 (describing harms to women of western beauty practices);NAOMI WOLF, THE BEAUTY MYTH (1990); SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION (1990); SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY (1993).

103 WINTER, THOMPSON & JEFFREYS, *supra* note 96, at 73.

104 For more information on colonial discourses, see FRANTZ FANON, A DYING COLONIALISM (New York : Grove Press, 1965); Scott, *supra* note 2;

non-Western backgrounds as different from and inferior to "civilized" Europeans due to their "primitive," "barbaric" patriarchal practices.[105] Secondly, the implication that only non-Western cultures are patriarchal underestimates the patriarchal nature of commonplace Western practices, making these practices harder to combat. Thus, a modified harmful traditional/cultural practices approach points towards the wider sexist implications of the French prohibitions. In particular, through its failure to recognize—even its explicit erasure of—the connections between Islamic face-coverings and other, much more widespread patriarchal practices engaged in by French women, the French law actually hinders efforts to address the sexism that affects all women in French society.[106]

The modified concept of harmful traditional/cultural practices thus provides a useful tool to decolonize political and legal approaches to Islamic covering by analyzing western beauty practices as harmful cultural practices along with niqab and other Muslim head-coverings. The UN's original concept of harmful traditional practices recognizes that practices harmful to women can be constrained by culture,[107] and that women's choices to engage in them are shaped by tradition and social pressure, whether direct or indirect.[108] The modified version we propose emphasizes that this is the case for women from western cultural backgrounds as well as women from Muslim cultural backgrounds. This allows Muslim covering to be seen not as isolated and unique, but as a practice situated on a continuum with many others throughout the world, including the practices of western societies such as France. Moreover, this approach emphasizes that France's 2010 law singles out a practice engaged in by a very small number of women from

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Bouteldja, *supra* note 13; Hourya Bentouhami, *Phénoménologie politique du voile,* 44 PHILOSOPHIQUES 2 (2017).

105 Sherene Razack, *Imperilled Muslim women, dangerous Muslim men and civilized Europeans: legal and social responses to forced marriages*, 12 FEMINIST LEGAL STUDIES 129–174 (2004); *see also* Scott *supra* note 2; Fanon *supra* note 94.

106 *See also* CHRISTINE DELPHY, UN UNIVERSALISME SI PARTICULIER: FÉMINISME ET EXCEPTION FRANÇAISE (1980–2010) (2010).

107 *G.A. Res. 34/180* ¶*, supra note 97.*

108 *Id.*

a minority ethnic group, while failing to address much more common harmful traditional practices in which women of all ethnic backgrounds in France routinely engage.[109]

Consequently, the modified harmful traditional practices approach is helpful in understanding how the 2010 French law engages in intersectional discrimination on the basis of race and sex. It highlights how the law increases racist and sexist targeting of a particular group of French women by focusing exclusively on a single patriarchal practice engaged in by only some members of this group, while ignoring related practices engaged in by the majority.

CONCLUSION

The ground-breaking UNHRC decisions in *Yaker* and *Hebbadj* find France to have violated two Muslim women's freedom of religion by fining them for wearing niqab. These holdings are in striking contrast to the decisions of the ECtHR and other UN treaty bodies (notably CERD and CEDAW), which have consistently failed to find the French laws against Islamic face-coverings discriminatory. In this article, we noted the continuity in the UNHRC's approach to this issue, and argued that its decisions, which appear to be grounded in a commitment to intersectionality, indicate the development of resistance to the judicial acceptance of discrimination.

However, the UNHRC decisions fail to grasp the full extent of harms created by the 2010 law. In this article, we proposed one useful tool for the future development of intersectional discrimination jurisprudence to better comprehend the structural racism and sexism in which the French laws prohibiting Islamic

109 *See, e.g.*, Christine Delphy, *Anti-sexism or Anti-racism*, *in* SEPARATE AND DOMINATE: FEMINISM AND RACISM AFTER THE WAR ON TERROR (David Broder, tr. 2015) (arguing that this practice fails to address much more common harmful traditional practices).

face-coverings in public are embedded. We suggested that the use of a modified version of the UN concept of harmful traditional/cultural practices—following the work of Winter *et al.*, to recognize Islamic head-coverings as existing on a continuum of harmful traditional practices from all countries in the world—can better reveal the simultaneously racist and sexist dimensions of the law.

Through an interdisciplinary socio-legal contextual analysis, the article illuminates the normative power and wide-ranging negative effects of the Islamic face-covering prohibitions on French women. Understanding these harms is crucial for the future development of intersectional discrimination jurisprudence, and moving towards a Europe, a USA and a world in which patriarchal practices are recognized and combatted, and women of color are no longer subject to discriminatory laws.