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Banning the Full-Face Veil: Freedom of Religion and Non-Discrimination in the Human Rights Committee and the European Court of Human Rights

Sarah H. Cleveland*

INTRODUCTION

What is, or should be, the relationship between claims of violations of the right to manifest one's religion as a result of a generally applicable law or policy, and claims of indirect discrimination on grounds of religion?

The interrelationship of human rights protections is not a new question. Just as rights may conflict, rights may also overlap. The arrest of a human rights activist for expressing her views could violate both the prohibition against arbitrary detention and her freedom of expression. Excessive use of force against peaceful demonstrators could violate their rights to freedom of assembly, freedom of expression, and security of the person, and the prohibition against torture and cruel, inhuman, or degrading treatment or punishment. Certain actions or inactions may implicate specific rights, such as the rights to language and culture, and to freedom of religion, opinion, or belief, and may also constitute discrimination on those same grounds.¹ The relationship between closely related rights such as the freedoms of expression and assembly also may not be well-elaborated because human rights courts and other bodies at times may, for reasons of economy, restraint, or institutional tradition, refrain from examining some claims once they have found violations of others.

The international human rights to freedom of religion and protection from discrimination on grounds of religion are two such closely related rights. In *Yaker v. France* and its companion case *Hebbadj v. France*, before

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1. See, e.g., International Covenant on Civil and Political Rights, art. 26, Dec. 19, 1966, 999 U.N.T.S. 171 (prohibiting discrimination on “any ground such as . . . language, religion, political or other opinion”) [hereinafter ICCPR].

the UN Human Rights Committee,² and in *S.A.S. v. France*, before the European Court of Human Rights,³ the two bodies reached inconsistent conclusions regarding the compatibility of France's ban on wearing the full-face veil (the niqab or burqa) in any public space with France's obligations under the International Covenant on Civil and Political Rights (ICCPR)⁴ and the European Convention on Human Rights,⁵ respectively. The French law purported to be religiously neutral, in that it prohibited all apparel concealing the face.⁶ However, Article 2 of the French law exempted a large number of face coverings other than the full-face veil,⁷ and, in practice, the vast majority of the checks conducted under the Act involved Muslim women wearing the full veil.⁸ Sonia Yaker, who was twice subjected to criminal fines for wearing the niqab, and the claimant in *S.A.S.*, who wished to wear the full veil without risk of sanction, separately challenged the Act as, *inter alia*, violating their right to manifest their religion and constituting indirect discrimination on grounds of religion.⁹

Both the Court and the Committee recognized that by imposing criminal penalties on the Muslim women claimants who chose to wear the full-face veil in public, the Act interfered with their ability to manifest their religion under Article 9 of the European Convention¹⁰ and Article 18 of the

2. Yaker v. France, CCPR/C/123/D/2747/2016, No. 2747/2016, U.N. Hum. Rts. Comm., Views adopted by the Committee under Article 5(4) of the Optional Protocol at its 123rd session (July 17, 2018); Hebbadj v. France, CCPR/C/WG/123/DR/2807/2016, No. 2807/2016, U.N. Hum. Rts. Comm., Views adopted by the Committee under Article 5(4) of the Optional Protocol at its 123rd session (July 17, 2018).

3. *S.A.S. v. France* [GC], 2014-III Eur. Ct. H.R. 341.

4. ICCPR, *supra* note 1.

5. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5 [hereinafter European Convention].

6. Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of October 11, 2010 Prohibiting the Concealment of the Face in Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344. The French Constitutional Council also interpreted the law to exempt covering of the face in religious spaces open to the public. *See* Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2010-613 DC, Oct. 7, 2010 (Fr.).

7. Article 2(II) of the Act exempts from the prohibition clothing worn for "health reasons"; on "professional grounds" or as "part of sporting, artistic or traditional festivities or events," including "religious processions"; or that is prescribed or legally authorized by legislative or regulatory provisions. Loi 2010-1192 art. 2.

8. *See infra* note 16.

9. For further discussion of the concepts of indirect and direct discrimination, see generally Gerald L. Neuman, *supra* 34 HARV. HUM. RTS. J. 177 (2021) and Christopher McCrudden, *infra* 34 HARV. HUM. RTS. J. 249 (2021).

10. European Convention, *supra* note 5, at art. 9 ("Article 9 – Freedom of thought, conscience and religion. 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. 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.").

ICCPR,¹¹ respectively. The two bodies diverged, however, in their application of the limitations provisions of those articles, as well as the nondiscrimination provisions of the two treaties. This Essay explores the treatment of the claims of religious freedom and religious discrimination by the European Court and the Committee. This case study offers an opportunity to consider the relationship between these two fundamental human rights,¹² as well as the respective doctrinal and institutional roles of the regional Court and the more universal Committee as human rights interpreters.

I. EUROPEAN COURT OF HUMAN RIGHTS

A. *Manifestation of Religion*

Having found that the French ban interfered with S.A.S.'s freedom to manifest her religion under Article 9 of the European Convention, the European Court considered whether the interference was compatible with the limitations provisions of Article 9(2). That clause provides that the freedom to manifest religion "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."¹³ Because the ban on the full-face veil was codified in French law, the unresolved questions were: (1) did the legal prescription pursue one of the legitimate aims expressly set out in the clause; and (2) was it necessary in a democratic society to achieve that aim?

The European Court apparently accepted France's contention that the Act was neutral with respect to religion and applied generally to all clothing that covered the face. The Court did not address the numerous exceptions set forth in Article 2 of the Act, including the applicant's observation that the law expressly allowed for covering the face in traditional Christian festivals but prevented a Muslim woman from covering her face even during Ramadan.¹⁴ The Court did acknowledge aspects of the context in which

11. ICCPR, *supra* note 1, at art. 18 ("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.").

12. For additional discussion of the relationship between the rights to freedom of religion and non-discrimination on the basis of religion, see generally Yuval Shany, *infra* 34 HARV. HUM. RTS. J. 305 (2021).

13. European Convention, *supra* note 10, at art. 9.

14. S.A.S., 2014-III Eur. Ct. H.R. at ¶ 80.

the law had been enacted and implemented. For example, the Court noted that Islamophobic statements had been made during debates over the Act,¹⁵ that the ban had mainly affected Muslim women who chose to wear the full veil,¹⁶ and that the ban “has a significant negative effect on the situation of women” who choose to wear the full-face veil for religious reasons and “may have the effect of isolating them and restricting their autonomy.”¹⁷ Nevertheless, it emphasized that “the ban is not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face.”¹⁸

With respect to the second question—whether the Act served a legitimate aim—the Court rejected France’s contention that the Act could be justified on grounds of combating gender discrimination or terrorism.¹⁹ However, the Court accepted the government’s other argument, that the law served the aim of securing “respect for the minimum requirements of life in society,”²⁰ or “living together.”²¹ In other words, France was entitled to require all people to show their faces in public in order to ensure “respect for the minimum requirements of life in society.” The Court treated this purpose as part of the aim of “protection of the rights and freedoms of others” under Article 9(2).²² The Court reasoned that France had a “wide margin of appreciation” with respect to manifestations of religion²³ and that the law was proportionate to this aim, despite the fact that France was a notable outlier among Council of Europe member states in imposing such a ban, and despite the acknowledged burdens on religious freedom that the law imposed on affected women.²⁴ In light of the subsidiary role of the Court in assessing local needs and conditions, the Court accordingly concluded that the law did not contravene Article 9.²⁵

15. *Id.* ¶ 149.

16. *Id.* ¶ 151.

17. *Id.* ¶ 146.

18. *Id.* ¶ 151.

19. Both the Court and the Committee concluded that the Act could not be justified by France’s stated aim of promoting public safety by countering terrorism, because the law was, *inter alia*, disproportionate to that aim. S.A.S., 2014-III Eur. Ct. H.R. at ¶ 139; Yaker, *supra* note 2, ¶ 8.8. The European Court also rejected France’s stated aim of combating gender discrimination. S.A.S., 2014-III Eur. Ct. H.R. at ¶ 119. France did not advance that aim before the Committee.

20. S.A.S., 2014-III Eur. Ct. H.R. at ¶ 121.

21. *Id.* ¶ 122.

22. *Id.* ¶ 121.

23. *Id.* ¶ 155. The margin of appreciation is a doctrine developed by the European Court of Human Rights based on the premise that the primary responsibility vested in states to implement obligations under the Convention “carries with it a variable degree of discretion . . . as to the appropriate means of implementation.” Paul Mahoney, *Marvelous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1, 2 (1998).

24. S.A.S., 2014-III Eur. Ct. H.R. at ¶¶ 156, 146.

25. *Id.* ¶ 151.

B. *Nondiscrimination*

Having found that the Act was a necessary and proportionate means to achieving a legitimate aim under Article 9, the Court quickly dispensed with the applicant's claim of indirect discrimination under Article 14 of the European Convention (a claim that, under the European Convention, was to be construed in conjunction with Article 9). The Court reiterated that a general measure that disproportionately affects a particular group may be discriminatory if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality" between the chosen means and the aim pursued.²⁶ The Court acknowledged that the Act "has specific negative effects on the situation of Muslim women who, for religious reasons, wish to wear the full-face veil in public."²⁷ However, having already concluded that the Act was proportionate to a legitimate aim under Article 9, the Court found that this same conclusion established an objective and reasonable justification and defeated any finding of discrimination under Article 14.²⁸

In a partial dissent, Judges Nussberger and Jäderblom powerfully critiqued the European Court's rationale as vague and abstract and as not based on the protection of Convention rights.²⁹ They noted that there was no right under the Convention "not to be shocked or provoked by different models of cultural or religious identity, even those that are very distant from the traditional French and European lifestyle,"³⁰ or to "enter into contact with other people, in public places, against their will."³¹ Nor had France explained how the impact of the veil differed from that of forms of face covering that were exempted from the Act. "People can socialise without necessarily looking into each other's eyes," the dissenters concluded.³²

II. HUMAN RIGHTS COMMITTEE

In contrast to the European Court, the Human Rights Committee held that the ban on the full-face veil violated the right to freedom of religion under Article 18 and also discriminated against Muslim women under Article 26 of the Covenant. The Committee, unlike the European Court of Human Rights, also analyzed the intersectionality of gender and religion in its assessment of the discrimination claim.

26. *Id.* ¶ 161 (emphasis added).

27. *Id.*

28. *Id.*

29. S.A.S., 2014-III Eur. Ct. H.R. at ¶ 5 (Nussberger, J., and Jäderblom, J., dissenting).

30. *Id.* ¶ 7.

31. *Id.* ¶ 8.

32. *Id.* ¶ 9.

A. *Manifestation of Religion*

Like the European Court, the Human Rights Committee determined that the French ban infringed on the freedom to manifest religion under Article 18(1) of the ICCPR.³³ It then turned to the question under Article 18(3),³⁴ whether the law pursued one of the legitimate objectives set forth under that article and was necessary for achieving that objective, proportionate, and non-discriminatory.³⁵

Here, the Committee diverged from the European Court with respect to France's stated legitimate aim of "living together," which the Committee construed as the aim of protecting the rights and freedoms of others. Under Article 18(3) of the ICCPR, this aim is limited to protecting "the *fundamental* rights and freedoms of others."³⁶ That textual difference arguably makes this provision more restrictive than Article 9 of the European Convention, which does not facially require that the rights of others that would be infringed be "fundamental." The Committee further emphasized that this limitation on the freedom to manifest religion was to be strictly applied and that France had not identified any specific right of other specific individuals that was infringed upon by wearing the full-face veil. In particular, the Committee noted that France had failed to explain why wearing the full-face veil infringed upon the fundamental rights of others in a manner that other forms of face coverings permitted by the Act did not. The Committee emphasized that the ICCPR does not bestow on individuals a fundamental "right" to see the faces of, and interact with, all other individuals in the public space.³⁷ It further concluded that France had not demonstrated that a criminal ban on only certain means of covering the face in public was proportionate to the stated aim or that it was the least restrictive means of achieving the aim that was protective of religion or belief.³⁸ The ban and Ms. Yaker's convictions thereunder thus violated Article 18.³⁹

B. *Nondiscrimination*

Ms. Yaker framed her claim under Article 26 of the ICCPR as one of indirect discrimination on the basis of gender and religion. She did not contend that the French law on its face directly discriminated against Muslim women on these grounds. However, in support of her claim of indirect discrimination, Ms. Yaker contended that the Act was designed specifically to prohibit the full-face veil and that it had been disproportionately applied

33. Yaker, *supra* note 2, ¶ 8.3.

34. Article 18 provides that "[f]reedom 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." ICCPR, *supra* note 1, at art. 18.

35. Yaker, *supra* note 2, ¶ 8.5.

36. ICCPR, *supra* note 1, at art. 18(3) (emphasis added).

37. Yaker, *supra* note 2, ¶ 8.10.

38. *See id.* ¶ 8.11.

39. *Id.* ¶ 8.12.

to the veil. Although only 2,000 women wore the full-face veil in a country of approximately 65 million, more than half of the persons subjected to checks under the Act were Muslim women wearing the full-face veil.⁴⁰

France argued that the law did not discriminate on the basis of religion either directly or indirectly. The government contended that the law was not targeted at a particular form of religious dress but neutrally prohibited any covering of the face.⁴¹ It further argued that Muslim women were not unreasonably impacted by the law, because they could adequately demonstrate their religious faith by wearing a veil that did not hide the face.⁴²

The Human Rights Committee did not specify whether it was evaluating the Article 26 claim as one of direct or indirect discrimination. Like the European Court, the Committee reiterated that a violation of Article 26 “may result from the discriminatory effect of a rule or measure that is apparently neutral or lacking any intention to discriminate.”⁴³ The Committee, however, noted that the French National Assembly’s deliberations on the Act had focused on the full-face veil as a “radical practice” that was “contrary to the values of the Republic.”⁴⁴ The Committee also noted that the law exempted most other forms of face-covering, and that it had been primarily enforced against women wearing the full-face veil.⁴⁵ The Committee thus observed that “from the text of the Act, the debate preceding its adoption and its implementation in practice, . . . the Act is applied mainly to the full-face Islamic veil, which is a form of religious observance and identification for a minority of Muslim women.”⁴⁶

Having previously rejected France’s claimed aim of “living together” under Article 18, the Committee concluded that the Act failed to satisfy the requirements of reasonableness, objectivity, and legitimacy of aim under Article 26. Here, unlike the European Court, the Committee emphasized the exceptions provided for under Article 2 of the Act and France’s “failure to explain why a blanket ban on the veil [was] reasonable or justified, in contrast to the exceptions allowable under the Act.”⁴⁷ The Committee observed that wearing the full veil could reflect a personal choice and invoked its prior concluding observations to France that rather than liberating wo-

40. *Id.* ¶¶ 3.13, 3.14, 11.

41. *Id.* ¶ 7.5.

42. *Id.* ¶ 7.9.

43. *Id.* ¶ 8.14.

44. *Id.* ¶ 8.13.

45. The history of the ban also indicated that France initially had proposed banning only the full-face veil but that the French Conseil d’Etat expressed concern that such a prohibition would raise freedom of religion concerns, among others. See CONSEIL D’ETAT, STUDY OF POSSIBLE LEGAL GROUNDS FOR BANNING THE FULL VEIL 9, 19 (2010) (“Prohibition of the full veil would violate various fundamental rights and freedoms [such as] freedom to manifest ones convictions, notably religious, and prohibition of any discrimination.”). The Conseil d’Etat also expressed concern that a general ban on covering the face would be legally infirm on grounds of, *inter alia*, indirect religious discrimination. See *id.* at 25–26.

46. Yaker, *supra* note 2, ¶ 8.13.

47. *Id.* ¶ 8.15.

men, a comprehensive ban could result in the further exclusion and marginalization of Muslim women and girls.⁴⁸ It also noted that the criminal penalties imposed, though minor, had been imposed on some women multiple times, including Ms. Yaker.⁴⁹ The Committee concluded that the French law “disproportionately affects the author as a Muslim woman who chooses to wear the full-face veil, and introduces a distinction between her and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable.”⁵⁰

III. INCONSISTENT BUT NOT CONTRADICTORY

The contrasting outcomes in the two cases reflect a number of textual, institutional, and doctrinal differences between the Committee and the Court and the human rights instruments they apply. The relevant provisions of the European Convention and the ICCPR have somewhat different texts and different negotiating histories, and the jurisprudence on each has evolved differently. From an institutional perspective, the European Court of Human Rights oversees an explicitly regional convention, which is premised in part on the shared social, cultural, and political values and norms of the European member states. In the context of Europe, these shared values include a presumed commitment by the states Parties to the Convention to democratic governance, human rights, and the rule of law. Accordingly, the European human rights system has developed a number of doctrines distinct to that regional system, including the principles of “margin of appreciation” and subsidiarity, which are premised, at least in part, on the fact that the Court is overseeing actions taken by national authorities in presumptively democratic, rights-respecting states.⁵¹ The Court, therefore, often emphasizes its subsidiary role with regard to the decisions taken by national authorities in interpreting and applying rights under the Convention. Likewise, the Court explicitly applies its “margin of appreciation” doctrine based in part on the presumption that national authorities administer their human rights obligations democratically and in good faith.⁵²

Moreover, the European Court has embraced a particularly deferential margin of appreciation with respect to regulation of manifestations of religion, as the Court acknowledged in *S.A.S.*⁵³ The Court’s acceptance of

48. A recent study of the impact of the French ban on more than 200 women who wear the niqab concluded that some women chose to leave France, while others were increasingly marginalized by not going out of the home and cutting off contact with the outside world. See AGNÉS DE FÉO, *DERRIÈRE LE NIQAB* (2020).

49. Yaker, *supra* note 2, ¶ 8.16.

50. *Id.* ¶ 8.17.

51. *S.A.S.*, 2014-III Eur. Ct. H.R. at ¶ 129.

52. *Id.*

53. *Id.*

France's stated aim of promoting "living together" likewise reflected a regional European, or even distinctly French, conception of acceptable forms of human interaction in the public space.

On the other hand, aspects of the Court's reasoning seemed more political than principled. The Court did not attempt to explain its willingness to treat the French law as religiously neutral, as evidenced both by its failure to examine the Act's numerous exceptions for other face coverings under the Act and its failure to give weight to the Act's extensive history, which focused on banning the full-face veil. As the dissenters observed, in applying a broad margin of appreciation, the Court also concluded that there was no European consensus on the validity of a comprehensive ban on the full-face veil, despite the fact that "forty-five out of forty-seven member States of the Council of Europe . . . [had] not deemed it necessary to legislate in this area . . . a very strong indicator for a European consensus."⁵⁴

The institutional position of the Human Rights Committee is quite different. As a global human rights mechanism, the Committee oversees a universally applicable human rights treaty that has more than 170 State Parties.⁵⁵ Those states range from being highly democratic and rights-respecting to highly authoritarian and repressive, and span nearly all of the legal, political, social, and cultural traditions of the globe. For this reason, though the Committee necessarily defers, pursuant to various doctrines, to the decisions of national authorities regarding appropriate ways to implement their human rights obligations, the Committee does not apply a specific concept akin to the margin of appreciation, which is based on an underlying presumption about the democratic and human rights commitments of State Parties and a normative coherence within the European regional system.

Moreover, as a doctrinal matter, the Committee traditionally has taken a more protective approach to manifestations of religion under Articles 18 and 26, particularly with respect to religious clothing.⁵⁶ Whereas the European Court has applied a particularly wide margin of appreciation in this context, the Committee has traditionally demanded specific explanations from States of the legitimate aim being advanced and the reasonableness

54. *S.A.S.*, 2014-III Eur. Ct. H.R. at ¶ 19 (Nussberger, J., and Jäderblom, J., dissenting).

55. See generally OHCHR, STATUS OF RATIFICATION INTERACTIVE DASHBOARD.

56. Compare *F.A. v. France*, CCPR/C/123/D/2662/2015, No. 2662/2015, U.N. Hum. Rts. Comm., Views adopted by the Committee at its 123rd session (July 16, 2018) (finding that prohibiting educator from wearing headscarf in private childcare facility violated freedom to manifest religion and discriminated on grounds of gender and religion under Articles 18 and 26), and *Raihon Hudoyberganova v. Uzbekistan*, CCPR/C/82/D/931/2000, No. 931/2000, U.N. Hum. Rts. Comm., Views adopted by the Committee at its 82nd session (Nov. 5, 2004) (finding that banning university student for wearing a headscarf violated freedom to manifest religion under Article 18), with *Leyla Şahin v. Turkey* [GC], 2005-XI Eur. Ct. H.R. 173, ¶¶ 123, 165 (finding that banning university student from wearing headscarf in lectures and examinations did not violate freedom to manifest religion or constitute discrimination), and *Dahlab v. Switzerland* 2001-V Eur. Ct. H.R. 446 (dismissing as inadmissible claim by teacher who was banned from teaching in primary school for wearing a headscarf).

and proportionality of the restriction. The text of Article 18(3), with its emphasis on respect for the “fundamental” rights of others, comports with this more restrictive construction.

The Committee’s more restrictive approach may reflect the Committee’s more universal institutional role. In assessing France’s specific contention regarding the importance of requiring Muslim women to reveal their faces in public as fundamental to promoting the ability of people to live together as a society, the Committee had to be conscious of the fact that, in a global context, the same claim could be advanced to justify precisely the opposite result. A state such as Saudi Arabia (not currently a party to the ICCPR), for example, could equally assert that requiring women to conceal their faces, their hair, or other parts of their bodies was necessary to promoting the goal of “living together” in that society.⁵⁷ Accordingly, in interpreting the Covenant, the Committee must be sensitive to the implications of its doctrines for the protection of individual rights in a wide range of cultures and contexts, and be correspondingly wary of excessively broad understandings of what may constitute a legitimate aim of a state.

Finally, facts matter. The claimant in *S.A.S.* did not contend that she wore the full-face veil as an expression of her religious faith in all circumstances,⁵⁸ nor had the French ban been legally enforced against her. She instead brought a facial challenge to the Act. These facts may have led the Court to conclude that the burden the French law imposed on her religious manifestation was not disproportionate or unreasonable. By contrast, both Ms. Yaker and Ms. Hebbadj contended before the Committee that they routinely wore the full-face veil as an expression of their faith. Both also had, in fact, been criminally prosecuted and fined for violating the Act—in Ms. Yaker’s case, more than once. These factual differences could also have influenced the two bodies’ different assessments.

Ultimately, however, the two decisions, though reaching different assessments of the validity of the law, did not place *contradictory* obligations on France. Nothing in the *S.A.S.* decision required France to maintain a ban on the full-face veil. France could comply with both decisions simply by revising its law in a manner that was consistent with both treaty obligations. The concurring opinions of members of the Human Rights Committee offered various possible narrower and less punitive approaches that France could have pursued consistent with its ICCPR obligations.⁵⁹ This situation

57. Cf. *Indonesia Bans Mandatory Islamic Hijab Scarves for Schoolgirls*, CTV NEWS (Feb. 5, 2021) (describing Indonesia’s recent ban on longstanding requirements for non-Muslim schoolgirls to wear headscarves in conservative regions of the country).

58. See *S.A.S.*, 2014-III Eur. Ct. H.R. at ¶ 12 (claiming applicant was “content not to wear the niqab in public places at all times but wished to be able to wear it when she chose to do so, depending in particular on her spiritual feelings. There were certain times [such as during Ramadan] when she believed that she ought to wear it in public in order to express her religious, personal and cultural faith.”).

59. See, e.g., Yaker, *supra* note 2, at 16–17 (joint concurring opinion of Committee members Ilze Brands Kehris and Sarah Cleveland).

is not unusual. It is often the case when a state is party to different instruments imposing multiple and somewhat differing human rights obligations. The state must conform its conduct to the most protective standard.⁶⁰

IV. MANIFESTATION OF RELIGION AND INDIRECT DISCRIMINATION

Beyond the differences in institutional and doctrinal approaches, however, the two decisions raise interesting questions regarding the relationship between the rights to manifest one's religion and against indirect discrimination on the basis of religion under these two treaties. The European Court concluded that because the French Act served a legitimate government aim and was proportionate to that aim for purposes of manifestation of religion under Article 9, it necessarily did not violate the nondiscrimination prohibition in Article 14, because it had a reasonable and objective basis. Of course, the converse reasoning does not necessarily apply, because the limitations provisions for manifestations of religion are more stringent. The religious freedom clauses of the European Convention and the ICCPR have explicit, closed limitations provisions that specify the types of government aims that may be invoked to restrict manifestations of religion. To satisfy the limitations clauses of those provisions, a government aim must satisfy one of those specific aims as well as be generally legitimate and reasonable. The religious freedom clauses also require that any measure be "necessary" (or "necessary in a democratic society") to achieving that aim—a requirement that may go beyond mere reasonableness or proportionality to require that the measure be the least restrictive means to achieving the stated aim.

Moreover, at least under the Committee's jurisprudence, a restriction on the manifestation of religion that is *discriminatory* is not compatible with Article 18(3). Restrictions on religious freedom may not be imposed for a discriminatory purpose or in a discriminatory manner.⁶¹ Thus, a finding of discrimination with respect to manifestation of religion is also likely to establish a violation of Article 18.

By contrast, the nondiscrimination clauses in the two treaties (Articles 14 and 26) do not contain express limitations provisions or identify specific government aims that may justify a restriction. The assessment of the validity of the government aim justifying the restriction and the restriction's reasonableness and proportionality to that aim is conducted as a matter of interpretation. At least in principle, therefore, an aim could be considered legitimate, or a measure reasonable and objective, for purposes of a nondis-

60. For further discussion of the jurisdictional overlap between the Court and the Committee, and the implications for jurisprudential cohesion of human rights doctrine, see generally Sarah H. Cleveland, *Human Rights Connectivity and the Future of the Treaty Body System*, in *BETWEEN PAST AND FUTURE – HUMAN RIGHTS IN TRANSITION* (Nehal Buta ed.) (forthcoming 2021).

61. See Yaker, *supra* note 2, ¶ 8.4 n.20 (citing U.N. Human Rights Committee, CCPR General Comment No. 22: Article 18 [Freedom of Thought, Conscience or Religion], ¶ 8 [July 30, 1993]).

crimination assessment, even if it does not satisfy the more specific legitimate aim or necessity requirements of the religious manifestation clause. In this manner, a measure could violate the freedom to manifest religion but not constitute discrimination.

On the other hand, because discrimination may be based on various grounds, including religion, a claim of nondiscrimination allows a human rights body to consider the cumulative effect of multiple forms of discrimination in a way that a claim of a violation of religious freedom does not. In the *Yaker* case and its companion, the Committee concluded that the Muslim women claimants had been the victims of intersectional discrimination under Article 26, because they had been discriminated against on the bases of both their faith and their gender, that is, as *Muslim women* who chose to wear the full-face veil.⁶² From this perspective, by relying on its finding that there was no violation of religious freedom under Article 9 to formulaically reject the claim of discrimination under Article 14, the European Court missed an opportunity to consider whether the intersection of gender-based and religious discrimination in this context might have cumulatively yielded a violation of the prohibition on non-discrimination.

Are there other considerations that distinguish an assessment of indirect discrimination from a violation of the freedom to manifest religion? In *Yaker* and its companion case, the Committee found a violation of Article 18 with respect to claimants who chose to wear the full-face veil and then found a violation of Article 26 based on largely analogous reasoning: The State Party had not identified a legitimate justification for the Act—in particular for its apparent targeting of the full-face veil. Nor was the measure sufficiently proportionate to any justification that France had advanced.

In this context, of course, the Committee was addressing a generally applicable law, knowing that roughly 2,000 women in France wear the full-face veil—a tiny portion of the population—and that the law had been disproportionately applied to a significant number of these women. France acknowledged before the Committee that wearing the full-face veil, while not mandated by the Islamic faith, was a religious custom practiced by some portion of the Muslim community. The Committee was also confronted with two nearly identical challenges to the law by different women in addition to the prior claim brought by S.A.S. in the European Court.

62. *Yaker*, *supra* note 2, ¶ 8.17 (“[The ban] disproportionately affects the author as a Muslim woman who chooses to wear the full-face veil, and introduces a distinction between her and other persons who may legally cover their face in public that is not necessary and proportionate to a legitimate interest, and is therefore unreasonable. The Committee hence concludes that this provision and its application to the author constitutes a form of *intersectional discrimination based on gender and religion*, in violation of article 26 of the Covenant.”) (emphasis added); see also Monika Zalnieriute & Catherine Weiss, *Reconceptualizing Intersectionality in Judicial Interpretation: Moving Beyond Formalistic Accounts of Discrimination on Islamic Covering Prohibitions*, 35 BERKELEY J. GENDER L. & JUST. 1 (2020) (analyzing the Human Rights Committee’s approach to intersectional discrimination in *Yaker* and *Hebbadj*).

Thus, information before the Committee established that some number of the full-veil-wearing Muslim women in France considered the law discriminatory and an affront to their religious faith. Was this additional information necessary for the Committee to conclude that the violation of Ms. Yaker's right to manifest her religion also discriminated against her as a Muslim woman? In other words, to what extent did the finding of indirect discrimination require a showing of systemic harm? Would Ms. Yaker have been found to have been discriminated against on grounds of gender and religion had she been the only woman in France who affirmatively wished to wear the full-face veil? Would she have been found to have been discriminated against on grounds of gender and religion if the French law had, in fact, prohibited all apparel concealing the face in public without exception? These questions will warrant further development in the indirect discrimination jurisprudence of human rights bodies, including that of the Committee and the European Court.

