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**DAMNED IF IT DOESN'T AND DAMNED IF IT DOES:  
THE EUROPEAN COURT'S MARGIN OF APPRECIATION  
AND THE MOBILIZATIONS AROUND RELIGIOUS  
SYMBOLS**

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ABSTRACT

This Article argues that the European Court of Human Rights' use of the margin of appreciation in cases involving religious symbols can be seen as the Court's status-seeking mechanism, whose application varies with the status of states, and the social status and distance of religious symbols from mainstream social norms. Notwithstanding the Court's self-restraint through the margin of appreciation, due to the informational function of law and status concerns, its procedures and decision have mobilizing effects upon third party interveners, states, groups, and "loyalists", with, at times, adverse effects. The mobilization of the states as third-party

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interveners in front of the Court creates a structural misbalance unfavorable to the individual applicants, while intervention of non-state third parties in the Court's procedures defers the alignment of socially controversial religious symbols, such as the wearing of the burqa with mainstream norms. Mobilization of states, groups and loyalists in the wake of the Court's deliberations decreases overall social pluralism, since states and various groups benefit from using litigation in front of the Court for purposes of the preemptive defense of the status quo and the creation of an emerging consensus, norm-entrepreneurship and strategic cause-legitimization (in the case of groups), and "mobilization of loyalties" (in the case of "loyalists").

As democracy implicitly rests on the social norms of past generations, disputes over the presence of headscarves, turbans, crucifixes, and burqas in various spaces are but minor symptoms of the growing anxieties over the institutional and social willingness and capabilities of democracies to manage pluralism caused by social and demographic change. This article suggests that the European Court of Human Rights is even less willing and well-equipped to deal with the phenomenon of increased religious diversity. The Court is "damned if it doesn't and damned if it does": both its self-restraint via the margin of appreciation and more activist decisions can do more harm than good, inflame what are controllable low-intensity social tensions, and create troubles where there are initially none.

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## 1. INTRODUCTION

The European Court of Human Rights's ("the Court") jurisprudence on Article 9 freedom of religion of the European Convention on Human Rights ("the Convention")<sup>1</sup> is modest, but only likely to grow, given steady increases in religious diversity.<sup>2</sup> Within this jurisprudence, with two notable exceptions,<sup>3</sup> the Court displayed a considerable deference toward Council of Europe ("CoE") member states' regulations of religious symbols by relying on the doctrine of the margin of appreciation,<sup>4</sup> particularly in cases in-

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<sup>1</sup> See Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 UNTS 221 (codifying "the right to freedom of thought, conscience and religion").

<sup>2</sup> For a discussion of reasons behind the Court's modest Article 9 jurisprudence, see, e.g., Tom Lewis, *What Not to Wear: Religious Rights, the European Court, and the Margin of Appreciation*, 56 INT'L & COMP. L.Q. 395, 397-401 (2007) (arguing that the Court accords low priority to Article 9 because religion has little relevance for the effective operation of political democracy, the Court's primary concern); Aaron R. Petty, *Religion, Conscience, and Belief in the European Court of Human Rights*, 48 GEO. WASH. INT'L L. REV. 807, 825-44 (2016) (discussing various historical, conceptual, and doctrinal reasons behind the Court's reluctance to engage with the question of religion); Asim Jusic, *Constitutional Changes and the Incremental Reductions of Collective Religious Freedom in Hungary*, 10 VIENNA J. INT'L CONST. L. 199, 200-01 and accompanying notes (2016) (arguing that the varied social background of CoE states and the consequent lack of a coherent methodology for deciding freedom of religion cases has hindered the development of Article 9 jurisprudence).

<sup>3</sup> See *Arslan v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. (2010) [hereinafter *Ahmet Arslan*], <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237> [<https://perma.cc/3QDY-2XPC>] (holding that the punishment of persons participating in a public parade wearing distinct religious clothing violates Article 9); *Eweida and Others v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10, 36516/10, Eur. Ct. H.R. (2013) [hereinafter *Eweida*], <http://hudoc.echr.coe.int/eng?i=001-115881> [<https://perma.cc/HDB6-KWT4>] (finding the prohibition of wearing of religious necklace to be a violation of rights under Article 9). In *Eweida* the Court held there is disproportionate interference with individual religious belief once the private employer, an airline company, requests an employee (*Eweida*), to remove a discreet cross; but no interference when the public employer, the state hospital, requested virtually the same of the second applicant (*Chaplin*). Another possible exception includes *Hamidović v. Bosnia and Herzegovina*, App. No. 57792/15, Eur. Ct. H.R. (2017), <http://hudoc.echr.coe.int/eng-press?i=003-5933801-7581160> [<https://perma.cc/GKN2-96R5>] (finding that state authorities exceeded the margin of appreciation when a member of the Wahhabi/Salafi Islamic group was fined for contempt of court after refusing to remove his skullcap while witnessing, and the fine was later commuted to imprisonment). The latter judgment is not final at the time of finalization of this article.

<sup>4</sup> The margin of appreciation is basically a doctrine of judicial restraint de-

volving Muslim women.<sup>5</sup> When using the margin of appreciation in these cases, the Court has rarely balanced the interests of states and the rights of individuals. Rather, as in many other instances, the Court has relied upon the margin of appreciation to please the states vigorously and with zeal.<sup>6</sup>

Such zealousness was at times too much for scholars, who responded mostly with criticism to the Court's interpretation of the margin of appreciation in three groundbreaking cases involving religious symbols: *Leyla Sahin v. Turkey*, where the Court supported the Turkish prohibition of headscarves worn by a university student on account of political threats to Turkey's constitutional secularism;<sup>7</sup> *Lautsi v. Italy* Grand Chamber decision, which, contrary to

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veloped by the Court to defer to the judgment of the state in evaluating factual situations and applying the provisions of international human rights treaties. It looms large in cases involving the freedom of religion. See YUTAKA ARAI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR*, 2-3, 92-99 (2001) (providing background information on the margin of appreciation doctrine). Its use by the Court is usually traced back to a historical case, see *Handyside v. UK* App. No. 5493/72, Eur. Ct. H.R. para. 49 (1976) ("The domestic margin of appreciation . . . goes hand in hand with a European supervision."). Under various guises and names, the margin of appreciation is used in multiple international decision-making bodies and courts, and its application is marked by the judicial deference to authorities and the foggy doctrinal contours. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 909-10 (2005) (detailing characteristics of the margin of appreciation doctrine).

<sup>5</sup> For a general critical overview of the Court's unfavorable treatment of religious symbols, see generally Isabelle Rorive, *Religious Symbols in the Public Space: In Search of a European Answer*, 30 CARDOZO L. REV. 2669 (2009). For a discussion on the application of the margin of appreciation in cases involving Muslim women, see, e.g., Tom Lewis, *supra* note 2, at 405-09 (detailing why the Court gave leeway to state restrictions on religious expression by Muslim women in Turkey); Melanie Adrian, *The Principled Slope: Religious Freedom and the European Court of Human Rights*, 45 RELIG. ST. SOC'Y 174 (2017) (examining the Court's application of the margin of appreciation in four cases involving headscarves and veil in public spaces).

<sup>6</sup> For a critique of the use of margin of appreciation as a method of the Court's avoidance of conflict with the states, see Eyal Benvenisti, *Margin of Appreciation, Consensus and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 851-53 (1999) (describing how the Court's "consensus doctrine enjoys considerable support among legal commentators," and why this support is flawed). Even those sympathetic to the margin of appreciation do not find Court's application of the doctrine faultless. See generally Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee*, 65 INT'L & COMP. L. Q. 21 (2016).

<sup>7</sup> See generally *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173 (2005) [hereinafter *Sahin*], <http://hudoc.echr.coe.int/eng?i=001-70956> [<https://perma.cc/PU23-X6YW>]. For a voluminous literature criticizing the *Sahin* judgment, see Rorive, *su-*

the holding of the court's Second Chamber in *Lautsi v. Italy*, deferred to the traditional display of the Catholic cross in Italian public schools;<sup>8</sup> and in *SAS v. France*, a case in which the Court found that the margin of appreciation and the requirements of "living together" justified the 2011 French law banning the burqa (full-face veil) in all public spaces.<sup>9</sup>

The doctrine of the margin of appreciation is a result of the Court's understandable preference for conflict aversion, a manifestation of the Court's partially secondary and supervisory role in the face of pluralism of state interests, and the variety evident within states' institutional and social backgrounds.<sup>10</sup> While its positive sides, doctrinal faults and negative impact on the general duty of international human rights tribunals to provide meaningful protection to those in need are well covered,<sup>11</sup> there are very few

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*pra* note 5, at n.61.

<sup>8</sup> See generally *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2009) [hereinafter *Lautsi* I], <http://hudoc.echr.coe.int/eng?i=001-95589> [<https://perma.cc/DWA5-S6MY>]; see also *Lautsi v. Italy*, App. No. 30814/06, 2011-III Eur. Ct. H.R. 61 (2011) [hereinafter *Lautsi* Grand Chamber], <http://hudoc.echr.coe.int/eng?i=001-104040> [<https://perma.cc/K33G-FGGY>] (finding that the state-installed cross in a public school in Italy was a passive historical symbol which the state is free to erect). For a critique of the application of the margin of appreciation in the *Lautsi* Grand Chamber decision, see generally Giulio Itzcovich, *One, None and One Hundred Thousand Margins of Appreciations: The Lautsi Case*, 13 HUMAN RIGHTS L. REV. 287 (2013).

<sup>9</sup> See generally *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 341 (2014) [hereinafter *SAS*], <http://hudoc.echr.coe.int/eng?i=001-145466> [<https://perma.cc/EXL3-B532>]. For criticism of the French prohibitions of burqa in public space, see, e.g., Armin Steinbach, *Burqas and Bans: The Wearing of Religious Symbols under the European Convention of Human Rights*, 4 CAMB. J. INT'L & COMP. L. 29 (2015) (examining the French burqa ban in light of the evolution of the Court's jurisprudence on the wearing of religious symbols and arguing that the margin of appreciation does not justify the expansion of legitimate aims of restriction allowed under Article 9 of the Convention); Myriam Hunter-Henin, *Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS*, 4 OXFORD J. L. & RELIG. 94 (2015) (criticizing the use of the margin of appreciation in *SAS* but finding that the judgment takes a balanced approach that charts new paths for renegotiating the place of religion in Europe).

<sup>10</sup> See Benvenisti, *supra* note 6, at 846 ("The percolation of the doctrine into areas devoid of security consideration . . . reflected an altogether different philosophy, one which is based on notions of subsidiarity and democracy and which significantly defers to the wishes of each society to maintain its unique values and address its particular needs.").

<sup>11</sup> For a voluminous list of literature discussing the margin of appreciation doctrine, see Andreas Føllesdal, *Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—Or Neither?*, 79 L. & CONTEMP. PROBS. 147, n. 46 (2016); McGoldrick, *supra* note 6, at 37–38 (detailing critiques about the margin of appreciation doctrine).

studies that provide an in-depth discussion of links between the causes behind the Court's use of the margin of appreciation in cases involving religious symbols, the Court's behavior *and* the social consequences of the two.<sup>12</sup> Here, this link is discussed from the interdisciplinary perspective of the sociology of international law and tribunals<sup>13</sup> and the sociology of law and religion.<sup>14</sup> It is hoped that such an interdisciplinary approach will provide novel perspectives on the macro- and micro-interdependencies between the international tribunals, state behavior, and the legal and non-legal regulation of social processes affected by religion as a social fact.

Several arguments are presented. Overall, the margin of appreciation can be seen as the Court's status-seeking mechanism, whose application varies with the status of states, and the social status and distance of religious symbols from the mainstream social norms. Irrespective of its restraint through the margin of appreciation, due to the informational function of law and concerns regarding status, the Court's procedures have mobilizing effects upon third party interveners, states, religious and non-religious groups, and "loyalists," with, at times, negative consequences. The mobilization of the states as third-party interveners in front of the Court creates a structural misbalance unfavorable to the individual applicants, while intervention of non-state third parties in the Court's procedures increases applicants' social distance from the mainstream by deferring the alignment of socially controversial symbolic religious practices—such as burqas—with mainstream norms. Mobilization of states, groups and loyalists prior to and in the aftermath of the Court's deliberations decreases overall social

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<sup>12</sup> For exceptions, see Benvenisti, *supra* note 6, at 847 (arguing, without specifically focusing on religious symbols, that minorities, including religious ones, are the main victims of the Court's liberal use of the margin of appreciation); Lewis, *supra* note 2, at 409 (noting that the Court's reliance on the margin of appreciation in the *Sahin* case resulted in a disregard of the individual circumstance and the behavior of the applicant).

<sup>13</sup> See Karen J. Alter et al., *How Context Shapes the Authority of International Courts*, 79 L. & CONTEMP. PROBS. 1 (2016) (examining how the formal legal authority of international courts evolves into a *de facto* authority); see generally Mikael R. Madsen, *Towards a Sociology of International Courts* (Danish Nat'l Res. Found. Ctr. Excell. Int'l Cts., Working Paper No. 1, 2013) (analyzing international courts from the perspective of classical sociological theories).

<sup>14</sup> See James T. Richardson, *The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis*, 67 SOC. RELIG. 271 (2006) (providing a structural and socio-legal analysis which examines the historical, sociological, and cultural factors that explain the outcome of legal cases involving the religious freedom of minority groups).

pluralism, since states and various groups—religious and non-religious alike—benefit, using the litigation in front of the Court for purposes of the preemptive defense of the status-quo and the creation of an emerging consensus (as in the case of high-status states promoting burqa ban across Europe), norm-entrepreneurship and strategic cause-legitimization (in the case of groups), and “the mobilization of loyalties” (in the case of “loyalists”).

This paper builds on and contributes to several strands of research: literature on informational function of law and compliance with decisions of the international tribunals that generally lack coercive power,<sup>15</sup> previous research pointing out the relative ineffectiveness and undesirable effects of international human rights norms,<sup>16</sup> literature arguing that human rights treaties have mobilizing effects on domestic constituencies,<sup>17</sup> and the sociology of law and religion.<sup>18</sup> The main added value of the paper is twofold: Firstly, it gives a sociological perspective of the relationship between the margin of appreciation as the expression of the Court’s status

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<sup>15</sup> See Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043 (2005) (advancing the theory of “expressive adjudication” to explain compliance with decisions of the tribunals that lack the power of sanctions); Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004) (using a set of expressive theories of law to explain compliance with decisions of the International Court of Justice, which has no real power to independently impose sanctions); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008) (theorizing that international tribunals that lack coercive power provide information that can be used to increase voluntary compliance with international law).

<sup>16</sup> See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2001) (supplying evidence that the ratification of human rights treaties by less democratic nations can lead to a worsening of the actual level of the protection of human rights); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005) (suggesting that, in the aftermath of accession to human rights treaties, governments occasionally decrease the effective level of the protection of human rights); Andrew T. Guzman & Katerina Linos, *Human Rights Backsliding*, 102 CALIF. L. REV. 603 (2014) (arguing that, in the aftermath of the attachment to international human rights norms and treaties, states that are otherwise strongly committed to human rights decrease the domestic protection of human rights).

<sup>17</sup> See generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

<sup>18</sup> Treatment of minority religions in the Court was rarely in focus of the sociologist of law. *But see generally* James T. Richardson & Jennifer Shoemaker, *The European Court of Human Rights, Minority Religions, and the Social Construction of Religious Freedom*, in *THE CENTRALITY OF RELIGION IN SOCIAL LIFE* 103–16 (Eileen Barker ed., 2008).

concerns, the status of the CoE States, and states' regulation of non-mainstream religious symbols and social norms as domestic causes of mobilizations in the wake of the Court's decisions. Secondly, it highlights the undesirable effects of mobilizations of states, third party interveners, and domestic constituencies in the name of human rights.

The organization of the paper is as follows. The argument in Section 2 is that the Court's own status concerns are the main reason for the margin of appreciation being frequently used in cases involving religious symbols, and that, in using it, the Court differentiates between high- and low-status states and high- and low-status religious symbols and social norms. Section 3 argues that the informational value of the Court's decisions has mobilizing effects on states, groups, third party interveners in front of the Court, and, in addition, upon the "loyalists," and lays out the downsides and negative effects of such mobilizations. In light of arguments laid out in Section 2 and 3, Section 4 discusses implications, critically assesses the process of the Court's sliding further toward the relativistic status-based considerations, and questions the Court's willingness and capability to act as an arbiter in disputes involving religious symbols in societies marked by increasing religious diversity.

## 2. THE COURT'S STATUS AND THE MARGIN OF APPRECIATION

Somewhat like other international tribunals, the Court has no mechanism for direct enforcement of its decisions.<sup>19</sup> Rather, the

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<sup>19</sup> Cf. Guzman, *supra* note 15, at 179 ("[W]hen a state loses before an international tribunal, no formal legal structure exists to enforce the ruling. The assets of the noncompliant state will not be seized, nobody will be arrested, and the state will not even lose its ability to file complaints."). In the case of the Convention, in accordance with its Article 46, the Council of Europe Committee of Ministers has the authority to supervise the execution of the Court's judgments. This Committee of Ministers consists of Ministers of Foreign Affairs of 47 Council of Europe countries. See COUNCIL OF EUROPE, *About the Committee of Ministers* (2016), <http://www.coe.int/web/cm/about-cm> [<https://perma.cc/7G3Z-BPHJ>] ("The Committee of Ministers also supervises the execution by member states of judgments of the European Court of Human Rights."). Nevertheless, the ultimate power of execution of the Court's judgments rests with the states themselves, and the 11,018 cases pending before the Committee of Ministers as of 2013 due to the lack of full compliance with and execution of the Court's judgments by states

practical impact of Court's decisions relies to a large extent on the consent and the willingness of sovereign intermediaries (CoE states) to comply. There are behavioral and doctrinal implications of this state of affairs: The Court recognized its own structural limitations and developed the doctrine of judicial restraint, the margin of appreciation,<sup>20</sup> which partially derives its justification from 19<sup>th</sup> century theories of state consent as a cornerstone of international law.<sup>21</sup> In what follows, I discuss the Court's strategic and tactical use of the margin of appreciation for the purpose of increasing its status in cases involving religious symbols.

### 2.1. *The Court's Status Concerns*

International tribunals have been studied in order to explain states' compliance with their decisions in the absence of sanctions.<sup>22</sup> One theory is that international tribunals rely on the in-

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shows that the Court's authority is in crisis. See Mikael Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & CONTEMP. PROBS. 141, 173 Figure 6 (2016) (displaying a rising number of cases before the Committee of Ministers since 1996).

<sup>20</sup> On the structural concept of the margin of appreciation, see George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 706 (2006) (introducing a novel analysis of the margin of appreciation doctrine).

<sup>21</sup> See Susanna Mancini, *The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty*, 6 EUR. CONST. L. REV. 6, 25 (2010) ("[T]he doctrine of the margin of appreciation derives its justification primarily from the 19th century theories of state consensus . . ."). Theoretically, once the initial consent of states is secured, the international human rights tribunals can be considered as non-consensual mechanisms that have, at the very least, eroded the principle of the sovereign consent. See Laurence Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 86-87 (2008) (describing nonconsensual international lawmaking applied to human rights issues). Practically, however, state consent still remains the cornerstone, as states can restrain the influence of international tribunals. See Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 787 (2012) ("The lesson from the ICJ can be generalized to other tribunals. In one way or another, states cabin the influence of tribunals and preserve the central role of consent."). The relationship between consent and consensus is a vexed issue, but for the purposes of this paper, following Dzehtsiarou, the term "European consensus" means a continuously updated consent of States party to the Convention. See KANSTANTIN DZEHTSIAROU, *EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 149 (2015) (defining "European consensus").

<sup>22</sup> See McAdams, *supra* note 15, at 1103, n. 196 (surveying literature finding a high level of state compliance with decisions of international tribunals); see also

formational function of their decisions and rulings in order to influence the behavior of states. The information they convey may assist the parties in resolving a dispute in a mutually acceptable way. It may also inform the state parties to the cases, as well as third parties, on the violation of law, with potential reputational and reciprocal consequences for a state violator or potential violator, with a caveat that the (potential) violator, given lack of coercive mechanisms, faces no immediate costs as a result of violation.<sup>23</sup>

However, the Court claims its task is more ambitious because the Convention is a network of obligations that should be collectively enforced by the CoE states.<sup>24</sup> Although the Court primarily decides upon disputes involving individuals and states, its decisions, which, technically speaking, do not have an *erga omnes* effect, potentially have wider social effects, and the justices at the Court believe they do exert *de facto* influence well beyond the immediate dispute and affect the application of domestic law in similar cases across the CoE states.<sup>25</sup>

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Ginsburg & McAdams, *supra* note 15, at 1233-34 and 1310-11 (showing that, in spite of the lack of enforcement power, the International Court of Justice managed to secure a high rate of compliance with its decisions). Additionally, see David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L. J. 723, 725-26 (2009) (surveying literature on compliance with constitutional courts and informal tribunals' decisions in the absence of state sanctions).

<sup>23</sup> See Guzman, *supra* note 15, at 180-82 (detailing the "two kinds of information dissemination that might allow a tribunal to influence states.").

<sup>24</sup> See *Ireland v. United Kingdom*, App. No 5310/71, Eur. Ct. H.R. para. 239 (1978), <http://hudoc.echr.coe.int/eng?i=001-57506> [<https://perma.cc/3JRD-64UE>] ("[T]he Convention . . . creates . . . a network of mutual, bilateral undertakings, objective obligations which . . . benefit from a 'collective enforcement'").

<sup>25</sup> Formally speaking, judgments of the Court are only binding for the states involved in the case. See Council of Europe, *supra* note 1, art. 46(1) ("The High Contracting Parties undertake to abide by the final judgment of the Court in cases to which they are parties."). However, the Court has stated on multiple occasions that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention . . . Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States." See *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199, para. 26, <http://hudoc.echr.coe.int/eng?i=001-61263> [<https://perma.cc/Z4HU-RF5P>]. For a nuanced discussion on the Court's decisions as a potential source of *de facto erga omnes* obligations, see Dean Spielmann, *Jurisprudence of the European Court of Human Rights and the Constitutional Systems of Europe*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1231, 1246 (Michel Rosenfeld & Andras Sajó eds., 2012) ("... even though the judgments

In light of these claims, this article starts from three premises: Firstly, in the absence of direct enforcement mechanisms, the Court continuously employs informational (expressive) influence of its decisions to increase its authoritative status (a *de facto* authority).<sup>26</sup> Secondly, when it comes to cases involving religious symbols, the Court interacts with internal state-religion relations, within which states regulate religions and their symbols according to their social status as measured by the distance from the mainstream. The mainstream is occupied, formally or informally, by the most socially prevalent norms and/or religions, and followed by other norms and religions whose social status decline proportionally to their distance from the mainstream.<sup>27</sup> Thirdly, as states and their social backgrounds differ, in order to increase its own authoritative status the Court ranks states into categories of “high-status states,” to whom the Court grants greater privileges (and wider margins of appreciation), and “low-status states,” to whom the Court grants fewer privileges (and narrower margins of appreciation). The privileges among states are attributable to *who* states are, and not necessarily to *what* they do (i.e. state performance).<sup>28</sup>

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of the ECtHR do not, legally speaking, have *erga omnes* effect, the interpretation chosen by the ECtHR in a particular case has a *de facto* relevance for the subsequent application of the domestic law in all similar pending or parallel cases”); Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 78 (2014) (“Nevertheless, many [international courts’] rulings have—or purport to have—*erga omnes* effects. . .”).

<sup>26</sup> The expressive power of law lies in its ability to have effect and occasionally generate compliance by what it says and what sort of social information it provides independent of sanctions. See McAdams, *supra* note 15 at 1045–49 (providing theoretical explanations as to why people obey laws and courts). For the purposes of this article, the authoritative status of the Court means its *de facto* authority. It is more than merely a state’s compliance with the Court’s instructions, as it includes interaction with wider social norms, and is independent of the question of the legitimacy of the Court. Cf. Alter et al., *supra* note 13, at 7 (explaining that *de facto* authority of international courts “has two key components—(1) recognizing an obligation to comply with court rulings and (2) engaging in meaningful action pushing toward giving full effect to those rulings.”).

<sup>27</sup> Compare Richardson, *supra* note 14, at 277 (Table 1). Richardson ranks religions in a vertical hierarchy, whereas in this work religions and social norms are placed on a horizontal scale.

<sup>28</sup> The language of status is implicit in descriptions of the margin of appreciation since, when relying on the margin of appreciation, the Court gives weight to national interest not because of the arguments in dispute, but out of respect for national governments—that is, not because of *what* but because of *who*. See TORINGE HARBO, *THE FUNCTION OF PROPORTIONALITY ANALYSIS IN EUROPEAN LAW* 70 (2015). Prior works have relied on the concept of reputation rather than status to

The Court can increase its own status by using various judicial tactics, of which the margin of appreciation is arguably one.<sup>29</sup> However, by doing so, the Court's authoritative status remains uncertain relative to that of states, as the Court remains captive to the threats of non-compliance, including the ultimate threat of retaliatory exit (e.g., the disgruntled state(s) leaving the Convention as a result of disagreement with Court's decisions and jurisdiction).<sup>30</sup>

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explain Court's behavior. See Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L L. 115, 116 and note 1 (2011) ("The ECHR does not have an effective mechanism to enforce its judgments. . . In order to obtain higher compliance rates with its judgments, including those that enable it to promote its preferences the ECHR seeks to increase its reputation ."). While reputation, status, and legitimacy are often indistinguishable, the distinction between reputation and status is that reputation rests on differences in quality or past and present performance and observable behavior, while status captures differences in privileges not related to performance. See Alessandro Piazza & Fabrizio Castellucci, *Status in Organization and Management Theory*, 40 J. MGMT. 287, 292-93 (2014) and the literature cited therein (" . . . reputation captures differences in quality or merit generating performance-based rewards, status captures differences in agreed-on social ranks generating privileges not related to performance."). Status, for the purposes of this article, means higher or lower legal privileges that reflect power differences among states, and also among social actors within states, and are only partially related to performance. Irrespective of the widespread use of the concept of status in the social sciences and the slow march towards non-consensualism in international law, the consent view based on a principle of sovereign equality is still a dominant (though not uncontested) paradigm in international law scholarship, and few recent works have systematically questioned its continued relevance and attempted to analyze international law using the concept of status. See John J. Chung, *Customary International Law as Explained by Status Instead of Contract*, 37 N.C. J. INT'L L. & COM. REG. 609 (2012) (arguing that the status-oriented theory, rather than the predominant consent/contract view, offers a better explanation of the formation and functioning of customary international law); Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014) (discussing the gradual decline of consent as a cornerstone of international law); Armin Steinbach, *The Trend Towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective*, 27 EUR. J. INT'L L. 643 (2016) (exploring the application of behavioral economics and rational choice theory to formats of non-consensualism).

<sup>29</sup> See Dothan, *supra* note 28, at 122-33 (discussing various judicial tactics the Court uses to increase its reputation).

<sup>30</sup> As to threats of exiting the Convention, British political elites, including prime ministers, have protested that the Court's judgments are damaging to British interests and sovereignty, and have argued that the United Kingdom should leave the Convention. Insiders criticized this position, arguing that leaving the Convention is harmful to the state's international standing, and unnecessary given its ability to restrict the impact of the Convention. See Anushka Asthana & Rowena Mason, *UK Must Leave European Convention on Human Rights, Says Theresa May*, THE GUARDIAN (Apr. 25, 2016), <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>

Examples discussed below aim to show how, in cases involving religious symbols, the Court's application of the margin of appreciation varies with the status of the state.

## 2.2. High-Status States and the Expansion of Compliance

Whereas the reputation of a state is dependent on its performance as measured by human rights standards, the high status of the state is marked by the privileges it enjoys as the party in spite of its performance. The aftermath of France's 2004 prohibition of religious attire (turbans and headscarves) in schools illustrates the impact of the status of a state on its treatment in the Court. Once a group of French Sikh and Muslim pupils affected by the prohibition addressed the Court, the Court held that an application was inadmissible, as it fell under the margin of appreciation enjoyed by French state.<sup>31</sup> Deliberating on the same issue at the request of a French Sikh pupil—Bikramjit Singh—the U.N. Human Rights Committee (UNHRC) found that a prohibition disproportionately, and without a real explanation, violated an individual's right to manifest religion.<sup>32</sup> However, France simply refused to implement

[<https://perma.cc/Z87U-UGHX>].

<sup>31</sup> Aktas v. France, App. No. 43563/08, Eur. Ct. H.R. (2009), [<https://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237>] [<https://perma.cc/Y3Y7-5UCM>]; Bayrak v. France, App. No. 14308/08, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237> [<https://perma.cc/A39T-TBCA>]; Gamaliddyn v. France, App. No. 18527/08, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237> [<https://perma.cc/9UBC-R9Q4>]; Ghazal v. France, App. No. 29134/08, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237> [<https://perma.cc/JB4J-FLQH>]; Jasvir Singh v. France, App. No. 25463/08, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237> [<https://perma.cc/L3TH-82YK>]; Ranjit Singh v. France, App. No. 27561/08, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng-press?i=003-2801594-3071237> [<https://perma.cc/AQ2W-M34H>] (holding that all applications were inadmissible).

<sup>32</sup> H.R. Comm., Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (106th session) concerning Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008 (Feb. 4, 2013), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=CCPR/C/106/D/1852/2008](http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/106/D/1852/2008) [<https://perma.cc/B8RH-233Z>]. In the Mann Singh case, the Court similarly declared inadmissible the application of a practicing Sikh required to remove his turban for identity photographs for a driver's license. See Mann Singh v France, App. No. 24479/07, Eur. Ct. H.R. (2008),

the decision of the UNHRC.<sup>33</sup> Conscious of this development, the Court did not seek to improve its status by means of aligning its opinion with the UNHRC. Rather, the Court perceived France's defiance in the face of the UNHRC as a threat that its future decision will not be complied with by a state which the Court considers its ally, consequently negatively affecting the Court's status.<sup>34</sup> For this reason, relying on the margin of appreciation, the Court later continued its previous policy and supported the French general ban of burqas in public spaces<sup>35</sup> and the almost general prohibition of headscarves in the workplace.<sup>36</sup>

The high-status states seldom endanger the Court's status

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<http://hudoc.echr.coe.int/eng?i=001-89848> [<https://perma.cc/979Q-2U76>]. However, The UNHRC, deliberating on the request of Mann Singh on a virtually identical claim (identity photographs for a passport), again in opposition to the Court, later found that such a measure, without explanation, is not necessary for guaranteeing public safety, and violates an individual's right to manifest his religion as guaranteed by Article 18 of the International Covenant on Civil and Political Rights. See H.R. Comm., Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (108th session) concerning Communication No. 1928/2010 (July 8-26, 2013), <http://undocs.org/CCPR/C/108/D/1928/2010> [<https://perma.cc/4HHT-2RQ5>] at 347-359. Though the decisions ("Views") of the UNHRC are technically not binding judgments, they arguably still have legal consequences, as the States who are parties to the Optional Protocol of the International Covenant on Civil and Political Rights have an obligation to take them into consideration in good faith. On the relevance of the UNHRC Views in three cases involving Sikh religious symbols, see Nikolaos Sitaropoulos, *States are Bound to Consider the UN Human Rights Committee's Views in Good Faith*, OXFORD HUM. RTS. HUB BLOG (Mar. 11, 2015), <http://ohrh.law.ox.ac.uk/states-are-bound-to-consider-the-un-human-rights-committees-views-in-good-faith/> [<https://perma.cc/MXP6-SBCX>]. To illustrate the influence of the UNHRC's opinions, consider that U.S. federal courts have held that the UNHRC's opinions represent the persuasive authority for purposes of interpreting the International Covenant on Civil and Political Rights. David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 19 (2006).

<sup>33</sup> On France's refusal to consider and implement the UNHRC's views in cases involving Sikh religious symbols, see Sitaropoulos, *supra* note 32. For a detailed discussion of the different treatment of Sikh religious symbols in French residence and identity documents and in schools by the Court and the UNHRC, see McGoldrick, *supra* note 6, at 46-52.

<sup>34</sup> See Dothan, *supra* note 28, at 135 (finding that the Court's credibility suffers great damage if the high-reputation state threatens to refuse compliance with the Court's decision).

<sup>35</sup> Esther Erlings, 'The Government Did Not Refer to It': SAS v. France and Ordre Public at the European Court of Human Rights, 16 MELB. J. INT'L L. 587, 606 & n.124 (2015).

<sup>36</sup> Ebrahimian v. France, App. No. 64846/11, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-158878> [<https://perma.cc/R93M-W5RQ>].

through explicit or implicit threats of non-compliance for a simple reason: as is often pointed out, through mutual understanding and the occasional exchange of arguments, the practices of high-status states and the Court eventually align in such a way as to confirm the Court's authority.<sup>37</sup>

However, a closer look at the process of increasing the Court's authoritative status reveals that, at least when it comes to regulation of religion, this is a process in which the high-status states are, in fact, directing the Court. Consider the flow of cases emanating from Switzerland, some of which involved religious symbols. In *Dahlab v. Switzerland*, the issue was whether firing a teacher who insisted on wearing a headscarf while working in a primary school in Switzerland violated her freedom of religion. During the proceedings, the teacher, Ms. Dahlab, pointed to the fact that she had been working with a headscarf for more than five years prior to being fired with no disturbance to the religious harmony in the school composed of a wide range of nationalities accustomed to diversity and tolerance, and without complaints from pupils or parents. The Court took note of Dahlab's prior conversion from Catholicism to Islam and, unable to find empirical evidence of the impact of her behavior on others, felt compelled to engage theological and sociological considerations, arguing that:

The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children . . . it cannot be denied outright that the wearing of a headscarf might have some kind of proselytizing effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.<sup>38</sup>

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<sup>37</sup> See, e.g., Madsen, *supra* note 19, at 164-66 (discussing the interplay between the Court and the French judicial and political elites, which eventually, according to Madsen, resulted in the Court's extensive authority in France).

<sup>38</sup> *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. (2011), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-22643"\]}](https://hudoc.echr.coe.int/eng#{) [<https://perma.cc/XX56-ZNSZ>].

In the aftermath of this inadmissibility decision largely based on the margin of appreciation, the Court later also declared as inadmissible a challenge to the 2009 Swiss constitutional amendment which, after a controversial popular referendum, prohibited the building of minarets, arguing that the applicants could not claim to be the victims of a violation of the Convention.<sup>39</sup> The fact of a popular referendum and constitutional amendment—an ultimate signal of the prevalent social consensus—likely emboldened the Court to continue supporting Switzerland's regulation of religious rights in the educational context, a policy which was precipitated by the Court's decision in the *Dahlab* case.<sup>40</sup>

Hence, while the Court might exhibit deference to high-status states due to a credible threat of non-compliance, this does not fully explain why the Court does this in such a consistent way and why it relies on sociological evaluations (as in *Dahlab*). It appears that disputes involving a high-status state and religious symbols that are lacking in cultural intimacy with the mainstream social norms and that are of lower cultural status<sup>41</sup> basically present an opportunity for the Court to enhance its own status. The Court can use its discretion and resort to the margin of appreciation (or other procedural devices) as a way of disregarding the evidence and justifying results unfavorable to the members of non-mainstream and unpopular religions<sup>42</sup> without risks and with prospective status gains for the following reasons: On one hand, benevolently disregarding minority norms carries little risk to the Court's status vis-à-vis the high-status states. On the other, the Court's prospective status will increase, since in the future, high-status states will, if implicitly, act in compliance with Court's jurisprudence, given that they have received a "blank check" in advance.

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<sup>39</sup> *Ouardiri v. Switzerland*, App. No. 65840/09, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-105619> [<https://perma.cc/FL2T-HP8M>]; *Ligue des Musulmans de Suisse & Others v. Switzerland*, App. No. 66274/09, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-105618> [<https://perma.cc/UJX8-KZU9>].

<sup>40</sup> *See, e.g., Osmanoglu and Kocabas v. Switzerland*, App. No. 29086/12, Eur. Ct. H.R. (2017) [https://hudoc.echr.coe.int/eng#{"itemid":\["001-170346"\]}](https://hudoc.echr.coe.int/eng#{) [<https://perma.cc/AWS6-9YLG>] (holding that the mandatory mixed-gender swimming classes in schools override the religiously-grounded objections of Muslim parents).

<sup>41</sup> The use of law increases with a decrease in cultural intimacy (relational distance). DONALD BLACK, *THE BEHAVIOR OF LAW* 41 (1976).

<sup>42</sup> Judicial discretion abounds in cases involving socially unpopular religions. *See Richardson, supra* note 14, at 287–88.

In sum, when state preference and signals of social consensus clearly label certain religious symbols as socially controversial and marginal, the Court is not just leaving a space of free action to the high-status states; it is preemptively increasing this space and its own status.<sup>43</sup>

### 2.3. *Low-Status States and the Selective Margin of Appreciation*

What differentiates high- and low-status states is that the latter, for various reasons, cannot expect deference from the Court in most cases. The reasons for the Court possibly considering a state to be low-status partially depend on state performance and (non-)compliance with the Court's decision(s). Consider the following examples: Richardson has previously hypothesized that the Court has "double standards" and a tendency to find violations of Article 9 in disputes involving Russia more frequently than it does with countries like France that enjoy deference under the margin of appreciation.<sup>44</sup> Since Russia has been consistently non-compliant with the Court's decisions finding it in violation of Article 9,<sup>45</sup> this likely led the Court to perceive it as a low-status state. The predictability of Russia's non-compliance made the impact of defiance upon the Court's status negligible,<sup>46</sup> whereas, as noted above, the Court perceives the impact of the French threat of non-compliance on the Court's status as credible, due to its perception of France as its ally.

However, poor performance which might motivate the Court to consider a state to be of low status does not explain significant variations in the Court's behavior towards the low-status states.

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<sup>43</sup> In a sense, rulings of the Court are similar to rulings of other international tribunals: a means by which states can increase their influence and legitimize already-made decisions. See Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 L. & CONTEMP. PROBS. 37, 75 (2008) ("If, instead of following controversy, scholars followed the litigants, they would be writing more about [international courts] involvement in private-public dispute adjudication, enforcement, and administrative review, and about how most of these rulings are exactly what states hoped for when they delegated authority to [international courts].").

<sup>44</sup> James T. Richardson & Jennifer Shoemaker, *supra* note 18, at 106 & 114.

<sup>45</sup> James T. Richardson & Brian M. Lee, *The Role of the Courts in the Social Construction of Religious Freedom in Central and Eastern Europe*, 39 REV. CENT. EAST EUR. L. 291, 302 (2014).

<sup>46</sup> Dothan, *supra* note 28, at 117 & 136.

Even countries which, in the eyes of the Court, likely have a low status due to low compliance and a high number of cases lodged against them can temporarily enjoy a selective (topical) margin of appreciation similar to that of high-status states for reasons of *who* they are. Between 1987 and 2001, the Court considered roughly 2,400 cases filed against Turkey, finding at least one violation of the Convention in eighty-seven percent of those cases. From the total number of all judgments finding violations of the Convention, around 1,700 were not fully implemented as of 2012, making Turkey one of the countries least compliant with the Court's decisions.<sup>47</sup> Nevertheless, despite this record, and until recently, the Court consistently deferred to the Turkish constitutional principle of secularism whenever the dispute involved religious symbols. On the grounds of the margin of appreciation, the Court upheld the limitation on wearing headscarves on secondary school students,<sup>48</sup> university students attempting to finish their studies or make university identity photos,<sup>49</sup> and university professors.<sup>50</sup>

In the *Sahin* judgment, the Grand Chamber, echoing sociological and theological considerations from the *Dahlab* case, clearly pointed out that the Court's reliance on the margin of appreciation should be viewed in relation to who the state party to the case is and in the wider Turkish historical and social context, noting that:

[T]he Court considers that, when examining the question of the Islamic headscarf the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it . . . in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need . . . this religious symbol has tak-

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<sup>47</sup> Madsen, *supra* note 19, at 164 & n.166.

<sup>48</sup> Köse & 93 Others v. Turkey, 2006-II Eur. Ct. H.R. 339 (2006), [http://www.echr.coe.int/Documents/Reports\\_Recueil\\_2006-II.pdf](http://www.echr.coe.int/Documents/Reports_Recueil_2006-II.pdf) [<https://perma.cc/F5DV-DLCQ>].

<sup>49</sup> Sahin, *supra* note 7; Karaduman v. Turkey, App. No. 16278/90, Eur. Ct. H.R. (1993), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-86170"\]}](https://hudoc.echr.coe.int/eng#{) [<https://perma.cc/X6UD-LGUE>].

<sup>50</sup> Kurtulmus v. Turkey, 2006-II Eur. Ct. H.R. 297 (2006), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-88325"\]}](https://hudoc.echr.coe.int/eng#{) [<https://perma.cc/K2HV-AWHQ>].

en on political significance in Turkey in recent years. . . . there are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts.<sup>51</sup>

The Court's generous use of the margin of appreciation in the case of religious symbols in Turkey can be likened only to the Court's similar stance toward the regulation of religious symbols in France.<sup>52</sup> This, however, does not imply that the Court has a consistent preference for secularism that is (or was) supposedly shared by Turkey and France.<sup>53</sup> As the difference in the Court's stance toward Turkey and France in the cases *Ahmet Arslan v. Turkey* and *SAS v. France* shows, for better or worse, the Court's stance towards Turkey has changed. This likely happened due to political and social changes in the last decade.<sup>54</sup> Both *Ahmet Arslan v. Turkey* and *SAS v. France* were based on similar facts—prohibition and/or punishment for wearing religious clothing and symbols in the public space—but the outcomes differed. According to the Court, the French and Turkish cases can be distinguished as the burqa ban in France was worthy of the margin of appreciation due to the fact that it was not expressly based on the veil's religious symbolism but on the fact that it conceals the face,<sup>55</sup> which implies that the ban

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<sup>51</sup> See Sahin, *supra* note 7, para. 115, citing first instance Chamber judgment paras. 107-09. The extremist political movements to which the Court refers are a reference to the Court's case *Refah Partisi (the Welfare Party) & Others v. Turkey*, where the Court held that given Turkey's special history, the dissolution of the established Islamic political party is necessary in order to protect pluralism and a democratic system, and therefore does not violate the Convention. See *Refah Partisi (the Welfare Party) & Others v. Turkey*, 2003-II Eur. Ct. H.R. 267, [https://hudoc.echr.coe.int/eng#{"itemid":\["001-60936"\]}](https://hudoc.echr.coe.int/eng#{) [<https://perma.cc/FQ3F-CPXL>]. Carving out a special treatment and granting a wider margin of appreciation for restrictive state practices on account of the individual state's special political and historical situation is frequently done by the Court. See, e.g., *Rekvenyi v. Hungary*, App. No. 25390/94, Eur. Ct. H.R. (1999), <http://hudoc.echr.coe.int/eng?i=001-58262> [<https://perma.cc/FU8E-2H9S>]; *Republican Party of Russia v. Russia*, App. No. 12976/07, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-104495> [<https://perma.cc/KH5N-DXY7>].

<sup>52</sup> See discussion of line of cases emanating from France *infra* Section 3.4.

<sup>53</sup> Stijn Smet, *Freedom of Religion v. Freedom from Religion: Putting Religious Dictates of Conscience (Back) on the Map*, in *THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM* 113, 125 (Jeroen Temperman ed., 2012).

<sup>54</sup> On the interplay of social and political changes and religion in Turkey from 2002 onwards, see WILLIAM HALE & ERGUN OZBUDUN, *ISLAMISM, DEMOCRACY AND LIBERALISM IN TURKEY: THE CASE OF THE AKP* 68-79 (2009).

<sup>55</sup> See *SAS*, *supra* note 9, para. 136.

in Turkey was unjustified since it was based solely on the religious connotations of the prohibited symbols. However, since the French 2011 Law, banning burqas, was supported by the log of the French parliament resolutions clearly stressing the need to defend Republican values in the face of subversive religious threat,<sup>56</sup> these two cases cannot be substantively distinguished solely on these grounds, and the primary difference seems to be the respondent state.

Overall, despite the otherwise low status of Turkey in the eyes of the Court, the Court might have previously treated Turkish secularism as worthy of the margin of appreciation due to its deference to high-status states in order to improve its own status of an instrument of democratization.<sup>57</sup> Yet recent and ongoing changes in socio-political reality and social norms have likely pushed the Court in a different direction. Superficially, this redirection might appear as good news for those seeking an increased acceptance of religious symbols in the public space and a signal of the Court's increased permissiveness and understanding of the context and differences. However, there are more likely signals that nowadays, in the area of religious symbols (as already the case in other areas), the Court considers Turkey to be a low-status state whose legal system and underlying social norms are both prone to violation of the Convention and generally substantively differing from the Court's view of human rights and secularism.<sup>58</sup>

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<sup>56</sup> *Id.*, paras. 15-17, 24-26 (detailing the background behind the French report proposing a resolution to reassert Republican values and "condemn as contrary to those values the wearing of a full-face veil").

<sup>57</sup> Madsen, *supra* note 19, at 163-64 (contrasting the Court's approach to situations in Italy and Turkey to establish that its purpose varies significantly depending on the sociopolitical realities present in the specific country; the Court's function in relation to Turkey, for example, is to propel its democratization).

<sup>58</sup> *See, i.e.,* Izzettin Dogan and Others v. Turkey, App. No. 62649/10, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-162697> [<https://perma.cc/JTK6-AEE4>] (finding that the Turkish state's treatment of the Alevi Islamic community and its places of worship is incompatible with the state duty of neutrality and impartiality, irrespective of the fact that the unfavorable treatment of the Alevi community was based on the requirements of secularism which the Court upheld in cases involving headscarves) and *infra* Section 4.1. (arguing that the Court will be more permissive toward religious symbols and religion in general in cases when the status of the state coincides with the cultural or social status of the symbol or religious group).

## 3. MOBILIZATIONS

The Court's application of the doctrine of the margin of appreciation by definition supports the *status quo* and social conformism, since the doctrine defers to national rules created with an eye on state preferences and/or prevalent social norms and expectations. The margin of appreciation, therefore, raises no issue of state compliance, largely because there is essentially nothing to comply with. While this might be a straightforward impact of the margin of appreciation, the negative, positive, or neutral effects of international tribunals depend not only on state (non)compliance but also on actions and interactions of states and domestic groups.<sup>59</sup>

In this part, it is suggested that due to the informational function of law and status concerns, the Court's decisions have an additional mobilizing impact that explains the increase in litigation related to religious symbols and the mobilization of states and various international and domestic constituencies during the course of litigation and in the wake of the Court's decisions.<sup>60</sup> Four types of mobilizations are discussed—mobilization of third-party interveners, state mobilization, group mobilization, and the mobilization of loyalists—in order to show that each has, at times, adverse effects. These four types of mobilization overlap to a large extent, but in order to clearly isolate the different effects and aspects of each, they will be discussed separately.

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<sup>59</sup> Cf. Shrima Baradaran et al., *Does International Law Matter?*, 97 MINN. L. REV. 743, 747 (2013) ("Whether international law is ultimately effective in accomplishing its goals may depend less on whether a state complies and more on whether sub-state entities act consistently with the goals of international law.").

<sup>60</sup> See SIMMONS, *supra* note 17, at 8-14 and 136-38. The author argues that international human rights treaties have mobilizing effects. Overall, however, the author focuses on mobilization for compliance with human rights treaties, whereas the argument here is that the Convention is used as a tool for destructive mobilizations that do not aid the individual applicants and whose ultimate outcome might even be antithetical to human rights. See generally Eric Posner, *Some Skeptical Comments on Beth Simmons's Mobilizing for Human Rights*, N. Y.U. J. INT'L L. & POL. 819 (2012) (criticizing Simmons argument).

### 3.1. Mobilization of Third-Party Interveners

Litigation involving controversial religious groups and socially divisive religious symbols attracts third-party interveners. Such third-party interveners are motivated by special stakes they have in religious groups succeeding or failing in their legal claims, and their interest increases proportionally to the public saliency of the case.<sup>61</sup> The hallmark of third party intervention in the Court is that both the CoE states and non-state actors, that are not the direct parties to the case, can act as third-party interveners in the course of litigation.<sup>62</sup> Theoretically, third party interveners can improve the quality of litigation in terms of supplying quality evidence and, in the case of non-state interveners, improve, through legal aid, the equality of arms between the (usually) underfunded applicants and the resourceful CoE states.<sup>63</sup> However, in the case of litigation in the Court pertaining to religious symbols, effects of third-party interventions are likely negative. The width and breadth of third-party interventions skews the process, and produces wasteful attempts at excess litigation, for the reasons elaborated below.

The CoE states are “repeat players” in front of the Court. Helfer and Slaughter argue that states have interest in the Court’s decisions as they use these to gradually align their national regulations with the Court’s interpretation of the Convention.<sup>64</sup> Yet, in cases involving contentious social issues and controversial religious symbols, a state might also have an interest in intervening in

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<sup>61</sup> Richardson, *supra* note 14, at 286–87 (showing the ways in which third party partisans can play a key role in defending religious freedom, or alternatively, attacking it).

<sup>62</sup> See European Convention on Human Rights art. 36(2), Nov. 4, 1950; see also Rule 44(3)(a), Rules of Court at Rules of Court - European Court of Human Rights, (2016), [http://www.echr.coe.int/Documents/Rules\\_Court\\_ENG.pdf](http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf), [https://perma.cc/TPV9-7KB4]. For a more detailed description of the process of the third-party intervention in the Court, see Edita Gruodytė & Stefan Kirchner, *Legal Aid for Intervenors in Proceedings before the European Court of Human Rights*, 2 INT’L. COMP. JURIS. 36, 40–41 (2016) (parsing the language of the Article 36(2) of the Convention and discussing who can intervene and under what conditions).

<sup>63</sup> See generally Gruodytė and Kirchner, *supra* note 62 at 40 (noting that the legal aid is indispensable for ensuring access to justice and that “this is particularly true in instances in which the person who is in need of financial support find him- or herself already in a structurally weaker position than the other party, for example in cases in which a citizen faces the government.”).

<sup>64</sup> Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 317 (1997).

the dispute in order to sustain the *status quo* and prevent or preempt a situation in which the litigation and the Court's decision become a focal point for a positive or negative social mobilization of religious groups and their supporters with an interest in the faith of a religious symbol.<sup>65</sup> The Court can (mis)use state intervention as a signal (of dubious veracity) that indeed there exists (or does not exist) a consensus of the states in favor of or against the applicant's claims, which serves as cornerstone of the Court's margin of appreciation analysis.<sup>66</sup>

Ultimately, through the generation of sheer noise, the states acting as third party interveners can inflate the extent of the social controversy related to a particular religious symbol. This creates a structural procedural imbalance for the applicant, who finds themselves outweighed by *de facto* multiple influential opponents, since the Court, given its status concerns, is more cognizant of state pressure than an individual applicant's arguments.<sup>67</sup>

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<sup>65</sup> See Richard McAdams, *Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000) (explaining how law, through its expressive function, can provide a focal point around which individuals can coordinate their behavior). States acting as third-party interveners in previous cases become beneficiaries of Courts' judgment favorable to state interveners' views in later decisions. The Belgian government, which itself had enacted a general ban on face veils, intervened on the side of France in support of the burqa ban; see *SAS*, *supra* note 9, paras. 86-88 (discussing the procedural history and explaining the reasoning behind the Belgian ban on face veils). Later on, relying on the theory of "living together" developed in *SAS* and the margin of appreciation, the Court approved the general ban on face veils in Belgium. See *Belcacemi and Oussar v. Belgium*, App. No. 37798/13 Eur. Ct. H.R. (2017) <http://hudoc.echr.coe.int/eng-press?i=003-5788361-7361157>, [<https://perma.cc/UUR3-62K5>]; and *Dakir v. Belgium*, App. No. 4619/12 Eur. Ct. H.R. (2017) <http://hudoc.echr.coe.int/eng-press?i=003-5788319-7361101>, [<https://perma.cc/W7ZD-NH5G>].

<sup>66</sup> See Helfer and Slaughter, *supra* note 64, at 316-17 (delineating how the Court uses national consensus on an issue to strike a balance between deference and independent judicial review in its margin of appreciation analysis).

<sup>67</sup> The same conclusion, more directly based on a need to protect the right to fair trial, is reached by Gruodytė and Kirchner, *supra* note 62 at 41 (arguing that it is a government's obligation to protect third party interests, even without their inclusion in a trial, so their explicit participation requires an acute awareness and addressing of the structural imbalance created for the applicant). An implication that immediately suggests itself is that the possibility of states intervening as third parties opens the Court to pressure and decreases its independence. For opinions to the contrary *cf.* Guzman, *Rational Choice Analysis*, *supra* note 15 at 227 footnote 145 ("Other features supporting independence (of international tribunals) include the ability of third parties to participate in the process. . ."), and Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 51 (2005) (suggesting that the right of third parties to intervene in a dispute can serve as a measure of judicial independence in international tribunals).

The *Lautsi* litigation is a case at point. In *Lautsi I* the Court, prompted by an atheist parent complaint, held that a state-installed cross in a public school in Italy is a “powerful external symbol” that has no place in public schools as it undermines the confessional neutrality and pluralism with adverse effects on the rights of children and their parents.<sup>68</sup> After the Court’s decision provoked widespread public resentment, in the interim period before the *Lautsi* Grand Chamber decision, a consortium of governments (Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta and San Marino) intervened in the Court as third party interveners. The consortium argued that half of the European population lives in non-secular states with various church-state arrangements, and the Court should be alerted to a possible flood of litigation seeking prohibition of religious symbols in schools if *Lautsi I* is upheld. Most of the intervening states were previously found to be frequent violators of Article 9 of the Convention by the Court, and some of them (i.e. Russia) had little to worry about in relation to future litigation against them, as they habitually fail to comply with the Court’s decisions.<sup>69</sup>

Despite their mostly weak human rights and compliance record, responding to the concentrated opposition, the Court allowed only the intervening states to take part in oral proceedings during the *Lautsi* Grand Chamber deliberations, but not the NGOs on the side of the applicant.<sup>70</sup> In the final *Lautsi* Grand Chamber judg-

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<sup>68</sup> *Lautsi I*, *supra* note 8, paras. 54-56 (describing how hanging a crucifix in a school may be harmful to children). Although the Italian government argued that for historical reasons and due to a lack of the European consensus on the issue of state-promoted religious symbols in educational setting the margin of appreciation applies, the Court avoided addressing the argument, *see id.* para. 41. *See also* Zoe Luca, *Case of Lautsi v Italy: Religious symbols in public schools and the (lack of) margin of appreciation*, 17 MAASTRICHT J. EUR. COMP. L. 98, 102-04 (2010) (discussing the implications of the Court’s lack of response to the Government’s argument that, when interpreting the principle of secularism, states enjoy a margin of appreciation).

<sup>69</sup> *See* Teresa Sanader, *Religious Symbols and Garments in Public Places – a Theory for the Understanding of S.A.S. v. France*, 9 VIENNA J. INT’L CONST. L. 186, 203 note 116 (2015) (noting that “interveners are mostly the states against which a violation of Article 9 ECHR was found in the past” and providing a list of Article 9 violators).

<sup>70</sup> *See Lautsi Grand Chamber*, *supra* note 8, para. 8 (list of parties who were given leave to intervene as a third party); *see also* Laura Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31/3 NETH. Q. HUM. RTS. 271, 273 n. 7 (2013) (“only states were allowed to take part in the public hearings.”).

ment, the Court ultimately corrected itself and re-described the same state-installed cross as a passive historical symbol beyond its reach, tacitly conceding that, when it comes to the regulation of religious symbols, states can largely expect to enjoy a margin of appreciation.<sup>71</sup> This was an implicit recognition that, as the Italian foreign minister succinctly put it, “the popular sentiment in Europe had won.”<sup>72</sup>

In other words, the notice to the Court to consider background state-backed social norms and future litigation was hardly a result of states’ willingness to reconsider their regulation in light of the Court’s decision. Rather, it was a warning signal to the Court. The states and their supporters signaled that the *Lautsi* Grand Chamber decision and future similar decisions, if unfavorable to the states, would not only remain collectively unenforced by the traditional low-status non-enforcers, and potentially by a larger group of states, but likely provoke social mobilization in opposition to the Court’s judgment, which would further undermine the Court’s status, since concerted collective non-compliance makes the Court

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<sup>71</sup> See *Lautsi* Grand Chamber, *supra* note 8, para. 70-72 (holding that the lack of European consensus on the question of the presence of religious symbols and paraphernalia in state schools calls for the margin of appreciation, and stressing that “a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court’s view,”). For a general critique of the argumentation used in the *Lautsi* Grand Chamber decision, see Stanley Fish, *Crucifixes and Diversity: The Odd Couple*, OPINIONATOR, <http://opinionator.blogs.nytimes.com/2011/03/28/crucifixes-and-diversity-the-odd-couple/> [<https://perma.cc/UY4N-B3QB>] (“It may be the case that over the centuries the crucifix has become allied with secular values in the sense that the religion it represents no longer sets itself against them; but that doesn’t mean that the crucifix, especially when installed by law in state-administered classrooms, is no longer a Christian symbol and the bearer of a distinctly Christian message (salvation is by Christ and through the Church) non-believers might find uncomfortable and pressuring.”). For a critique of the application of the margin of appreciation in *Lautsi* Grand Chamber decision, see Kristin Henrard, *Shifting Visions about Indoctrination and the Margin of Appreciation Left to States*, 6 RELIG. HUM. R. 245, 249–251 (2011) (“it chooses to argue that the greater visibility of Christianity through the crucifixes is balanced out by the fact that the school environment opens the door up to other religions as well, once again ignoring crucial differences in terms of duration and government imprint.”). For an opinion to the contrary, see Monica Lugato, *The Margin of Appreciation and Freedom of Religion: Between Treaty Interpretation and Subsidiarity*, 52 J. CATHOL. LEG. STUD. 49 (2013) (arguing that the Court’s use of the rules on treaty interpretation and the principle of subsidiarity provided its decision with a sound legal basis).

<sup>72</sup> Riazat Butt, *European Court of Human Rights rules crucifixes are allowed in state schools*, THE GUARDIAN (Mar. 18, 2011) <https://www.theguardian.com/law/2011/mar/18/european-court-human-rights-crucifixes-allowed>, [<https://perma.cc/K323-RYFN>].

and the Convention redundant.<sup>73</sup> For these reasons, a third-party state intervention arguably serves as an early signal of the extent of the threat of non-compliance.

The effects of the non-state third-party intervention on the side of the applicant are different to those of when states act as third-party interveners in favor of other states. Many cases in the Court draw the attention of non-state third-party interveners like NGOs to join litigation in front of the Court, mostly on the side of the applicant, by so increasing the overall drive to litigate.<sup>74</sup> If the dispute involves a religious symbol of considerable controversy, as was the case with the burqa ban in *SAS v. France*, third party intervention by non-state actors can increase the public saliency of the case and provide resources and a motivation to litigate.<sup>75</sup> However, rare empirical studies show that NGOs' third-party interventions do not seem to significantly increase an applicant's chances of prevailing in the Court.<sup>76</sup> At the same time, prolonged litigation of socially controversial religious symbols such as the burqa increases the social distance and adversarial relations between the individual and their environment, without any beneficial effects.<sup>77</sup>

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<sup>73</sup> For arguments to the contrary, albeit in a context of final judgments, see Dothan, *supra* note 28 at 134–35 (theorizing that several low-reputation states acting jointly are unlikely to defy the Court due to free-riding concerns and publicity required for their actions to be effective); see also Benvenuti, *supra* note 6, at 852 (wondering “. . . to what extent it is really possible to envision credible threats by member States to challenge the court's authority in reaction to unpopular judgments.”).

<sup>74</sup> For various reasons, local and international NGOs are among the Court's key constituencies. See Alter et al., *supra* note 13, at 24–25 (explaining that civil society is an important contributor to the enlargement of the Court's authority because NGOs often file test cases, monitor suits filed by private litigants, and coordinate medium and long-term litigation strategies among litigants, attorneys, and government officials). Third party intervention by NGOs (and other bodies) in front of the Court is continuously increasing, particularly in recent years; see Eynde, *supra* note 70, at 280 Figure 1.

<sup>75</sup> A number of NGOs intervened on the side of the applicant seeking to overturn the burqa ban in France; see *SAS*, *supra* note 9, paras. 89–98 (listing the third-party interveners, including Amnesty International, ARTICLE 19, and the Human Rights Centre of Ghent University).

<sup>76</sup> See Eynde, *supra* note 70, at 292–93 (doubting the existence of a positive correlation between NGO third-party intervention and applicant success).

<sup>77</sup> The experience of women wearing burqas in Europe suggests that their social position in the course of – and in the aftermath of – the litigation became worse, not better. For example, the applicant in the *SAS* case experienced threats and requested anonymity during the Court proceedings for fear of further harassment; see Eva Brems, *Face Veil Bans in the European Court of Human Rights: The Importance of Empirical Findings*, 22 J. L. POL'Y 517, 524–25 (2014) (recounting true

Overall, since the Court's status concerns motivate it toward valuing high-status state interests over those of an applicant with socially distant religious practices, chances are the applicants will end on the losing side and will eventually have to seek ways to consensually negotiate symbolic practices with their immediate environment. The non-state actors' intervention on the side of applicants with socially distant religious practices likely only prolongs this process, to the detriment of the applicant.

### 3.2. State Mobilizations

The Court's status concerns and the discrepancy between high and low status of states endows the decisions of the Court with a different informational value for high- and low-status states. Low-status states with weaker human rights records and a resolution to oppose the Court have little to fear and much to gain from the Court's decisions. If the Court approves their rules and practices or defers to those under the doctrine of the margin of appreciation—the effect is the same—the rules gain additional credibility as being “in accordance with human rights standards.” In opposite cases, costs are negligible. States' reputations for adherence to human rights standards will not suffer immensely since they were weak in the first place,<sup>78</sup> and the worst they can expect is minor material costs.<sup>79</sup> A good illustration is Russia's stance toward the decisions finding that it violated Article 9 of the Convention. Except for the payment of minuscule litigation costs and damages,

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stories of how women were negatively affected in the aftermath of the litigation). See also Alter et.al. *supra* note 13, at 25 (noting that NGO advocacy can be a double-edged sword).

<sup>78</sup> The same logic holds for (non-)compliance with human rights treaties in general. See Hathaway, *supra* note 16, at 2011 (“If countries may obtain reputational benefits from ratifying some treaties while suffering little reputational cost from failing to observe the obligations assumed, countries may be substantially more likely to fail to comply with their treaty obligations. . . it is possible that the expressive benefit of a treaty is at its greatest for precisely those countries not already in compliance with the treaty - those countries may have more to gain, and perhaps less to lose, than those with good practices and hence good reputation.”).

<sup>79</sup> See ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014) at 49 and note 7 (discussing studies showing relatively weak state compliance with the Court's decisions and very low litigation costs and damages awarded by the Court). For a review of literature that claims that the Court's decisions enjoy a relatively high level of compliance, see Dothan, *supra* note 28, at 119 n. 13.

Russia mostly refused to implement the Court's decisions, with little or no damage to its reputation, and without leaving the CoE.<sup>80</sup>

The situation is more promising for high-status states considered staunch supporters of the Court. On average, these states seem to eventually comply with Court's decisions,<sup>81</sup> however their statuses make them less likely to suffer losses in the Court and more likely to enjoy deference, with the effect being that the *status quo* is confirmed as in line with human rights. The same status affords opportunities to continuously experiment with laws and practices that might appear to be a performance contrary to human rights standards before their inspection by the Court. Since low performance has no effect on high-status states, they are in a better position to push down the bar of human rights standards and invite others to do so.<sup>82</sup> If the Court finds that the new practice of a high-status state is in line with human rights standards, other states can "jump the wagon" and, on aggregate, the result is a spread of conformity.

An example of this process is readily available: prior to the SAS decision, as the Court itself noted, the French position on the total

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<sup>80</sup> See Richardson and Lee, *supra* note 45, at 298 ("Enforcing [. . .] decisions has been problematic [. . .] since Russia's usual response is eventually to pay the limited financial awards but not to change its policies and practices."). To illustrate how the Court's minuscule damages have no effect on the behavior of states, consider that in response to one of the Court's judgments awarding the sum of 3,000 EUR as a just satisfaction to the organizers of the banned gay pride parade, one Member of the Russian Parliament proclaimed that Russia was ready to pay 3,000 Euros every year, but there would be no such parades in Moscow; see Kanstantsin Dzehtsiarou & Alan Greene, *Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*, 12 GER. L. J. 1707, 1709 (2011) ("Perceptions of ECtHR judgments as merely awarding just satisfaction are damaging to its effectiveness as a whole. Therefore, the importance of general measures should be emphasized by the ECtHR, and their meaning should be clear.").

<sup>81</sup> Madsen, *supra* note 19, at 164 et seq.

<sup>82</sup> Cf. Hafner-Burton and Tsutsui, *supra* note 16, at 1378 (arguing that international human rights treaties ". . . may at times provide governments with a shield for increasingly repressive behaviors after ratification, as treaty ratification confers on them human rights legitimacy and makes it difficult for others to pressure them for further action."); see also Fionnuala Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L. L. J. 101, 114 (1995) ("Where ostensibly democratic states have engaged in the suspension of certain rights guaranteed under the Convention, the Commission and Court are less exacting in their requirements."). Guzman and Linos labeled this phenomenon "human rights backsliding", a tendency for states otherwise committed to the protection of human rights to weaken their domestic human rights regimes after joining human rights treaties, see Guzman and Linos, *supra* note 16 at 605.

burqa ban in public spaces was a minority position in Europe.<sup>83</sup> Once the Court affirmed that French burqa ban lay within the wide margin of appreciation afforded to states, other countries mobilized to enact their own bans, explicitly or implicitly relying on the Court's decision as justification.<sup>84</sup>

What emerges from this explanation is that usual rationale behind application of margin of appreciation—the imperfect consensus among states—is misleading. The absence of state consensus is considered to be inversely related to the margin of appreciation: less consensus means the Court will grant larger margins to the state-backed national social norms and vice versa.<sup>85</sup> Yet, given the relative diversity of the state-backed social norms amongst the CoE states, there will always be examples available signaling the lack of consensus. The sheer difference in social norms and institutional architecture among the CoE states always provides some justification for deference via the margin of appreciation. If reasons of the lack of consensus as justification for the Court's deference would be taken to extreme, then the Court would always have to defer to the states.<sup>86</sup>

The explanation advanced here is that the margin of appreciation is the Court's deflection tactic to allow it to wait for a high-status state to make the first move, thus mobilizing other states on the way, and sparking the creation of partial, emerging consensus<sup>87</sup>

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<sup>83</sup> See *SAS*, *supra* note 9, para. 156 (“[. . .] from a strictly normative standpoint, France is very much in a minority position in Europe: with the exception of Belgium, no other member State of the Council of Europe has, to date, opted for such a [ban].”).

<sup>84</sup> See EVA BREMS, *SAS V FRANCE: A REALITY CHECK 2* (2016), <https://papers.ssrn.com/abstract=2810221>, [https://perma.cc/3SCH-A5QZ] (“the Grand Chamber judgment of *SAS* provides legal and political shelter to all existing face covering bans across Europe, as well as to any that might still be in the pipeline.”). For a list of legislative proposals to ban burqas in various European countries, see *id.* at 2, note 6. Of course, this is not to say that these countries would not have enacted the bans in the absence of a pronouncement from the Court.

<sup>85</sup> See Benvenisti, *supra* note 6, at 851 (discussing the relationship between the consensus and margin of appreciation doctrine).

<sup>86</sup> The absence of a European consensus is an important—but not the only—factor the Court takes into account when deciding whether to grant states a wider or narrower margin of appreciation. Accordingly, as the Court claims, where “a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will normally be restricted.” See *S.H. and Others v. Austria*, App. No. 57813/00, Eur. Ct. H.R. para 94 (2011) <http://hudoc.echr.coe.int/eng?i=001-107325> [https://perma.cc/M73N-LLQP].

<sup>87</sup> Cf. Dothan, *supra* note 28, at 135 (suggesting that the ability to influence

through the creation of a focal point and ensuing cascades of norms through availability.<sup>88</sup> In the example of France's burqa ban, the policy of the high-status state and the Court's confirmation of it creates the focal point by increasing the saliency and epistemic availability of the policy in public discourse, leading to a chain reaction that later makes the policy acceptable as a result of the internal and status-seeking motives of other states and sectors of society within and across states. Over time, a sufficient number of states mimicking the first mover can convince the Court that there exists an emerging consensus (the doctrinal opposite of the margin of appreciation)<sup>89</sup> within CoE states' views on a particular policy (i.e. the burqa ban), which the Court must now take into account in order to adapt the meaning of the Convention to changing conditions.<sup>90</sup>

other states gives influential (high reputation) states additional leverage against the Court). The Court claims that, when identifying the emerging consensus, it takes into account developments in many member states; *see, e.g.*, *Fabris v. France*, App. no. 16574/08, Eur. Ct. H.R. para. 56 (2013) <http://hudoc.echr.coe.int/eng?i=001-116716>, [<https://perma.cc/H6KL-VZDC>] ("the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved"). However, at the same time, the Court does not necessarily disapprove of legal and social experimentation. Relying on the margin of appreciation, the Court can tolerate a single state imposing a new restriction even if no other state has done anything similar. In light of the absence of a European consensus, the French burqa ban seems to have been one such experimental law approved by the Court. *See* McGoldrick, *supra* note 6 at 30 ("It is clear that [The Court] is open to States to impose new restrictions on rights and these may fall within the [margin of appreciation] even if other states have not imposed them.").

<sup>88</sup> On focal points, *see* McAdams, *Focal Point Theory of Expressive Law*, *supra* note 65, at 1651 ("[t]he law provides a focal point around which individuals can coordinate their behavior[:] when individuals have a common interest in coordinating, [. . .] a legal rule may guide behavior merely by influencing expectations about how others will behave."). On availability cascades, *see* Timur Kuran & Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 *STAN. L. REV.* 683, 685 (1999) (defining availability cascades as a process through which "expressed perceptions trigger chains of [. . .] responses that make these perceptions appear increasingly plausible through their rising availability in public discourse.").

<sup>89</sup> *See* *Glor v. Switzerland*, App. no. 13444/04, Eur. Ct. H.R. para. 75 (2009) <http://hudoc.echr.coe.int/eng?i=001-92525> [<https://perma.cc/DF6T-53H3>] ("One of the relevant factors in determining the scope of the margin of appreciation left to the authorities may be the existence or non-existence of common ground between the laws of the Contracting States").

<sup>90</sup> *Cf.* Shai Dothan, *Judicial Deference Allows European Consensus to Emerge* 18 *CHI. J. INT'L. LAW* (forthcoming 2018) (discussing the influence of the first mover country on policies of other countries, the relationship between the emerging consensus and the margin of appreciation, and the problems of identifying emerging consensus in the case of burqa bans.)

As the states are heterogeneous, the Court's confirmation of the first mover high-status state policy will not convince all states to follow the same path, and those that do will likely do so for inauthentic reasons unrelated to those that motivated the first mover. Nevertheless, the creation of an emerging consensus by the first-mover high-status state and through later mimicry by other states ultimately increases the Court's status, since it retroactively justifies its deference while risking one of the damaging consequences of availability cascades: populist firestorms and sectarian tensions.<sup>91</sup>

### 3.3. Group Mobilizations

In and of themselves, religious symbols have very different meanings in different contexts, and the continuum and variance of contexts, speakers, and audiences can change the meaning of the same symbol from purely religious to entirely secular or commercial.<sup>92</sup> This view of symbols, however, somewhat underestimates the social function and effects of religious symbols. Even if their meaning is infinitely variable and ultimately secularized and emptied of their religious and historical baggage, religious symbols can serve as credibility-enhancing group coordination signals.<sup>93</sup> From an *external* point of view, a religious symbol enhances the credibility and the visibility of the group to which a symbol belongs in a wider social setting—the everyday appearance of a headscarf or

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<sup>91</sup> Kuran & Sunstein, *supra* note 88, at 736. For Kuran and Sunstein, availability cascades can cause populist firestorms and are essentially a problem of democracy, as they distort and misrepresent citizens' actual beliefs, desires, and judgments. From their point of view, courts have a role to play in preventing reactions to availability cascades and regulating risks they create. *See id.* at 758-759. But there is no reason to think that the Court and states strategically interacting and mimicking each other's behavior cannot have a role in perpetuating availability cascades, especially when engaging in legal and social experimentation. As Kuran and Sunstein acknowledge, courts are not immune to availability cascades, since the outcome of legal cases conveys an institutional message and affects social struggles over the meaning of legal cases. *See id.* 765-766.

<sup>92</sup> For a brief overview of the possible varieties of meanings of religious symbols, see Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confession Symbols*, 13 FIRST AMEND. L. REV. 71, 82-87 (2014).

<sup>93</sup> Christian Eilinghoff, *Religious Information and Credibility*, 1 GER. WORK. PAP. LAW ECON, Paper 8 (2003).

cross or burqa turns it into an acceptable social meme. From an *internal* point of view, religious symbols act as a mechanism for religious groups to sustain group membership by creating group boundaries. As group boundaries are used for intra-group sustainment and intergroup differentiation, symbols are particularly contested in times of conflict and used for purposes of group mobilization.<sup>94</sup> This is the polarizing effect of religious symbols: even if those adhering to or opposing particular symbols see nothing particularly “religious” about them, symbols can easily become focal points of conflict over social meaning and group loyalties.

From this perspective, and depending on the circumstances, the Court’s decision can be perceived as a violation of social meaning, providing a cause for group mobilization.<sup>95</sup> Consider the following two examples: various objections by social and political groups that mobilized against the Court’s decisions in *Lautsi I* boil down to this: Social meaning of the cross or its regulation in the public space is not a matter for a Court to discuss, but is instead best left to society.<sup>96</sup> The Court succumbed and eventually confirmed this in the *Lautsi* Grand Chamber judgment, relying on the margin of appreciation. Vice versa, when in *Leyla Sahin v. Turkey* the Court stuck to the margin of appreciation and upheld the ban on headscarves in Turkish universities, the decision was a cause for group mobilization resulting in the constitutional amendment in 2008 which effectively allowed headscarves into the public educa-

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<sup>94</sup> See Jeffrey R. Seul, ‘Ours is the Way of God’: Religion, Identity, And Intergroup Conflict, 36 J. PEACE RES. 553, 564 (1999) (“[. . .] when conflict involving one or more religious groups does occur, the combatants may be emboldened by a sense of religiously defined identity and purpose, and their traditions may provide a fund of symbolic, moral, institutional, and other resources that can be used to mobilize the group and legitimate its cause.”).

<sup>95</sup> The impact of law depends on and affects social meaning, which Lessig defined as “the semiotic content attached to various actions, or inactions, or statuses, within a particular context,” see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995).

<sup>96</sup> For example, among many others, thirty-three members of the European Parliament, acting collectively as interveners in *Lautsi* Grand Chamber case, argued that “the Court was not a constitutional court and had to respect the principle of subsidiarity and recognise a particularly broad margin of appreciation in favour of Contracting States not only regarding the relationship between the State and religion but also where they carried out their functions in the area of education and teaching . . . . [T]he display of crucifixes in public buildings did not conflict with the Convention, and the presence of religious symbols in the public space should not be seen as a form of indoctrination but the expression of a cultural unity and identity.” See *Lautsi* Grand Chamber, *supra* note 8, para. 56.

tional system.<sup>97</sup> The amendment encountered short-lived resistance by the Turkish Constitutional Court, to no avail. Prohibitions of headscarves in public educational institutions in Turkey were eventually dropped.<sup>98</sup>

Two negative effects likely occurred in the process of these group mobilizations: group polarization and the decrease in in-group diversity and overall social pluralism. As the *Lautsi I* example shows, by choosing the more activist posture and striking down the state-installed cross in public schools, the Court transformed a symbol that might indeed become, for historical reasons, aligned with secular values, into an identity-preserving symbol. In doing so, it has made future voluntary negotiations over the presence and meaning of the symbol more difficult. The Court's decision attracted the noise of the defenders of the symbol and silenced those that might adhere to the cross as a symbol but would, for various reasons, prefer to see it removed from public schools. The decision not to defer to the prior state-backed social norm undermined possibilities for achieving societal consensus on the meaning of the cross under the circumstances of increased diversity. What was previously perhaps an authentic support for the cross as a religious symbol in the schools is now likely a merely instrumental opportunistic or strategic support, justified by reasons unrelated to the symbol itself.

Paradoxically, the Court's decision in *Lautsi I*, ostensibly seeking to affect social norms and increase inclusion, ended up confirming the prior practice and transforming the surrounding social meaning of the religious symbol. This was decried as a defeat of inclusion and a decline of religious neutrality,<sup>99</sup> although it is high-

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<sup>97</sup> RAN HIRSCHL, CONSTITUTIONAL THEOCRACY 158-59 (2010) (discussing the context behind the ratification of the amendment guaranteeing equal access to the public education system, effectively lifting the ban on wearing headscarves in schools).

<sup>98</sup> On the treatment of the amendments in the Turkish Constitutional Court, see generally Yaniv Roznai & Serkan Yolcu, *An Unconstitutional Constitutional Amendment – The Turkish Perspective: A comment on the Turkish Constitutional Court's Headscarf Decision*, 10 INT'L. J. CONST. LAW 175 (2012). On the dismantling of the headscarf ban, see Jonathan Head, *Quiet End to Turkey's College Headscarf Ban*, BBC NEWS, December 31, 2010, <http://www.bbc.com/news/world-europe-11880622> [<https://perma.cc/MNY7-RGE6>] (explaining the context behind the amendment and noting both positive reactions and negative backlash).

<sup>99</sup> See, e.g., Richard Moon, *Christianity, Multiculturalism, and National Identity: A Canadian Comment on Lautsi and Others v. Italy*, in THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 241-66, 263 (Jeroen Temperman ed., 2012) (examining the significance

ly questionable as to whether either inclusion or neutrality is increased by removal of the cross, since this action unnecessarily alienates those who would like to retain the cross in the schools without any real off-setting benefits to anyone else.<sup>100</sup>

A similar process, this time owing to the Court's upholding of the margin of appreciation, occurred in the aftermath of the *Sahin* headscarf decision. It is highly uncertain that prior to the *Sahin* decision the headscarf had a politicized meaning, as the Turkish government claimed it to, and the Court, relying on the margin of appreciation, affirmed.<sup>101</sup> As the dissenting Justice Tulkens recognized, on the record of the *Sahin* decision, there was nothing to suggest that the student was intending to use a headscarf to pressure others or send a political message.<sup>102</sup> After *Sahin*, however, headscarf became a mobilizing identitarian symbol whose extant individual religious meaning appears to have become entirely irrelevant.<sup>103</sup> This increased the intra-group solidarity and out-of-group competition among the supporters and opposers of the headscarf in an educational context, producing group polarization.<sup>104</sup> After ensuing social and political change in Turkey, this polarization now produces adverse effects, as those who oppose the headscarf are now exposed to punitive measures.<sup>105</sup>

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of the crucifix in Canadian institutions).

<sup>100</sup> See Joseph Weiler, *Editorial: Lautsi: Crucifix in the Classroom Redux*, 21 EUR. J. INT'L. L. 1 (2010) (pointing out that simply removing the cross in public schools under current conditions hardly improves inclusion).

<sup>101</sup> See *Sahin*, *supra* note 7, para. 115 (citing previous Courts decisions that affirm significance of the religious symbolism of the headscarf).

<sup>102</sup> *Id.* para. 7 (Justice Tulkens, dissenting). For a further discussion along the same lines, see Smet, *supra* note 53 at 126 (examining the fallacies in the Court's assumptions, and noting, for example, that the student was not in a position of authority or power and that the "victims" of the potential indoctrination were adults, not children).

<sup>103</sup> For an overview of literature on identity disputes related to headscarf issues in Turkey, see Roznai and Yolcu, *supra* note 97, at 176, and note 4.

<sup>104</sup> Similar polarizing effects also occur when a state supports religious symbols; cf. Eric Posner, *The Legal Regulation of Religious Groups*, 2 LEG. THEORY 33, 50-51 (1996).

<sup>105</sup> This much can be concluded from *Pekinli v. Turkey*, App. No. 25832/14, Eur. Ct. H.R. (2017) <http://hudoc.echr.coe.int/eng?i=001-174537> [<https://perma.cc/U7DZ-M53Q>], where the Court held that an application by a university lecturer who contested his criminal conviction for preventing a student wearing a headscarf from entering a higher education institution is inadmissible. See AFP, *Turkey Jails Professor for "Denying Headscarved Student Entry"*, DAILY MAIL ONLINE (Nov. 27, 2014), <http://www.dailymail.co.uk/wires/afp/article-2852116/Turkey-jails-professor-denying-headscarved-student-entry.html>

In retrospect, under conditions of what is best described as an increase in publicity and heterogeneity of local norms and a decrease of state social control in Turkey, the Court's decision to defer to the state-backed rule and prohibit a religious symbol likely undermined the possibilities for the mediation of a social dispute over a symbol whose concrete social relevance was—and is—grossly exaggerated, but which served as a focal point for strategic mobilizations with far-reaching and dramatic consequences.<sup>106</sup>

There is another side to this. Viewed from the outside, religious symbols enhance the visibility of the group, whereas viewed from the inside they act as a mechanism for sustaining group membership and policing boundaries. The prohibition of a religious symbol likely increases its value and serves to strengthen in-group solidarity by increasing group commitment and decreasing the internal group pluralism and even group membership.<sup>107</sup> This is because prohibitions of symbols might be acceptable to less enthusiastic members of religious groups, and unacceptable for the more enthusiastic members of religious groups or their strategic supporters.

The latter group can use the perception of grievance and the sense of rights-entitlement for purposes of social and political mobilization in pursuit of group causes through litigation.<sup>108</sup> From a

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[<https://perma.cc/8PKB-FCRK>].

<sup>106</sup> Immediately following the Court's Fourth Section *Sahin* decision, later confirmed by the Grand Chamber of the Court (see *Sahin*, *supra* note 7), Turkish Prime Minister Recep Tayyip Erdoğan alluded to the Court's decision being political and based on double standards. See Zaman, *Erdoğan on Sahin Verdict: Double Standard*, BIANET (Jul. 5, 2004), <http://bianet.org/english/print/38297-erdogan-on-sahin-verdict-double-standard> [<https://perma.cc/PGH3-BRPM>]. Post-2010, the headscarf ban was lifted in both educational and state institutions (with the exception of judges, prosecutors, police and military personnel), with Prime Minister Erdoğan commenting that "[a] dark time eventually comes to an end . . . . Headscarf-wearing women are full members of the republic, as well as those who do not wear it"; see Turkey Lifts Decades-Old Ban on Headscarves, AL JAZEERA ENGLISH, October 8, 2013, <http://www.aljazeera.com/news/europe/2013/10/turkey-lifts-decades-old-ban-headscarves-201310814177943704.html> [<https://perma.cc/TC3V-BTXK>].

<sup>107</sup> Cf. Michael W. McConnell & Richard Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 58 (1989) (suggesting that similar consequences occur when religious groups are generally persecuted, but that the exact effect depends on the strength of group commitment.)

<sup>108</sup> See Effie Fokas, *Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence*, 4 OXFORD J. L. & RELIGION 54, 68-69 and accompanying notes (2015) (discussing how litigation mobilizes social and political movements well beyond the immediate

strategic point of view, the outcome of the litigation at the Court may not matter at all. Any decision of the Court, whether in favor of or against the prohibition of the religious symbol, will be beneficial for committed groups and their strategic supporters with a vested interest in the Court's decision. The positive decision is a criticism of the state-backed prohibition that confirms the group's pre-existing beliefs and mobilizes it for future actions, while the negative decision can serve as a cause for adversarial mobilization and further increase the group commitment across multiple locations. In other words, any decision of the Court can be a useful tool for group mobilization. If the *Sahin* and *Lautsi I* decision are analyzed this way, what appears as a loss or a victory for individual applicants, respectively, was a gain for the strategic norm-entrepreneurs.

The picture that emerges out of this analysis is paradoxical. Given the adverse effects of group mobilizations, the reality created in the aftermath of Court's decisions is the exact opposite of what the Court purports its decisions should help create. At least some of the Court's holdings on religious symbols have polarizing effects and, more problematically, result in a decrease in internal in-group diversity and overall social pluralism. It is simply not the case that all Muslim women wear or want to wear headscarves, pressure others to do so, or feel pressured by others to do so; nor do all committed Catholics or the supporters of Christian traditions necessarily always prefer to see crosses in public schools. Yet, in the aftermath of decisions like *Lautsi* Grand Chamber, *Sahin*, and others to follow, and against the background of group polarization and the divisive in- and out-of-group competition, these individuals and groups will have a harder time communicating their arguments within in-group or out-of-group communication or in a public space. They are more likely to become internal minorities of the majority or "minorities among the minorities."

If that is indeed so, however, the Court's statement on the obligation of CoE States in the *Sahin* decision appears an irony at best, and sarcasm at worst:

[T]he Court has frequently emphasized the State's role as the neutral and impartial organizer of the exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance

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effects of legal decision).

in a democratic society . . . Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.<sup>109</sup> (emphasis added)

### 3.4. Mobilization of Loyalists

Religious symbols are often at loggerheads with state laws. Under conditions of heterogeneity, regulation of religious symbols can have multiple polarizing effects, producing conflicting loyalties and functioning as in- and out-of-group “loyalty tests” for two reasons: On the one hand, for religious groups, symbols act as mechanism for indicating group membership, through which individuals arguably signal group loyalty. On the other, laws function as categorizing mechanisms that inform a society of the labeling of a group or individual as socially (un)acceptable, coordinating and legitimizing the positive or negative group attention toward the already-categorized-as-socially-distant,<sup>110</sup> particularly when the law prohibits certain religious symbols and, in doing so, influences people’s beliefs and behavior towards the person who engages (or refrains from engaging) in the now-forbidden symbolic action.

As an example, consider the 2011 French Law banning burqas.<sup>111</sup> On its face, the law targeted veiled women. However, they were hardly its only targets, since laws prohibiting symbols of the “other group” are not simple rules, but instead pieces of social information. They target not only the opposing group (out-of-group), but also the in-group outliers who might be hesitant to engage in confrontation with the symbols and practices of the other group, all in order to strengthen the in-group solidarity.<sup>112</sup> This

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<sup>109</sup> See *Sahin*, *supra* note 7, para. 107, internal citations omitted.

<sup>110</sup> MARY DOUGLAS, *HOW INSTITUTIONS THINK*, 91-92, 100-02 (1986) (discussing how institutions affect social categorizations and attach positive and negative labels to behavior and persons).

<sup>111</sup> Loi No 2010-1192 du 11 Oct. 2010 interdisant la dissimulation du visage dans l'espace public, *Journal Officiel (JORF)* 12 Oct. 2010, with additional provisions, in force since April 2011, cited in Steinbach, *supra* note 9 at 31 n. 17.

<sup>112</sup> On the in-group effects of the prohibition of out-of-group symbols, see Eric Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEG. STUD. 765, 785-89 (1998). Effects of prohibition on geographically and cognitively distant out-of-group members can be even stronger, see Alex Geisinger & Ivan Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN ST.

means the 2011 Law symbolically targeted two groups: the obvious suspects, considered disloyal, not “really French” but preferring instead their “Muslim” identity over their “French” one,<sup>113</sup> and the less obvious suspects, the potentially loyal but faint of heart members of the mainstream. The law, in other words, served as a focal point for “mobilizing loyalties,” that is, convincing potentially unconcerned members of the mainstream that loyalism is a prevalent social norm and attitude.<sup>114</sup>

Evidence of this phenomenon is available in the SAS case. Prior to the enactment of the French 2011 Law banning burqas, barely 1900 women wore a burqa in the country. In the period between 2011 and 2016, less than 200 citations for violation were issued per year.<sup>115</sup> The prohibition, in other words, was not intended to be fully applied, but had an expressive and symbolic role with nevertheless very real social effects. After the 2011 Law confirmed and legitimized social disapproval of burqas and their bearers, incidences of attacks on women wearing burqas increased. The attackers cited loyalty to laïcité as a motivation for the attacks and sought to self-enforce the law spontaneously by physically and verbally harassing the women wearing burqas.<sup>116</sup> As was shown during the SAS trial, the application of the 2011 Law legitimized

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L. REV. 77, 135 (2007). This suggests that the burqa ban was perhaps a foreign policy measure, rather than a purely domestic issue.

<sup>113</sup> The incompatibility of the French and Muslim identity, for historical reasons, has been a lingering topic for many years, see T. Jeremy Gunn, *Religious Freedom and Laicity: A Comparison of the United States and France*, 2004 BYU L. REV. 419, 456 (2004).

<sup>114</sup> As Eric Posner argues, when members of the majority discriminate against minorities, they do so not necessarily because of their innate animosity towards them, but in order to signal loyalty to other members of the majority, which is why norms of discrimination tend to spread (and disappear) rapidly, mobilizing large groups of people in the process. See Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, *supra* note 112, at 786-87.

<sup>115</sup> See Robert Zaretsky, *These Hijab-Inspired Clothes Just Reignited a Major Culture War in France*, THE WEEK (Apr. 7, 2016), <http://theweek.com/articles/616468/hijabinspired-clothes-just-reignited-major-culture-war-france> [<https://perma.cc/ZT7Y-PHPS>].

<sup>116</sup> See Open Society Justice Initiative, *After the Ban: The Experiences of 35 Women of the Full-Face Veil in France*, 3, (Sep. 2013), <https://www.opensocietyfoundations.org/sites/default/files/after-the-ban-experience-full-face-veil-france-20140210.pdf> [<https://perma.cc/BBT7-QVV4>], and Valeria Costa-Kostritsky, *France and the Veil – the Dark Side of the Law* OPENDEMOCRACY (Nov. 28, 2012), <http://www.opendemocracy.net/5050/valeria-costa-kostritsky/france-and-veil-%E2%80%93-dark-side-of-law> [<https://perma.cc/RM45-RW6W>].

violence against women wearing a burqa and increased their overall intersectional structural discrimination, likely because the prohibition emboldened the public who felt compelled to question the “true Frenchness” of the veiled women.<sup>117</sup>

In essence, the informational function of the 2011 Law was hardly only about those who—for reasons of their racial, ethnic, and religious background—are allegedly resisting the influence of *laïcité* and healthy assimilation, and are potentially disloyal citizens.<sup>118</sup> More likely, it was meant as a loyalty mobilizing mechanism for those within the mainstream that are insufficiently opposed to the former group. The suspicion that the different racial, ethnic, and religious groups will exist apart from the rest of the society, and therefore exhibit a lack of loyalty corrosive to cultural unity, is hardly new in France, and was detested from the early days of the French Revolution.<sup>119</sup> For complex historical reasons, the link between loyalty to the unitary Republic and the fidelity to *laïcité* became intertwined both as a matter of the constitutional text<sup>120</sup> and the public order of the Republican cultural unity.<sup>121</sup> The link is meant to signal “*adhesion to a political project, loyalty towards a civilization which is a common good, and the intense feeling of sharing in each other’s fate,*”<sup>122</sup> with the *laïcité* having a status of “. . .the first re-

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<sup>117</sup> See *SAS*, *supra* note 9, at para. 104, citing Open Society Justice Initiative, *supra* note 116.

<sup>118</sup> As empirical studies show, from the 1970s to the late 1980s, most French Muslims held *laïcité* in high regard and considered it to be a guarantee of religious freedom, becoming “experts” in *laïcité*, see AMELIE BARRAS, *REFASHIONING SECULARISMS IN FRANCE AND TURKEY: THE CASE OF THE HEADSCARF BAN 74* (2014).

<sup>119</sup> In the aftermath of the 1789 French Revolution, the French National Assembly debated whether the Jews could be “transformed” into loyal citizens of the new French Republic, given Judaism’s communitarian leanings. WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* 51 (2008). Identical views persist even today and, for example, Jehovah’s Witnesses in France have been subjected to similar doubts. See SUSAN PALMER, *THE NEW HERETICS OF FRANCE: MINORITY RELIGIONS, LA REPUBLIQUE, AND THE GOVERNMENT-SPONSORED “WAR ON SECTS”* 200 (2011) (“The Jehovah’s Witnesses are perceived as undermining loyalty to the Republic, as they set up their own God-centered ‘kingdoms.’”).

<sup>120</sup> See Const., Art.1 (Fr.) (“France shall be an indivisible, secular (laic), democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs”).

<sup>121</sup> See CÉCILE LABORDE, *CRITICAL REPUBLICANISM: THE HIJAB CONTROVERSY AND POLITICAL PHILOSOPHY* 173 (2008) (discussing Republican solidarity and its relationship to *laïcité*).

<sup>122</sup> Fred Constant, *La citoyenneté* (Montchrestien, 1998) 28, cited in Laborde *supra* note 121 at 181 n. 41, internal citations omitted.

ligion of the Republic," one that requires "obedience and belief."<sup>123</sup>

Litigants like the applicant in *SAS* and those in earlier trials on headscarves in French national courts correctly understood the nature of the laws targeting religious symbols, and, likely aware of the epistemic strength of laïcité as tool of the struggle against the real or alleged communitarianism present among French Muslims,<sup>124</sup> have pledged their own allegiance and loyalty to laïcité to no avail.<sup>125</sup> Since laïcité itself is simultaneously a value-claim and a constitutional standard whose exact scope and outer limits are left strategically under-defined, no argumentation or evidence suffices.<sup>126</sup> French courts have, on multiple occasions, argued that, even in the absence of evidence of social harm, headscarves and burqas are an objective threat to the laïcité and the equality of sexes, and a means of promoting communal loyalties and group thinking against which the Republic must stand united.<sup>127</sup>

The Court's decision in *SAS* falls into the long line of the

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<sup>123</sup> Dominique Moïsi cited in Steven Erlanger and Tamara De Freytas-Tamura, *Old Tradition of Secularism Clashes with France's New Reality*, CRUX (Feb. 8, 2015), <http://www.cruxnow.com/faith/2015/02/08/old-tradition-of-secularism-clashes-with-frances-new-reality/> [<https://perma.cc/77NL-NECA>]; see also Raphael Liogier, *Laïcité on the Edge in France: Between the Theory of Church-State Separation and the Praxis of State-Church Confusion*, 9 MACQUARIE L. J. 25, 25-26, 43-44 (2009) (explaining that laïcité "morphed into a socio-cognitive frame of reference, a sort of screen wallpaper for France's social panorama, endorsed as such by all social groups").

<sup>124</sup> On transnational religious communitarianism among French Muslims, see John R. Bowen, *Does French Islam Have Borders? Dilemmas of Domestication in a Global Religious Field*, 106 AM. ANTHROPOLOGIST 43 (2004).

<sup>125</sup> For analysis of the intersection of loyalty and "foreignness" issues and French headscarf trials and debates on burqa banning, see, generally, Liogier, *supra* note 123.

<sup>126</sup> On the vagueness and multiple meanings of laïcité, see JOHN R. BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES: ISLAM, THE STATE, AND PUBLIC SPACE* 32 (2007) (noting that laïcité is "useful for political debates because its use conveys the double illusion that everyone knows what laïcité means and that this meaning has long been central to French Republicanism."). Similarly, see Herman T. Salton, *France's Other Enlightenment: Laïcité, Politics and the Role of Religion in French Law*, 5 J. POL. L. 30, 30-31 (2012), and Mohammad Idriss, *Lai'cite and the banning of the "hijab" in France*, 25 LEGAL STUD. 260, 260-65 (2006) (arguing that there is no single definition behind the concept of laïcité because its meaning holds various interpretations amongst academic commentators).

<sup>127</sup> Decisions of French courts and arguments used in cases involving prohibitions of headscarves and burqas in the period 2008-11 (including the post-2011 burqa-banning law period) are discussed in John R. Bowen, *How the French State Justifies Controlling Muslim Bodies: From Harm-Based to Values-Based Reasoning*, 78 SOC. RES. 325, 326-344 (2011) (detailing the various arguments for banning burqas, which the French courts considered over the years from 2003 to 2011).

Court's controversial French cases involving prohibitions of religious attire in schools.<sup>128</sup> It added an additional aura of human rights legitimacy to national laws' prohibitions, since the Court echoed various French courts and provided the ammunition for the mobilization of loyalists that sought to prevent an apathetic public and future governments from failing, willfully or through sheer inertia, to confront political threats to Republican unity and freedoms.<sup>129</sup>

The process is partially reminiscent of Moravcsik's claim that, from a republican-liberal perspective, creating a quasi-independent judicial body such as the Court is a tactic used by governments to bind ("lock in") future governments and stabilize institutions in the face of nondemocratic political threats,<sup>130</sup> in this case a religious threat. The "lock-in" argument was originally developed as an explanation of new Eastern European democracies' haste to join the Convention and accept the Court's jurisdiction. Given that the prior "lock-in" with the Convention did not prevent governments such as that of Hungary (and others) taking a turn toward becom-

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<sup>128</sup> The Court considered multiple applications of Sikh and Muslim primary and high school pupils prohibited from wearing turbans and headscarves, respectively, to be inadmissible on the grounds of the margin of appreciation, thereby deferring to the French March 2004 law banning ostentatious religious symbols in schools. See cases cited in *supra* note 31. Similarly, the Court confirmed the expulsion of secondary school pupils in France for refusing to remove headscarves during physical education and sports classes. *Dogru v France*, App. no. 27058/05, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=001-90039> [<https://perma.cc/Y3Y7-5UCM>]; *Kervanci v France*, App. no. 31645/04, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=001-90047> [<https://perma.cc/M82C-YFBE>]. Apart from the disputes involving religious insignia in schools in France, in two far less contested cases, the Court also relied on the margin of appreciation to uphold limitations on religious manifestations in the context of the security checks. See *El Morsli v. France*, App. No. 15585/06, Eur. Ct. H.R. (2008), <http://hudoc.echr.coe.int/eng?i=002-2109> [<https://perma.cc/N76M-TK62>] (holding that the margin of appreciation allows the French authorities to deny an entry visa to an applicant who refuses to remove her veil for an identity check); and *Phull v. France*, App. No. 35753/03, Eur. Ct. H.R. (2005), <http://hudoc.echr.coe.int/eng?i=001-77018> [<https://perma.cc/SXF8-XLUC>] (holding that requiring a practicing Sikh to remove their turban during security checks at an airport is a measure within the limits of the margin of appreciation).

<sup>129</sup> See *SAS*, *supra* note 9, paras. 15–17 (citing the French Parliament resolution supporting the 2011 French law banning burqas for reasons of the defense of Republican values in the face of subversive religious threat).

<sup>130</sup> See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L. ORG. 217, 220 (2000) ("From a 'republican liberal' perspective . . . creating a quasi-independent judicial body is a tactic used by governments to 'lock in' and consolidate democratic institutions, thereby enhancing their credibility and stability vis-a-vis nondemocratic political threats.").

ing illiberal democracies,<sup>131</sup> it remains to be seen whether this strategy will work for high-status states that enjoy more deference from the Court.

#### 4. IMPLICATIONS

The varied treatment of different religious symbols in cases involving France, Italy, Switzerland, and Turkey presented above, and the changes and (in)consistencies in the Court's freedom of religion jurisprudence in cases involving Turkey as opposed to those involving France, show that the sovereign consent and a threat of non-compliance as a single cause behind the Court's fallback on the doctrine of the margin of appreciation is only a partial explanation. The margin of appreciation is the Court's status-seeking mechanism, whose application varies vertically (between the high- and low-status states), and horizontally, depending on the social status and the distance of religious symbols from mainstream social norms.

This part discusses further implications of the vertical status of states and horizontal status of norms on the Court's decision-making process, and argues that, due to an increase in religious diversity, negative mobilizations shift the Court behavior further toward status-based views of states and religion.

##### *4.1. Vertical Status of States and Status-Based Toleration*

The implication that can be derived from the considerations discussed above is that most of the time the application of the margin of appreciation seemingly depends on the inverse relationship between state status and the status of a symbol: the higher status of the state and the lower and more socially distant status of the symbol, the more leniency is given and the margin of appreciation is relied upon. This increases the Court's status vis-à-vis high-status states, for two primary reasons. Firstly, the Court, with little

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<sup>131</sup> *Id.* at 220. On the turn towards the illiberal democracy in Hungary after enactment of the 2012 Hungarian Constitution (Fundamental Law), and the negative reactions of multiple Europe-wide institutions, including the Court, see Jusic, *supra* note 2, at 209, n.63.

risk to itself given the low social status of the disputed symbols, enlarges the freedom of action of high status states prospectively, or, in other words, the Court second-guesses state future orientation and aligns itself with it. Secondly, the Court positions itself as a *de facto* agent of high-status CoE states' seeking to produce norms around which the emerging consensus of both high- and low-status states can be manufactured. In short, in dealing with the high-status states, the Court, using the margin of appreciation, decreases its production of law due to the status of states,<sup>132</sup> and it allows high status states to increase the quantity of law and create (or give an impetus for the creation of) a consensus through norm diffusion that increases social distance internally within states, and aims at decreasing the distance across states through the adoption of formally similar regulations.<sup>133</sup>

This further implies that the Court will be more permissive toward religious symbols and religion in general in cases when the status of the state coincides with the cultural or social status of the symbol or religious group. In such cases, Court's actions are based on pragmatic considerations or status-based toleration rather than considerations of liberal, inclusive pluralism. In *Eweida and Others v United Kingdom*, for example, the Court considered the prohibition of wearing a discreet cross by the private employer an unjustified interference and found no interference when the public employer requested virtually the same of the second applicant.<sup>134</sup> As the case emerged from a high-status state, the UK, and involved a symbol that does not suffer from being distanced from mainstream norms, it is obvious that Court took no risks. It did not grant a margin of appreciation to a high-status state, but since the nature of symbol was within the mainstream, the high status of the state was hardly jeopardized.

Additional evidence that the Court essentially practices status-based toleration based on convergence of the status of the state and religious groups can be found in its other Article 9 cases. These cases involve the treatment of marginal ("low-status") religious

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<sup>132</sup> Law varies directly with social status and with higher status, law is more lenient and forgiving. DONALD BLACK, *SOCIOLOGICAL JUSTICE* 10 (1989).

<sup>133</sup> Cf. MOSHE HIRSCH, *INVITATION TO THE SOCIOLOGY OF INTERNATIONAL LAW* 129-56 (2015) (discussing, on the example of interaction between international investment tribunals and human rights, how cultural distance negatively affects norm diffusion among social groups. Adoption of the similar regulations and norms is supposed to decrease the cultural distance between states.).

<sup>134</sup> See *Eweida*, *supra* note 3.

groups, such as Jehovah's Witnesses, by the low-status states.<sup>135</sup> It was not by chance that one of the Court's first important decision finding a violation of Article 9 was the 1993 judgment in *Kokkinakis v. Greece*,<sup>136</sup> a case involving Greece's prohibition of proselytizing by Jehovah's Witnesses. Prior to this case, nearly all applications invoking violations of Article 9 were found to be inadmissible as "manifestly ill-founded" by the Court and by the European Commission on Human Rights. The trend continued and throughout the final decade of the 20<sup>th</sup> and first decade of the 21<sup>st</sup> century, the Court frequently decided in favor of Jehovah's Witnesses, a religious group considered to be socially distant and, for that reason, persecuted in many countries, finding the low-status states of the former Soviet Union and Southeastern Europe, such as Russia and Greece, breached their obligation to respect the Convention.<sup>137</sup> Simultaneously, however, the Court was more than lenient towards the punitive treatment of Jehovah's Witnesses and new religious movements in France, although France's attitude towards non-mainstream religions ("sects") was arguably more punitive than the one found in the countries of the former Soviet Union.<sup>138</sup>

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<sup>135</sup> See GLEN NEWAY, *TOLERATION IN POLITICAL CONFLICT* 13 (2013) (referring to this type of tolerance of marginal religious groups as status-based tolerance because it relegates the tolerated to a second-class civic status).

<sup>136</sup> *Kokkinakis v. Greece*, App. No. 14307/88, Eur. Ct. H.R. (1993), <http://hudoc.echr.coe.int/eng?i=001-57827> [<https://perma.cc/F2X6-XQNZ>].

<sup>137</sup> See Richardson & Shoemaker, *supra* note 18, at 106–11 (discussing the difference in the Court's decisions on religious freedom in cases involving Greece, Russia and France).

<sup>138</sup> *Id.* at 114. On the harsh legal and social treatment of "new" religious movements such as Jehovah's Witnesses, Soka Gakkai, and Scientology, and minority religious groups like French Muslims and Sikhs in France, see Palmer, *supra* note 119, at 178 (concluding that "France stands out as a unique example of intolerance toward religious minorities among the countries of Western Europe."). Only in 2011 did the Court start signaling a minimal change of attitude toward the treatment of minority religions in France. See *Association Les Témoins de Jéhovah v. France*, App. No. 8916/05, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-105386> [<https://perma.cc/A7R6-KJ9S>] (holding that a supplementary tax assessment of €45 million applied to donations marked for Jehovah's Witnesses violated Art. 9, as it was not a foreseeable regulation in accordance with the law). Moreover, the case *Izzettin Dogan & Others v. Turkey* arguably falls into this group of cases. The Alevi community in Turkey was perceived and treated as Islamic, but was nevertheless a non-mainstream group of a lower status relative to the mainstream Sunni Islam. See *Izzettin Dogan & Others v. Turkey*, *supra* note 58, paras. 35–45, para. 133. In other words, the low status of a religious group and the low status of the state have coincided.

#### 4.2. *Horizontal Mobilizations and Status*

Due to a possibility of non-compliance with the Court's decisions with little immediate costs, the CoE states ultimately retain the upper hand against both the Court and the individuals seeking redress in the Court. This creates a paradox: given the Court's deference toward the states and the mainstream symbols, such as the crucifix, and the Courts rhetoric in cases involving socially controversial religious symbols (the headscarf or burqa), it might seem that applicants with socially distant religious practices looking for the Court's support would have little or no incentive to litigate claims involving religious symbols. Similarly, the states would have little incentive to put up a strong defense against those claims—it would be enough to ignore them. The cases discussed above, however, suggest that for various groups, litigation in the Court is a strategy used for various types of mobilizations aimed at increasing or protecting their own status. Such mobilizations occur in two somewhat extreme situations both arising when the horizontal status of mainstream and non-mainstream social norms and symbols as their expressions are contested.

At one extreme, mobilization occurs once a disputed religious symbol has a strong horizontal social status firmly embedded within mainstream social norms across states (as in, e.g., the *Lautsi* cases). The strength of the horizontal embeddedness of the norm abolishes the vertical difference between the high and low status states and provides a cause for both state and social mobilization that can endanger the Court's status and authority. In such cases, the margin of appreciation is based on a threat of social (not only state) non-compliance, and the danger to the Court's status is extreme due to a possibility of the systemic friction of the institutional framework built around the Convention. Hence, as the Court itself is aware, at least in the area of religious symbols, the Court is subservient to social norms and its decisions cannot vary widely from what the Court perceives as the preexisting social structure in which the norms of its audience(s) are created.<sup>139</sup> However, this sheds doubt on the Court's oft-repeated statement that the margin of appreciation is inversely related to a lack of consensus across

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<sup>139</sup> On this point, see Mancini, *supra* note 21, at 26–27 (“The collective reputation of a court depends, to a large extent, on the audience at which its opinions are aimed . . . . [I]f a court's interpretations deeply differ from the convictions of the people, the people will start resisting judicial decisions.”).

states. In the *Lautsi* Grand Chamber case, it was the existence of a widespread social consensus, around which marginally different state systems of expressing the social consensus have been erected, that prompted the Court to resort to the margin of appreciation.

At the other extreme, mobilizations occur at the point when a symbol is deemed to be extremely distant from the state-backed mainstream norms, as in, e.g., the *SAS* case, where the state collided with the socially controversial nature of the burqa; or in *Sahin* case, where, due to the Court's perception of the oppositional nature of headscarf relative to state-backed mainstream norms, the state further collided with an allegedly controversial and socially distant symbol. In such cases, the direction of mobilizations is contingent on the domestic constituencies. It can move in the direction of confirming the embedded mainstream norms like loyalism, as in the wake of the *SAS* case, to which the Court's decisions more or less accede. Alternatively, as the aftermath of the *Sahin* case shows, in the short- and long-term, mobilization served as a corrective of the Court's perception, coercing it to adjust its views of the distribution of horizontal social norms, for which religious symbols are but a proxy. In the latter case, what was considered a non-mainstream symbol crossed over to the mainstream.

The main conclusion is that the Court is captive to social mobilizations and is itself an institution whose status is dependent on—and even subservient to—wider social approval (or at least the absence of an active social disapproval), meaning that the Court is relevant not only when cooperating with states, but also when cooperating with social forces.<sup>140</sup> Under conditions of contestations over social status caused by increased religious diversity, even the Court's resorting to the margin of appreciation, which is basically a form of judicial escape, is more likely to exacerbate than to resolve tensions, further reducing the function of law as a conflict-resolving and rights-protecting mechanism.<sup>141</sup> Therefore, any at-

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<sup>140</sup> Cf. Malcolm Feeley, *Hollow Hopes, Flypaper, and Metaphors*, 17 L. & SOC. INQUIRY 745, 751 (1992) (“[T]he conventional wisdom among political scientists and sociologists who have studied these matters is that the courts by themselves are not very powerful and, at best, are important at the margins or in conjunction with other governmental bodies.”).

<sup>141</sup> See Karl-Heinz Ladeur, *The Myth of the Neutral State and the Individualization of Religion: The Relationship between State and Religion in the Face of Fundamentalism*, 30 CARDOZO L. REV. 2445, 2446 (2009) (discussing judicial escape options in cases involving religion and social conflicts); see generally Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice*, 60 U. TORONTO L.J. 23 (2010) (discussing how judicial concerns over social perceptions (“reputation”) result in self-restraint and

tempt to venerate the Court as the counter-majoritarian protector of the human rights of minorities against the oppressive majorities—an image based on the problematic and somewhat condescending view of oppressed minorities in need of protection—appears largely unfounded, and should be viewed with skepticism.<sup>142</sup> The Court is only capable of following social changes or keeping its finger on the pulse of temporary majorities, but not of leading.<sup>143</sup>

While the Court itself has, on multiple occasions, stated that it will use social change as an indication of the new patterns of social behavior and consensus across European societies,<sup>144</sup> following the temporary majorities is problematic for two reasons. First, the Court may become a victim of the common wisdom fallacy since judicial evaluations of social facts or deferral to legislative bodies often strengthen conflation of normative assessments and unfounded empirical observations that do not guarantee normatively or empirically appealing results.<sup>145</sup>

Second, consensus is prone to biases and various types of social falsifications and manipulations.<sup>146</sup> For that reason, social consensus is often thin and inauthentic and based on mimicry, as with the process of the democratization of Eastern European societies post-1990 when these countries, partially supported by the Court, were

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the sub-optimal protection of human rights).

<sup>142</sup> See Hillel Y. Levin, *Rethinking Religious Minorities' Political Power*, 48 U.C. DAVIS L. REV. 1617, 1624–25 (2015) (discussing how the relative social position of religious minorities is often underappreciated, just as the majoritarian oppression of minority religions is overappreciated). The premise that courts, at least those in the U.S., are counter-majoritarian institutions has been thoroughly debunked by a number of empirical studies, and, for an overview of the relevant literature, see Law, *supra* note 22, at 728–30 and accompanying footnotes.

<sup>143</sup> Similarly, see Helfer and Voeten, *supra* note 25, at 106 (“[T]he Strasbourg Court engages in a kind of majoritarian activism.”).

<sup>144</sup> Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133, 141 (1993).

<sup>145</sup> On the complicated impact of social and legislative choices on the practice of various higher courts, and the need to avoid these, see Niels Petersen, *Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 INT’L J. CONST. L. 294, 297 (2013) (arguing that, in the context of judicial decision-making, “the practical conclusions of a normative argument may be misleading if the normative argument is based on unrealistic empirical assumptions.”).

<sup>146</sup> See generally TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1997) (claiming that the tendency to falsify public preferences to conform to social expectations creates a false sense of social consensus).

expected to emulate the established democracies. Unforeseen events can turn social change and alleged consensus upside down with potentially tragic consequences, as the religious and ethnic conflicts in former Yugoslavia and rapid changes in places like Turkey amply show.<sup>147</sup>

#### 4.3. *The Court's Status Concerns and Status Relativism*

With exceptions for discreet symbols worn by employees of private entities established by *Eweida* and symbols in public space established by *Ahmet Arslan* (later contradicted by *SAS*), the Court's jurisprudence on religious symbols so far exhibits two trends. First, the Court embraces the progressive enlargement of the scope of the prohibition of non-mainstream individual religious symbols from a specific context to a general public space using the margin of appreciation, often expressing an unfavorable view of the Islamic symbols worn by Muslim women.<sup>148</sup> Second, in its opinions that have dealt with mainstream symbols (e.g., the crucifix in the *Lautsi* Grand Chamber judgment) and non-mainstream symbols (Islamic ones in particular), the Court has relied upon various sociological and theological analyses, and translated these into a language of standards of pluralism, neutrality, equality, and toleration, a language that, as critics have argued, seems unsubstantiated and vacuous,<sup>149</sup> and lacking in procedural fairness towards individual applicants.<sup>150</sup>

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<sup>147</sup> See Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623, 647–49 (1998) (discussing how sudden social shocks in the previously peaceful and relatively unified society of former Yugoslavia provoked large-scale social segregation along ethnic lines).

<sup>148</sup> Steinbach, *supra* note 9, at 51; Cebada Alicia Romero, *The European Court of Human Rights and Religion: Between Christian Neutrality and the Fear of Islam*, 11 N.Z. J. PUB. INT'L L. 75, 94–100 (2013).

<sup>149</sup> For a critique of Court's arguments in cases involving Islamic symbols, see Rorive, *supra* note 5, at 2684 and accompanying footnotes. See also Fish, *supra* note 71 (commenting on the Court's *Lautsi* Grand Chamber decision and noting that the judgment rests not only on the unpersuasive argument that removing crucifixes from classrooms would diminish diversity and tolerance, but also on "the plausible-but-flawed argument (the crucifix is a symbol of democracy and national unity), the bizarre argument (the crucifix is a symbol of Christianity, but Christianity is not a religion), the theoretical-and-therefore-irrelevant argument (a crucifix can mean many things) and the empirically unpersuasive argument (because crucifixes don't come with voice boxes, they communicate no active message).").

<sup>150</sup> See Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Ad-*

These criticisms appear correct, but their implications are limited. The long-term status of the Court is not dependent on adherence to procedural fairness (which affects and is relevant only for individuals), but on the acquiescence of high-status states and mainstream social norms (a benchmark for measuring social distance of a religious symbol), both of which affect the Court's authoritative status. Simply put, it has thus far been beneficial and affordable for the Court to resort to the margin of appreciation and describe Christian symbols as passive and aligned with values of secularism and diversity while interpreting Islamic symbols as illiberal and insufficiently contained, as the Court has sensed that a majority of its primary audience among the high-status states and wider public feels the same.<sup>151</sup>

The motivation for this behavior of the Court is not some "hidden anti-Muslim bias," but rather the Court's own status concerns that vary with and depend upon the wider relevance of the issue at stake, and the norms and the composition of its primary audience. To illustrate variance, consider the case *I.A. v. Turkey*. There, somewhat paradoxically given its opinion in *Sahin* (connecting Islamic religious symbols with extremist movements in Turkey) and an otherwise strong protection of the freedom of expression, the Court relied on the margin of appreciation to acquiesce in the criminal conviction of a writer whose publications the Turkish authorities deemed to be insulting to Islamic traditions and beliefs.<sup>152</sup>

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*judication: The European Court of Human Rights*, 35 HUM. RTS. Q. 176, 186-87 (2013) (discussing the Court's neutrality and its characteristics transparency, accuracy and correctability).

<sup>151</sup> See Christoph Engel, *Law as a Precondition for Religious Freedom*, MPI COLLECTIVE GOODS REPRINT NO. 2011/6 14 (2011), <http://papers.ssrn.com/abstract=1803254> [<https://perma.cc/S7BF-YHNM>] (stating that tolerance toward particular religions increases proportionally with their level of social (self-)containment). In a sense, the Court's margin of appreciation is a tool for recognizing and dealing with the variance in the degree of toleration and self-containment that different communities and religions exhibit over time.

<sup>152</sup> *I.A. v. Turkey*, App. No. 42571/98, Eur. Ct. H.R. (2005), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-70113"\]}](https://hudoc.echr.coe.int/eng#{) [<https://perma.cc/B32K-FXF5>]. Though the judgment in *I.A. v. Turkey* was consistent with the Court's case law on the protection of religious sensitivities from gratuitously offensive and profane expression (*see id.* para. 24), as a matter of principle its outcome stands in stark contrast to, for example, the case *Gündüz v. Turkey*, App. No. 35071/97, Eur. Ct. H.R. (2004), <http://hudoc.echr.coe.int/eng?i=001-61522> [<https://perma.cc/W5KT-R9T2>] (holding that a religious leader's freedom of expression was violated when Turkish authorities convicted him for using a popular live TV broadcast to criticize the government, publicly insult children born outside of marriage, and propose the

In other words, the Court uses the margin of appreciation to implicitly incorporate a relativistic status-based view of states and societies, a view according to which society (both international and national) consists of separate “communities of consents” with differentiated social standing based on perceived social and religious characteristics that determine and condition capacity for the respect of human rights. While the margin of appreciation necessarily implies some degree of healthy relativism (or realistic universalism) that results in variation in treatment due to the different social backgrounds and considerations,<sup>153</sup> in its past judgments on religious symbols in different states, the Court has arguably overstepped its limits in terms of this relativism, and unnecessarily so.

The fact that the Court relies on a relativistic status-based treatment of states and different religions might be neither surprising nor a result of the Court’s own making. The drafters of the Convention saw the Court primarily as an instrument of *external* democratization of low-status states, probably labored under assumption of relative cultural homogeneity, and did not envision that the Court would have to deal with changes of social norms resulting from the increase of pluralism in high-status states.<sup>154</sup> The Court, in other words, has been building on cultural presuppositions and assumptions of homogeneity which it itself did not create.<sup>155</sup> If, as it is often argued, cultural homogeneity is one of the

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introduction of Sharia law).

<sup>153</sup> For an argument that the oft-repeated charge that relativism is a cause behind the margin of appreciation rests on a simplistic and unreal understanding of universality, see McGoldrick, *supra* note 6, at 37, 53. See generally James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT’L & COMP. L.Q. 459 (2005) (arguing that the application of the margin of appreciation implies some, but not full, relativism).

<sup>154</sup> See LORD WOOLF, REVIEW OF THE WORKING METHODS OF THE EUROPEAN COURT OF HUMAN RIGHTS 7 (2005), <http://www.echr.coe.int/LibraryDocs/Lord%20Woolf-2005-EN1587818.PDF> [<https://perma.cc/J8UJ-Q883>] (noting that the Convention was conceived as “an early warning system to prevent states from lapsing into totalitarianism. It set out the fundamental rights and freedoms that states should secure to everyone in their jurisdiction, and provided a judicial enforcement system—the European Court of Human Rights—by which states which violated human rights could be called to account.”). See also Madsen, *supra* note 19, at 142–43 (discussing the historical trajectory of the Court in response to changes in political situations and increases in democratization).

<sup>155</sup> Ernst-Wolfgang Böckenförde’s hypothesis is that the free, liberal, and democratic state rests on assumptions that it itself cannot deliver. In essence, the hypothesis implies that underlying secularized Western Christian values spread

prerequisites for effective transnational human rights adjudication,<sup>156</sup> a contemporary withering away of (religious) homogeneity could spell further deepening of the divide between the two (or multiple) tracks of the margin of appreciation developed for different states and religious symbols (and religions more generally), tracks that will make the Court less useful for individuals but more useful for selected CoE states.<sup>157</sup> This might harm the status of the Court within certain sectors of society, and perhaps among a number of states. However, the damage to the status of the Court is unlikely to be a mortal blow, since courts have an influence over social life so long as social actors behave as if they matter.<sup>158</sup>

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across a relatively homogenous society are necessary for the institutional existence of a liberal and pluralistic state. See ERNST-WOLFGANG BÖCKENFÖRDE, *STAAT, GESELLSCHAFT, FREIHEIT: STUDIEN ZUR STAATSTHEORIE UND ZUM VERFASSUNGSRECHT* 60 (1976) cited in Ladeur, *supra* note 141, at 2454 n.41. For further discussion of Böckenförde's hypothesis, see Asim Jusić, *Actionable Pluralism and Toleration in Religiously Diverse Societies: For Whom and for What?*, CEDAR (2015), <http://www.cedarnetwork.org/2015/04/18/2014-cedar-occasional-paper-no-7-by-asim-jusic/> [<https://perma.cc/M4AZ-RML7>].

<sup>156</sup> See Helfer & Slaughter, *supra* note 64, at 335–36, nn.265–67 (discussing literature that argues that the relative cultural and political homogeneity of states positively affects the influence of supranational human rights tribunals such as the Inter-American Court of Human Rights and the European Court of Human Rights).

<sup>157</sup> Proposals for differentiated approach to states based on the respective differences in the quality of their judicial and legal systems have already been advanced. See Helen Keller et al., *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, 21 EUR. J. INT'L L. 1025, 1044 (2010) (arguing that there is a need for a formalization of the system of relative, rather than absolute, sovereign equality of states in order to preserve the goals of the Convention). Protocol 15 to the Convention (not yet in force) seeks to entrench the margin of appreciation directly into the Convention's Preamble, and, in doing so, set more explicit boundaries for the Court. Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms, TREATY OFFICE (2013), <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213> [<https://perma.cc/BAM3-DUZU>]. For further discussion, see Sanader, *supra* note 69, at 203.

<sup>158</sup> See JOHN BRIGHAM, *THE CULT OF THE COURT* 17 (1987) (describing how political, social, and other institutions share a capacity to order social life because people act as if they exist and matter). Similar to Brigham, Madsen notes that notwithstanding the challenges to the Court's authority and the low level of compliance with its decisions in Turkey, "the fact that so many cases are directed to Strasbourg suggests conversely the emergence of a legal field in which the European Convention and the ECtHR are increasingly accepted among many audiences as a tool for legal and social change even though some government agents continue to resist it." Madsen, *supra* note 19, at 164.

## 5. CONCLUSION

The analysis of the Court's case law on religious symbols shows that even judicial doctrines of self-restraint such as the margin of appreciation can be used by the various constituencies and states for purpose of mobilizations that result in adverse effects (as in the cases of *Sahin* and *SAS*). At the same time, even the Court's rare activist decisions, such as *Lautsi I*, can result in a backlash.<sup>159</sup> In short, the Court is "damned if it doesn't, and damned if it does": both its restrained and more activist decisions can do more harm than good, inflaming what are controllable low-intensity social tensions, and create troubles where none initially existed.

This certainly does not imply that the Court's decisions on religious symbols always act as a trigger for such mobilizations. It simply means that, ironically, it might have been better had many of the cases discussed in this article never been directed to the Court in the first place. The Court, unable to entirely avoid these issues, relied upon theoretical sociological and theological arguments to portray something that is, or was, already practically settled or was best left unresolved as an intractable conflict. The theory then became a self-fulfilling prophecy that exacerbated controllable social tensions.

This is an unfortunate outcome that should have been avoided not only by the Court, but also by the parties involved in these cases. Simply put, no one should be terribly impressed by either the presence or absence of crucifixes and teachers and students with headscarves in schools, or veiled women in the streets. Conversely, at times, individuals and institutions need to consciously abstain from gratuitously flaunting their identities through symbols, as living in diverse yet stable societies requires shouldering the costs of self-censorship. The sky will not fall in if this price is paid, but many will be spared unnecessary troubles.

Quarrels caused by the presence of various religious symbols in the public space will persist, and the Court will be invited to decide upon some of these in the future. At their core, disputes over

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<sup>159</sup> Activist decisions of the national courts tend to have unforeseen backlash effects and, in the process, harm those they were meant to help. See generally MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (abridged ed. 2007) (arguing that *Brown v. Board of Education* resulted in a backlash that effectively worsened the social position of African-Americans in the American South, which, in turn, led to national civil rights legislation).

headscarves, turbans, crucifixes and burqas in schools, the workplace and public spaces across Europe are but minor symptoms of the growing anxieties over institutional and social willingness and capabilities for managing a continuously increasing and likely irreversible religious diversity. Historically, Europeans have hardly been gentle with one another when settling religious differences,<sup>160</sup> and since European democracies represent the social norms of past generations, they are ill-equipped to deal with social and demographic change.<sup>161</sup> This analysis suggests that international human rights tribunals, like the Court, face an identical problem, and are even *less* willing and well-equipped to deal with such phenomena.

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<sup>160</sup> See Petty, *supra* note 2, at 807 (discussing the history of European religious conflicts).

<sup>161</sup> See Stephen Holmes, *Goodbye Future?*, EUROZINE (Nov. 12, 2012), [http://www.eurozine.com/articles/article\\_2012-11-21-holmes-en.html#footNote4](http://www.eurozine.com/articles/article_2012-11-21-holmes-en.html#footNote4) [<https://perma.cc/MA6P-GWY3>] (reexamining some aspects of the disappointments of democracy after communism in the context of the recent increase in global dissatisfaction with democracy).