

## A Critical Analysis of Application of Proportionality Test and Margin of Appreciation Doctrine by European Court of Human Rights

*Mohammad Jalali\**

*Sogol Soodbar\*\**

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### Abstract

The European court of human rights, as an independent court, was established to proceed applications alleging that a contracting state has breached one or more of the human rights enumerated in the Convention. Undoubtedly one of the main concerns of this court, as its name implies, is the protection of human rights and condemnation of states in case of violation. As an undeniable fact, the protection of human rights and public interest together are required for an efficient society. As a result, the European court of human rights must use a mechanism by which it can have a reasonable and balanced operation to actualize these two fundamental values. To approach this aim, the court uses the proportionality test, consisting of three principles of legitimacy, suitability, and necessity. Despite its efficient results for the Court, the manner in which this test is applied leads to some challenges in the way of keeping a balance between human rights and public interest. By application of margin of appreciation doctrine, this court authorized the member states to evaluate the legitimacy of an aim. therefor in some court's proceedings there is lack of clarity on the function of margin of appreciation doctrine. This study aims to explore the challenges and gaps in striking balance between individual rights and public interest which the court is facing with. By investigating in ECtHR precedents, we find out that puzzling scope of the margin of appreciation, lack of comprehensiveness and clarity are considered as main challenges in the application of margin of appreciation and proportionality test.

**Keywords:** European Court of Human Rights; Proportionality Test; the Margin of Appreciation Doctrine; Legitimacy of Aim.

\* Assistant Professor, Faculty of Law, Shahid Beheshti University, Tehran, Iran.

Email: mdjalali@gmail.com

\*\* PhD Student of Public Law, Faculty of Law, Shahid Beheshti University, Tehran, Iran

Email: sogolsoodbar@gmail.com



## **Introduction**

The European Court of Human Rights, like many constitutional courts and national judicial authorities around the world, strives to guarantee the rights and freedoms of human society. Indeed, the rationalization of establishing the court after the World War II, which was designed to prevent both the damage caused by the war and the violation of basic human rights, making the regional court's mission even more important.<sup>1</sup> However, what is controversial about the court's mission and the subject of this study is the court's reaction to conflicts between rights and freedoms on the one hand and the public interest of society on the other. This is because when an individual complains about the performance of the government under the provisions of the European Convention on Human Rights, judges must most often reach a commonality between rights, freedom and the public interest. The proportionality test and the doctrine of margin of appreciation are the ultimate court solution where individual rights and the public interest intersect.<sup>2</sup> This study focuses on the challenges posed by applying the proportionality and at the same time aims to learn more about the components of that test in the light of the judicial precedents. To achieve this, we benefit from an inductive method. Therefore, Part 1 (A) examines the components of the proportionality test, focusing on the content of some cases, and then Part 2 examines the results of Part 1 by criticizing the application of the doctrine of margin of appreciation. In this study, the authors sought to identify some ambiguities and gaps in the application of the doctrine of margin of appreciation, citing some voices from the courts. Because applying the above doctrine to balance rights and the public interest has some reasonable consequences, but in some cases, courts do not benefit from a transparent and consistent approach. Therefore, assessing this institution's performance in applying the doctrine of margin of appreciation in the light of judicial proceedings is an attempt to look at the institution from a new angle.

## **A. Balance and Proportionality in the European Court of Human Rights Procedure**

In many cases and proceedings, the court's primary concern is to resolve conflicts between basic human rights and the public interest of society. To achieve this balance, the court applies the principle of proportionality. This

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1. Jonas Christoffersen and Mikael Rask Madsen, *the European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011).

2. Cora S. Feingold, "Doctrine of Margin of Appreciation and the European Convention on Human Rights", *Notre Dame Law Review* 53, Issue 1 (1977): 90-106.

follows the practices of many European Constitutional and Administrative Courts.<sup>3</sup> By reviewing the procedure of the court in practice, we understand that when we apply the proportionality test to encourage the lawsuit process, this goal may be achieved by securing the rights of individuals, or by prioritizing the public interest of society which both will be addressed in the following pages. In this study, we are going to elaborate on the components of the Proportionality test and the doctrine of margin of appreciation by citing some examples from the procedure of the court.

## **1- The Components of the Proportionality Test**

### **1-1 Legitimacy of the Aim**

The “legitimacy of the Aim” is the first step of the proportionality test; governments following the violation of fundamental rights of their citizens typically explain the violation of those fundamental rights that is in line with the public interest of the society is legitimate. It is worth mentioning that the wording of Articles 8 to 11 of the Convention approves this approach to some extent and considers protecting matters such as national security, public health, public moralities, securing public rights and freedoms, public safety, and economic welfare of the nation, territorial integrity and right to a fair trial so important that violating the individual rights and freedom under certain conditions where it intersects with such matters, is authorized.<sup>4</sup> However, terms such as “respecting the rights and freedoms of others” and “public interest” are comprehensive enough to justify the restrictions imposed by the government on the basic rights of citizens. It is exactly at this stage that by performing the proportionality test in every case, the court shall resist against those actions of governments that are unjustifiable according to the components of this test. In most of the cases referred to the court, the court is faced with unfounded and illegitimate restrictions in which violating the fundamental human rights by governments according to judicial procedures of the court is inexcusable.<sup>5</sup> To clarify, let's take a look at the case

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3. Michel Fromont, “Le Principe de Proportionnalité”, In: *public Law, from Power Regulation to Guaranteeing Rights. Collection of Articles Donated to the Great Professor of Public Law Dr. Seyed Mohammad Hashemi*, Trans. by Mohammad Jalali (Tehran: Khane Andishmandane Oloume Ensani, 2019), 501.

4. Hossein Sharifi Taraz Koohi and Javad Mobini, “The Application of the Margin of Appreciation Doctrine in the Jurisprudence of the European Court of Human Rights”, *Quarterly Journal of Public Law Research* 16, no. 44 (2014): 84.

5. Saeed Rahaei, “The Doctrine of the ‘Margin of Appreciation’ and the Limitation of the Right to Religious Manifestation: with special Emphasis on Muslims in Europe”, *Journal of Comparative Law (Mofid letter)* 0, no. 18 (2010): 96.

of *Burdov v Russia*.<sup>6</sup> According to this case law, the plaintiff was summoned to participate in an urgent military operation at the Chernobyl site on October 1, 1986. He participated in the operation for four months and was injured after being exposed to radioactive waves. In 1991, Shakhty City Social Services, a city in western Russia, was required to pay compensation for physical injuries suffered by Burdov. In 1997, due to non-payment of indemnity, Burdov filed a lawsuit against the social service in Shakhty court of justice. The plaintiff claimed that due to dramatic changes to the Russian currency, the amount of money shall be calculated on a daily rate basis. Although the case was pursued in supreme courts until 2001, the aforementioned indemnity remained unpaid. The relevant entity argued that there were not enough budgets to cover the indemnity and after the financing of relevant amounts by financial institutions, it would be paid as soon as possible. Plaintiffs did not achieve the desired results in Russian courts and filed a complaint with the European Court of Human Rights, citing Article 6 of the Convention and Protocol 1. The court's rationale for this case can be summarized in two ways. First, under Article 6, Paragraph 1 of the Convention, everyone equally enjoys the right to a fair civil trial. In this regard, the court recognizes that extension of the trial for four years and the lack of executive guarantee of domestic court's decisions issued during these years is indeed the violation of basic rights of the plaintiff in the trial under Article 6 and does not compensate the physical injuries inflicted on plaintiff due to the mandatory participation of him in an emergency military operation under the pretext of lack of enough budget is illegitimate. Second, under Protocol 1 of Article 1 of the Convention, "every natural and legal person shall be able to enjoy the right to his properties peacefully". The court argued that failure to reimburse the damages inflicted on Burdov deprived him of the right to his properties. Finally, the court ruled that the Russian government needed to apply Article 41 of the Convention to compensate for the damage done to the plaintiff. According to this article, "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Contrary to the approach adopted in the above case, it is sometimes noticed that the court accepts the argument of the states about the legitimacy of the

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6. The European Court of Human Rights (2002), Case of *Burdov v. Russia*.

aim and justifies the infringement of fundamental rights based on that legitimate aim; in the case of *Mann Singh v. France*<sup>7</sup>, for example, a Sikh citizen lost his driving license in an armed robbery and was proceeded to regain it. According to Sikhism, followers of this religion shall always wear a headscarf. The aforesaid citizen had the headscarf when taking a photo, he needed to extend his driving license; while according to French laws and regulations, citizens shall not cover their head and look directly at the camera lenses when taking the photo to obtain important documents such as passport and driving license. Therefore, the Sikh application for renewal of his license was rejected in 2004. In 2005, he appealed to the French Administrative Court against this action, but his proceeding was initially found to be unacceptable. Mann Singh filed a lawsuit in the European Court of Human Rights in 2007, alleging that the French government's attitude violated the right to freedom of religion. The court ruled that the French government's action was legitimate since it was documented in the explicit context of the law on the covering of persons during photography, and accepted the government's argument for such a requirement to identify vehicle drivers and voted in favor of the government.

Just as can be concluded from the above and similar cases, sometimes in the process of assessing the first element of the proportionality test (Legitimacy of the Aim), the court accepts the argument of governments based on the fact that the decision is in compliance with existing domestic laws and regulations and therefore does not interfere with independently.<sup>8</sup>

### **2-1 Suitability of the Aim with the Violated Right**

The term "Reasonableness" (Suitability) also known as "Wednesbury's unreasonableness," was used after Lord Green's remarks in the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*<sup>9</sup> in England. In this case, the aforesaid judge emphasized that the court's intervention in a case can only be justified if a decision is so unreasonable that no reasonable authority can approve it.<sup>10</sup> The Principle of Reasonableness also applies to the decisions of government officials. Of course, proving the claim

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7. The European Court of Human Rights (2008), Case of *Mann Singh v. France*.

8. For more information: The European Court of Human Rights (2015), Case of *Kudrevičius and others v. Lithuania*.

9. England and Wales Court (1947), Case of *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*.

10. Mohammad Hossein Zarei and Khadijeh Shojaeian, "Principles of Unreasonableness and Proportionality in UK Legal System", *Legal Research Quarterly*, no. 13 (2013): 347-390.

that the decision of a government official or institution lacks the element of reasonableness is legally challenging. In this regard, paragraph 3 of Article 5 of the Convention on the detention of defendants emphasizes that detention is only possible for the relevant authorities if there is reasonable doubt and, of course, within a reasonable time. As it is clear, the wording of this section of Article 5 implies the necessity of a reasonable decision, followed by the suitability between means and aims.<sup>11</sup>

The court uses a similar interpretation in the *Kalashnikov case v Russia*.<sup>12</sup> In 1995, Kalashnikov, the director of Russia's Northeastern Commercial Bank, was charged with embezzlement, then prosecuted and arrested. Before the trial process begins, he spent four years in a detention facility in Magadan city. After the defendant finished the imprisonment period, he lodged a complaint with the court based on the unfavorable conditions of the detention facility. Kalashnikov claimed that he was being held in a very small room with a large number of prisoners. Lack of air conditioning and ventilation system, smoking in the public atmosphere of detention center due to lack of a special place for its use, and the presence of vermin and bothering insects were among the problems the prisoners were faced with in the detention facility. However, the Russian government denied the allegations of the plaintiff about the inhuman and degrading conditions in the detention facility by displaying some pictures and referring to statistics such as the fewer number of prisoners than the complainant claimed, more areas for cell, sanitation facilities, and proper cell ventilation. In addition, the government proclaimed that all facilities and equipment used as well as conditions governing the detention facility had been established under the surveillance of superior institutions and following the laws and regulations. Among the others, the government only admitted to an increase in the number of prisoners in the cell for a short time, as well as the problem of insects and vermin in the cell. In his legislative statements to the court, Kalashnikov referred to violations of Articles 3, 3.5, and 6.1 of the Convention. According to Article 3 of the Convention, "No one shall be subjected to torture or cruel inhuman and humiliating treatment or punishment". However, the plaintiff considers his conditions as an example of violating this Article. On the other side, the government blamed Russia's economic situation for weakening the judiciary in the extension of the trial

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11. Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Brill, 2009), 2.

12. The European Court of Human Rights (2002), *Case of Kalashnikov V. Russia*.

process, as well as the poor conditions of detention facilities, and claimed that during the defendant's detention period, the government had made every effort to improve the situation as much as possible. Although the government expressed its dissatisfaction with the condition in the detention facilities, it also had no intention of inflicting torture or performing inhuman and humiliating treatment or punishment. In response to the Russian authorities, the court believed that Article 3 of the Convention expresses one of the most fundamental features of a democratic society and the necessity of its application is absolute and unconditional. The court also proclaims the behavior to be inhumane in case it is accompanied with a minimum of severity, and this standard is defined according to different variables such as age, gender, health condition of the defendant and its evil consequence, and the length of the detention period. According to the above, the European Court of Human Rights believed that the provisions of this case are an explicit violation of Article 3 of the Convention; this is because not only the unfavorable conditions of detention have led to physical and psychological problems such as intimidation, a sense of inferiority and violation of human dignity in the defendant, but also its long duration aggravated the situation.

According to paragraph 1, Article 6 of the Convention, "People in the process of establishing civil rights and obligations, or those with a criminal charge, have the right to a hearing within a suitable time by an independent and unaligned tribunal." The time it takes to advance the proceedings is one of the characteristics of a fair trial and it is the guarantee of Article 6 of the Convention that the length of the proceedings, in this case, is explicitly longer than the minimum characteristics of a reasonable hearing. As a result, the court declared that the actions of the Russian government, in this case, violated paragraph 1, Article 6 of the Convention. As explained earlier, according to Article 5.3, the defendant's pretrial detention is only appropriate when there is reasonable suspicion or there is some information that the defendant has committed a crime or has escaped. The detention itself must be done under the provisions of paragraph 3 of this Article and should be done at an appropriate time. In this case, the court appears to justify the detention of the accused when faced with the crime for the first time, depending on the details and nature of the crime committed, but by conducting a preliminary investigation and gathering evidence such an action is no longer relevant. Therefore, the long-term detention of the defendant violates the principle of the suitability of the aim.<sup>13</sup> In short, to

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13. The European Court of Human Rights (2003), Case of Smirnova V. Russia.

balance rights and the public interest, courts always try to determine how rational a decision is based on the evidence of the case and therefore stick to the suitability of the Aim.<sup>14</sup>

### 3-1 Necessity

One of the main characteristics of the proportionality test is whether the method chosen by governments to protect the public interest has an alternative with less restriction on individual rights and freedoms?<sup>15</sup> The nature of the aim that a government seeks to achieve must be fully in line with the chosen means. This conformity and harmony which exists between aims and means is another form of the “Necessity Test”.<sup>16</sup> Paragraph 3, Article 4 of the Convention indicates the application of the principle of necessity. According to this article, “No one shall be held in slavery or servitude or forced into peonage or forced labor.” The following items are excluded from the wording “peonage or forced labor” referred to in this Article; “... any kind of service of a military nature or, service in countries that legalize military officers, compulsory (civilian) service instead of military service ... .” As you can see, there is a suitable and low-cost alternative for those persons who do not want to serve in the compulsory military service due to personal beliefs.

The case of *Arthur Avanesyan v Armenia*<sup>17</sup> is one of the clearest examples of the application of the principle of necessity. The plaintiff, in this case, is a follower of Jehovah's Witnesses. In January 2014, following a summons to serve in the military service, he wrote a letter stating that participation in military operation was considered contrary to the prevailing beliefs of this religion. Arthur Avanesyan stated given that the possibility of participating in social services instead of military activities is anticipated, he is fully prepared to provide such services. His request was rejected by the relevant authorities and after it was pursued through various stages of the proceedings, brought up to discussion in the court. Considering the need for the principle of necessity to rule between the rights of individuals and the public interest, the court found it unnecessary for the plaintiff to perform military service militarily and

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14. Alexey V. Dolzhikov, “The European Court of Human Rights on the Principle of Proportionality in 'Russian' Cases”, *Teise* 82, (2012): 215-224.

15. Ann-Sara Lind and Magnus Strand, “A New Proportionality Test for Fundamental Rights?” *Steps, European Policy Analysis*, Issue 2011, 1-12.

16. Mahdi Moradi Berelian, *Principle of Proportionality in the Legal System of the European Union with A View to the Jurisprudence of the Administrative Justice Tribunal* (Tehran: Khorsandi Publications, 2013), 172.

17. The European Court of Human Rights (2021), *Case of Avanesyan v. Armenia*, App. No. 12999/15.

considered civil services and services of public benefit as a less costly means of protecting the public interest.

The application of the principle of “Less Restrictive Mean (LRM)” in the court's ruling in the Kalashnikov case v Russia is also explicitly visible. “The judiciary's treatment with defendants should be of minimal violence and the government shall behave in a manner that is commensurate with the detainee's human dignity, in a way that the means and methods used do not put the defendant under psychological and physical pressure and it should not be more severe than the nature of the detention requires,”<sup>18</sup> the court said. In this case, the court requires the Russian government to minimize the consequences and the effects of detaining the defendant, which is an example of restricting his right to liberty.

The court believes that one of the crucial necessities for using less costly means to protect fundamental human rights is the so-called intervention of the judiciary in the process of legislating and macro policy-making of a state. In this regard, it should be noted that the judiciary should not only prevent the drafting and adoption of laws that violate fundamental human rights but should also pave the way to develop laws and regulations which are according to individual rights and freedoms.

## **2- The principle of Balancing and Subjectivity of Judges**

As mentioned earlier, the application of the proportionality test in the judicial decision-making process is an approach in which the European Court of Human Rights has played an affirmative role. Contrary to the aforementioned components of the proportionality test which are based on the essentiality of the means (fundamental rights constraint) and the aims (consideration of the public interest), the principle of balancing ensures the establishment of a balance between two conflicting values of individual rights and freedoms and the public interest.<sup>19</sup> This method of decision making is now recognized as one of the main techniques used by judges; For example, in one of its first rulings in the case of Sporrang and Lonroth v Sweden,<sup>20</sup> the court declared that establishing the balance between the public interest of society and the protection of the fundamental rights of individuals is of great importance

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18. The European Court of Human Rights (2002), Case of Kalashnikov V. Russia, App. No. 47095/99.

19. Mohammad Rasekh and Mahnaz Bayat Komitaki, “Right and Public Interest in the Scales of Justice”, *Legal Research Quarterly (Ministry of Science)*, Special Issue No. 8 (2012): 385-426.

20. The European Court of Human Rights (1982), Case of Sporrang and Lonroth v. Sweden.

throughout the context and content of the Convention. However, some judges do not agree with this approach and believe that this factor creates confrontation and conflict between the court and statesmen and policymakers of the domestic system. For example, the well-known Norwegian judge Terje Wold disagrees with the balancing function for the court on the ground that attributing a balancing function between individual rights and the public interest in this institution is not the main purpose of the court, but it brings the court into the realm of policy and the internal decision-making process of each country.

Unlike the opposition's view, what is carefully achieved in practice as well as in the court's judicial procedure is an attempt to strike a balance between these two fundamental values, which will be realized in the theory of Margin of Appreciation; For example, in the case of *Sporrong and Lönroth v Sweden*, the Sporrong family, who owns a large property near the city of Stockholm, appealed against the Stockholm City Council's decision to deprive them of their inherited property for 22 years. According to the reports obtained from this case in 1957, the Stockholm municipality which is responsible for general policies of the Swedish urban structure based on the Stockholm municipality law adopted in 1947, delegated the authority to allocate some properties to urban projects and to take ownership from their real landlords as well as the construction ban in these areas to the Stockholm municipality. According to this decision, 164 independent properties around the city of Stockholm, including the Sporrong family's inherited property, were to be expropriated to connect the country's main roads, improve the quality of the road network and facilitate the transportation process. In this regard, the government gave the residents of these areas a five-year deadline to evacuate and receive the price of land and inflicted damages, which was extended for another three years. During this period, the Sporrong family did not take any action to sell their property to the relevant municipality, and the government did not start the project of road construction. In these years, the Sporrong family has repeatedly tried to repair and renovate their 100-year-old property on the land, which was prohibited by the municipality. In this regard, the plaintiff considers the expropriation of his properties in this long time as a violation of Article 1, Protocol 1 of the Convention on the subject of the peaceful use of personal property. The court accepted the plaintiff's argument declaring that the restriction of this right, in this case, was not justified by any reason given by the government.

In the case of *Papamichalopoulos and Others v Greece*<sup>21</sup> in 1993, the court also declared that taking the ownership of private land by the Greek navy is considered a practical expropriation. However, the documentation of ownership belongs to the plaintiffs, because the plaintiffs are deprived of the right to use their land, which is the subject of Article 1, Protocol 1 of the Convention.<sup>22</sup> It should be noted that the content of this protocol in several cases – the two of which we have examined here - has raised the issue of conflict of interest between individual rights and public interests in the court.

Judges of domestic courts face constraints due to political and social considerations and efforts to preserve the integrity of society, and face more difficulties in making balanced decisions in comparison with judges of regional courts such as the European Court of Human Rights; for example, in the case of *Konstantin Markin v Russia*<sup>23</sup>, such a conflict exists between the national values of Russian society and the principles endorsed by the Council of Europe. According to the case, Konstantin Markin, the officer of the Russian government's intelligence-military service, following his separation from his wife and taking custody of his three children requested a three-year paternity leave. His request was based on the fact that his divorce took place immediately after the birth of his third child, and Konstantin, as the baby's parent, considered it necessary to take this leave to take care of his child. This request was rejected by the relevant authorities. In this regard, he appealed against the decision taken by the relevant unit to the court-martial. The court-martial also rejected the request, arguing that the provision for parental leave to care for a newborn child is limited only to women in the military. Finally, in October 2006, due to Konstantin's frequent absences, his chief of staff in the military unit accepted his request for a two-year leave and in addition, granted him financial assistance. The court-martial, which was still investigating the case, rejected the decision made by the chief of staff and declared it against the law. In 2008, the plaintiff appealed to the Constitutional Court against the prohibition of granting parental leave to him for taking care of his children and considered this decision against the principle of equality,

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21. The European Court of Human Rights (1993), Case of *Papamichalopoulos and Others v. Greece*.

22. Mehdi Meyhami and Mahmoud Bagheri, "An Analysis of Current Views on the Evolution of Determination of Indirect Expropriation: A Case Study of the Energy Sector Investments", *Energy Law Studies* 2, no. 2 (2016): 414.

23. The European Court of Human Rights (2012), Case of *Konstantin Markin v. Russia*, App. No. 30078/06.

which was again rejected. In 2010, Konstantin Markin filed a complaint with the court alleging violations of Articles 8 and 14 of the Convention. The government, on the other hand, insisted on the validity of its decision on two grounds which were gender and the specific requirements of military occupation. While earlier, the court had ruled in a similar case against the Austrian government on the grounds of equal treatment between men and women. Finally, the court, under the content of Articles 8 and 14 of the Convention on the right to respect for the private and family life of individuals and the prevention of discrimination, accepted the violation of these two articles and considered such discrimination unjustifiable and illegitimate even among military personnel and for protecting national security. Although the court's decision, in this case, was somehow at odds with the nationalist beliefs of judges of the Russian constitutional court, relying on the principle of indiscriminate and developing it to racial, national, religious, and gender issues, the European Court of Human Rights confirmed the correctness of this decision. The reaction of the judges of the domestic courts, in this case, is an example of the resistance of the domestic authorities against the decisions made in the court.

Up to this part of the research, by examining the judicial procedures of the court in the light of the Proportionality Test, we discussed how this institution is conducting the proceedings, then we try to focus on the most important challenges this court is facing in the process of decision making (especially how to assess the Legitimacy of the Aim).

### **B- Delegating Evaluation of a Legitimate Aim to Governments, Criticism to the Application of the Margin of Appreciation Doctrine**

One of the criticisms against the decision-making process in the European Court of Human Rights can be traced back to how the Legitimacy of the Aim (the first component of the proportionality test) is determined. This is because the court considers it the duty of the governments themselves to assess the legitimacy or illegitimacy of an aim based on which one of the rights and freedoms of individuals has been violated, and consider it within the jurisdiction of States. In addition, the European Court of Human Rights' application of the margin of appreciation doctrine to determine whether an aim is legitimate or illegitimate does not follow a single rule. In some cases, it has greatly widened the scope of function of governments without justified reason, and in some cases, it has narrowed their margin of

appreciation. Another criticism against this European Court is the lack of transparency in the application of the margin of appreciation doctrine; it means that the court has not taken a coherent and predictable approach to deal with complaints from European citizens in cases of conflict between individual rights and public interests. Furthermore, in some cases the margin of appreciation doctrine does not necessarily cover all aspects of the case. In the following, an attempt is made to explain the above-mentioned criticisms more effectively by examining several cases. To maintain the order of the discussions, we will study these criticisms in three consecutive sections: the puzzling scope of the margin of appreciation, ambiguity in the margin of appreciation's scope, and lack of certainty in the margin of appreciation's scope.

### **1- The Puzzling Scope of the Margin of Appreciation**

One of the most important criticisms against the methods in which the margin of appreciation doctrine is applied in the case-law of the European Court of Human Rights is the puzzling scope of the margin of appreciation in contracting states. In other words, in the process of hearing some cases, the court dedicate a wide margin of appreciation to states and, in other cases, dedicate them a narrow margin of appreciation.<sup>24</sup> In the following, we try to examine the problems of the puzzling scope of the margin of appreciation of states by investigating some cases.

Leyla Şahin<sup>25</sup>, a Turkish citizen who studied medical sciences at Bursa University in Vienna, was transferred to Cerrahpaşa Medical School of Istanbul University in her fifth year of education. Leyla Şahin, who had always attended the classes in a veil and headscarves worn by Muslim women during his four years of study, was deprived of the right to attend classes and courses with Islamic hijab, according to a directive approved by the President of Istanbul University on February 23, 1998. On February 9, 1998, the President of the Istanbul University issued a directive about the clothing of the students, stating that: "Based on the constitution, ongoing laws and regulations, as well as under the procedure of the Supreme Administrative Court and the directives issued by the administrative and executive board of the university, students who wear the Islamic hijab or

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24. Thomas A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", *Human Rights Quarterly* 4, no. 4 (1982): 495-496.

25. The European Court of Human Rights (2005), Case of Leyla Şahin v. Turkey.

appear with Islamic clothing will not be permitted to participate in classes and courses." Following Ms. Şahin's request to invalidate this directive and reject it by the Istanbul Administrative Court as well as the Supreme Court, she complained with the European Court of Human Rights alleging the violations of Articles 8, 9, and 14 of the Convention and Article 2, Protocol 1 to this document. According to Article 9 of this document, everyone shall enjoy the freedom of opinion, belief, and religion, and this freedom is restricted only in a democratic society and under the rule of law to maintain public order, health, and morals or to protect the rights and freedoms of others. In the decision-making process, in this case, the court applied the proportionality test and declares that governments can restrict the rights of citizens to maintain public order, and in this regard considers the development of such a directive as a binding, legitimate and justifiable document. According to the margin of appreciation doctrine and discretion delegated to the contracting states, the court declares that because of direct and continuous relations with educational society, the educational authorities can evaluate the local necessities and conditions and requirements of a special course better than any international authority and make decisions based on it. Therefore, the court declared that the Turkish Government's intervention in the complaints was generally justified and is suitable with the intended aim, thus rejected the allegation of a violation of Article 9 of the Convention.<sup>26</sup>

As it is obvious, in this case, and similar cases the recognition of the legitimacy of the domestic laws of the states has been widely delegated to them according to the political and social conditions and the requirements of public order in their society. The allocation of such wide scope to governments by the court seems to generate a kind of vicious circle; because the court as a regional and independent judiciary system has the mission of striking a balance between right and public interest, while the provision of such broad jurisdiction for governments is incompatible with achieving this goal.

As in the previous case in which the court's approach focused on expanding the Turkish government's margin of appreciation, in the case of *Bernh Larson v Norway*<sup>27</sup> about the tax audit, the court has significantly expanded the government's margin of appreciation. In this case, to investigate the tax case of

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26. Mohammad Rasekh and Mahnaz Bayat Komitaki, "Right and Public Interest in the Scales of Justice", *Legal Research Quarterly (Ministry of Science)*, Special Issue No. 8 (2012): 14.

27. The European Court of Human Rights (2013), *Case of Bernh Larson Holding AS and Others v. Norway*.

B.L.H. Company, the Norwegian tax office considered it necessary to access all the information in the computers of this company and asked the relevant clerks to submit the required documents and information. The B.L.H. refused to provide these files on the ground that their servers were shared with two other companies' servers. Following this claim, the tax office also investigated tax information and documents related to two other companies. After submitting the requested information to the tax office, the two companies filed lawsuits against this decision. The court ruled out against the tax office and revoked the license to investigate the tax documents of the two companies. Following the pursuit of this case by Larson Company in the court of appeal and rejecting their allegation based on the violation of privacy, the company filed a lawsuit in 2008 alleging a violation of Article 8 of the Convention (the right to respect for private and family life) and claimed that tax office access to all information on the servers including personal information of employees is against the principle of private and family life of individuals. Meanwhile, the Norwegian government considered access to this information necessary and legal to protect the principles of tax transparency and efficiency and to ensure the economic interests of society. The court argued that the application of the margin of appreciation to legal entities in similar cases is wider than that of individuals, and the government had more discretion in such cases. The court finally dismissed the alleged violation of Article 8 and ruled in favor of the Norwegian government.

The purpose of addressing the two above cases is to examine the widening of the scope of the margin of appreciation of states on issues such as religious freedom, taxes, and economic issues. As we shall see below, we are facing with lack of certainty in the margin of appreciation's scope of the governments.

Unlike the previous two cases, in *Polyakova and others v Russia*,<sup>28</sup> the margin of appreciation of the government has been so narrowed that you can say the Russian government has no margin of appreciation in this case. Polyakova was sentenced to prison for drug-related offenses, followed by a supplementary sentence to compensate the criminal charges and amend the defendant. After serving his sentence, he was forced to work in a center near his family home to provide public services and rehabilitation. Shortly afterward, according to a government directive, the organization transferred

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28. The European Court of Human Rights (2017), *Case of Polyakova and Others v. Russia*.

the convict who was the only child of the family to another rehabilitation center 5,000 kilometers away from his home. His family's appeal against the decision was rejected not only by the relevant authorities of the rehabilitation center but also by the court of the first stance. The court's arguments under Article 73 of the Russian Penal Code of 1997 were based on the fact that the transfer of convicts and their accommodation in other centers was due to the overcrowding of convicts in the aforementioned center and consequently was to keep their safety. Finally, the Polyakova family filed a complaint with the court alleging a violation of Article 8 of the European Convention on Human Rights on the right to respect for the private and family life of individuals. Emphasizing the importance of the convicts' right to have access and constant contact with their families, the court condemned the Russian government for violating Article 8 of the Convention. In its arguments on the margin of appreciation of states regarding the right of prisoners and convicts to visit their families at the end of their imprisonment and during rehabilitation, the court declared that states do not have a wide discretion regarding the right of prisoners to visit their first-degree relatives, especially during rehabilitation. Under European law regarding the situation of prisoners, governments are obliged to make arrangements for prisoners to meet with their first-degree relatives regularly to preserve the dignity of their family, and the margin of appreciation provided by governments in the face of this right is very narrow. Examining the present case and similar examples, we find out that the court has significantly restricted the discretion of states regarding the right of prisoners to access their families, without having to define an objective criterion for taking a different approach to the aforementioned cases.

## **2- The Lack of Clarity in the Margin of Appreciation Doctrine**

Another conflict over the functioning of the European Court of Human Rights includes the ambiguity in the application of the margin of appreciation doctrine. To better explain this challenge, we briefly look at one of the cases before the court. In *Enver Aydemir v Turkey*<sup>29</sup>, the court explicitly emphasizes the need to apply the theory of margin of appreciation, without explaining the reasons for resorting to the doctrine of the margin of appreciation as a final solution which in turn leads to ambiguity in the Court's procedure.

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29. The European Court of Human Rights (2016), Case of *Enver Aydemir v Turkey*.

In 2007, Aydemir, a 30-year-old Turkish citizen, explicitly refused to serve in the military service because of his religious beliefs. Following his refusal to wear military uniforms and obey his commander in chief, he was arrested and transferred to a detention center. Two criminal cases were also filed against him for this defiance. Enver Aydemir was released on parole in September 2007 on bail, but then escaped for two years and finally, he was arrested and remanded in custody. After spending two consecutive nights in prison, he claimed that he was not only beaten by prison officers but also humiliated by stripping him naked for 24 hours. Following Aydemir's complaint in the Turkish domestic courts, the crime of the relevant officials was investigated, but with the issuance of the stay order in the proceedings, the case remained practically open and inconclusive. In his complaint to the Court, Aydemir claimed that the Turkish government had violated Article 3 (prohibition of torture) and Article 9 of the Convention (Freedom of Opinion, Belief, and Religion). In this regard, the Court accepted his argument about the violation of Article 3 and condemned the Turkish government for inhuman treatment during his detention and for failing to address the plaintiff's case consistently, but dismissed his allegation about the violation of Article 9 of the Convention; the plaintiff claimed in his statement to the Court that he did not wish to serve in the military service for Turkish government because of his personal beliefs, but elsewhere in his remarks he pointed out that if Jihad was necessary according to the teachings of Qur'an, he undoubtedly participates in it. However, the Court believes that the text of the Convention, in this case, refers only to those who are not eager to participate in military operations because of their faith and peaceful beliefs. In this case, the Court refers to Enver Aydemir's reluctance to participate in military service only as a political inclination, which is not covered under Article 9 of the Convention concerning Freedom of Opinion, Belief, or Religion.

When the governments are faced with such cases, in the first instance the Court has delegated the right to governments to directly examine the legitimacy of the claim of a person refusing to serve in the military. Moreover, although there is no clear definition of "refusing to serve the military for ideological or religious reasons," the government has broad jurisdiction to ensure the validity and accuracy of each individual's claims and the extent to which his or her beliefs are consistent.

The performance of the Court on the theory of the margin of appreciation can be criticized on the ground that contracting states to the Convention

have the appropriate jurisdiction to apply the theory of the margin of appreciation in appropriate circumstances without being obliged to elaborate on the reasons for applying this theory. However, according to the principle of clarity in the procedure of all courts and tribunals including the European Court of Human Rights, the court is obliged to explain the reasons for its decisions.

### **3- Lack of Comprehensiveness in the Margin of Appreciation Doctrine**

Despite the tendency of lawyers to apply the margin of appreciation doctrine and the successful results of applying it in many cases before the Court, the inefficiency of this doctrine in dealing with some cases is undeniable. It should be noted that as long as the ultimate purpose of the Convention and the establishment of the Court is to constitute equal rights and fundamental freedoms for all citizens of the member states of the Council of Europe, the use of the doctrine of the margin of appreciation in some cases is negative proposition because of its subject being non-existing ab initio because European governments do not have the same function in terms of guaranteeing rights and freedoms. This challenge is one of the manifestations of the universal problem of human rights.<sup>30</sup> For example, if according to the laws and regulations, the rights and new sexual identity of a transsexual who has changed his gender are legally recognized in France, this right must be legitimate in Italy in similar cases.<sup>31</sup> This difference in human rights standards in European countries can only be understood when they abandon the holistic view when evaluating the performance of governments in dealing with human rights and narrow down their approach to cases of conflict between human rights and the public interest in any context.<sup>32</sup> It should be noted that the theory of the margin of appreciation is of no usage when deciding on the subject of some cases; because rights such as the right to live and the prohibition of torture (Articles 2 and 3 of the Convention) are so applicable that it seems unacceptable to assess the suitability between the violated right and the aim of the states in these cases.

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30. Seyed Mohammad Ghari Seyed Fatemi; Saeed Rahimzadeh and Fatemeh Bostani, "The Train of Universality of Human Rights on the Railway of Wittgenstein (from an Ideal language to a vague one)", *Quarterly Journal of Public Law Research* 16, no. 45 (2014): 22-28.

31. Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights", *Human Rights Law Review* 18, Issue 3 (2018): para. 498.

32. Janneke Gerards and Eva Brems, *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2014), 95.

## **Conclusion**

Resolving the conflict between fundamental human rights and the public interest of society has always been one of the concerns of the European Court of Human Rights since its establishment. To overcome this challenge, the Court has chosen to use the proportionality test, consisting of three stages: legitimacy, suitability, and necessity. Despite the positive impact of adopting this method by the Court and disseminating it to the constitutional and judicial courts, delegating an assessment of the legitimacy of an aim to the national authorities of each state is a critique of the Court's performance and makes the use of the margin of appreciation doctrine in some cases inefficient. However, the Court as an independent and transnational body should directly examine the three stages of the proportionality test and in this way plays an important role in promoting human rights while protecting the public interest. In addition, sometimes in various cases, the court delegates a wide margin of appreciation to governments and in some other cases regardless of a specific basis and criteria, narrows their margin of appreciation's scope, which also indicates the lack of a unified procedure about how the margin of appreciation doctrine is applied.

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