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13 September 2022

## **Enhancing Intersectionality in Judicial Interpretation**

Submission to the Study on *Patterns, Policies and Processes Leading Racial Discrimination and on Advancing Racial Justice and Equality* for the 54<sup>th</sup> Session of the United Nations Human Rights Council

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**Dear Members of the Human Rights Council Advisory Committee,**

Thank you for the opportunity to make a submission to this inquiry. I do so in a private capacity as scholar of human rights law and feminist theory at UNSW Sydney. The views expressed are my own, not those of my institution. Systemic, structural, and institutional racism is prominent across many areas of public life in national and international settings, such as access to justice, enjoyment of political and social rights. In line with my expertise, this submission addresses question 2 in *Questionnaire on patterns, policies, and processes leading to incidents of racial discrimination and on advancing racial justice and equality*, and the intersection of racism and sexism in face-covering prohibitions in particular.

Many countries around the world have discriminatory laws, which ban Muslim face coverings in public spaces. For example, in Europe alone, multiple countries (France, Belgium, Italy, Switzerland, Russia, Germany, Spain, Bulgaria, the Netherlands, Denmark, and Austria) have established various forms of such prohibitions.<sup>1</sup> Many nations in other parts of the world, such as ECOWAS, have similar rules.<sup>2</sup> As I have explained with my colleague Catharine Weiss (paper is freely available on SSRN) that such laws have particularly strong discriminatory and racist effect on women from Muslim cultural backgrounds in countries, in which Muslims constitute small minorities, usually immigrants from former colonies.<sup>3</sup> Face-covering prohibitions are widely accepted by the judiciary, including the European Court of Human Rights, and the UN treaty bodies, such as the committees on the *Convention on Elimination of All Forms of Racial Discrimination*

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<sup>1</sup> A summary of such measures can be found in *The Islamic Veil Across Europe*, BBC NEWS (May 31, 2018), <https://perma.cc/AK8D-EQM6>.

<sup>2</sup> Many Muslim-majority African states have also introduced various prohibitions on face covering, including Chad, parts of Niger, Cameroon, and Gabon. David Blair, *Why West Africa's Muslim-majority states are banning the burqa*, TELEGRAPH (May 2, 2016), <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 Wearing of Hijabs*, AFRICAN SUN TIMES (Dec. 17, 2015), <https://perma.cc/E9JS-42BE>. However, analysis of face-covering prohibitions should be sensitive to the context of power relations in which they operate.

<sup>3</sup> Monika Zalnieriute and Catherine Weiss, 'Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond Formalistic Accounts of Discrimination on Islamic Covering Prohibitions' (2020) 35 *Berkeley Journal of Gender, Law and Justice* 71. Available at <https://papers.ssrn.com/abstract=3514948>.



(“CERD”)<sup>4</sup> and on the *Convention on Elimination of All Forms of Discrimination Against Women* (“CEDAW”).<sup>5</sup> These bodies have failed to question the legitimacy of prohibitions that have a serious and systematic impact on women from Muslim cultural backgrounds.<sup>6</sup>

I therefore invite the HRC Advisory Committee to call on the UN bodies to enhance their understanding of theory intersectionality to ensure that systemic and structural barriers for women from Muslim cultural backgrounds are removed. I have recently proposed a way to enhance judicial interpretation of reconceptualizing intersectionality by reference to a modified concept of “harmful cultural practices” (this paper is freely available on SSRN).<sup>7</sup>

This step is crucial for eradicating structural, systemic, and institutional racism.

## Acknowledgments

Dr. Monika Zalnierute’s work and research for this submission has been funded by Australian Research Council Discovery Early Career Research Award (‘Artificial Intelligence Decision-Making, Privacy and Discrimination Laws’, project number DE210101183).

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<sup>4</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted on December 21, 1965; entered into force January 4, 1969.

<sup>5</sup> UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), adopted on December 18, 1979, by the United Nations General Assembly; entered into force as an international treaty on September 3, 1981.

<sup>6</sup> CERD, Concluding Observation regarding France, Apr. 18, 2005, CERD/C/FRA/CO/16 at ¶ 18; CEDAW, Concluding Observation regarding France, Apr. 8, 2006, CEDAW/C/FRA/CO/6 at ¶¶ 20, 21.

<sup>7</sup> Zalnierute and Weiss (n 3).