3. European Institutions of PHR I. – CoE Judiciary

The Proceedings of the ECtHR (required reading)

Keywords: unitary court system, ECHR, ECtHR, Chamber, Grand Chamber, admissibility criteria, victim status, significant disadvantage, manifestly ill-founded, justifiable interference, necessity in a democratic society, balancing test

Besides political and expert bodies working for the protection of human rights within the framework of the Council of Europe (CoE), the judicial forum responsible for the same task is perhaps the most famous internationally as well. The Strasbourg Court, i.e. the European Court of Human Rights (ECtHR) has the power to admit, hear and decide complaints (applications) filed by States against each other and by individuals against States (wherein States are signatories of the European Convention on Human Rights, the ECHR).

Below, the most important information on the judicial protection of human rights at the ECtHR introduces the criteria of admitting cases as well as such doctrines established, which influence the development of admissibility and the interpretation of the Convention itself.

By Márton Sulyok dr. jur. PhD

Learning outcomes

1. Understanding what position and role judicial protection of human rights has in the Council of Europe
2. Understanding basic rules of admissibility of applications against human rights violations and instances when interference with human rights might be justifiable.
3. Understanding the rationale behind strengthening admissibility criteria

Recommended Reading
1. Article 25-35 ECHR
2. The admissibility of an application (Human Rights Education for Legal Professionals, CourTalks)
3. Practical Guide on Admissibility (ECtHR Publications, 2018)
4. George Letsas: The Truth in Autonomous Concepts (European Journal of International Law, 15/2004, 279-305.
5. ECtHR Research Report on new admissibility criteria (ECtHR Publications, 2012) on significant disadvantage
6. Interpretative mechanisms of ECHR case-law: the concept of European consensus (Human Rights Education for Legal Professionals)
3. *All additional reading materials indicated under in-text links*

Study time: 1-2 hours (5-7 hours, with recommended reading included)

Disclaimer

This reading material comments on the relevant provisions of the ECHR and the case-law of the ECtHR. (Edited by Márton Sulyok)

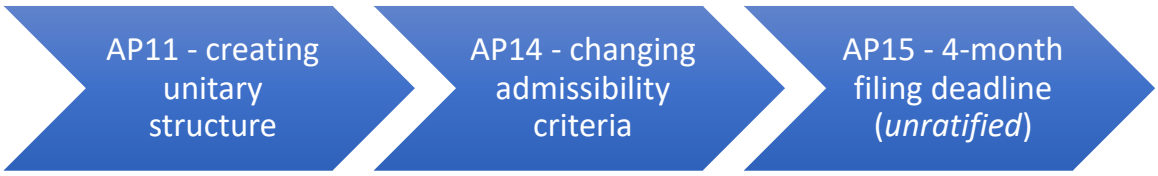
3.1. Introduction: the Convention and its Protocols

The 1950 ECHR (Convention) provides the legal foundations for the operation of the ECtHR. This very influential judicial institution was not part of the 1949 London Statute establishing the Council of Europe. The Strasbourg Court, as it goes by its other name, started its operation 1953, seeing its jurisdiction broadly extended in 1970, with (Additional) Protocol No 2. *[The ECHR is made up of Articles and (Additional) Protocols. The former elaborate on the content of rights and proceedings, while the latter adds to the ECHR in terms of further rights and additional guarantees and rules regarding the proceedings.]*

***Rights protected** by the European Convention on Human Rights: the right to life; prohibition of torture, inhuman or degrading treatment, or punishment; the prohibition of slavery and forced labor; the right to liberty and security; the right to a fair trial; the prohibition of retroactive effect; the right to respect for private and family life; the freedom of thought, conscience and religion; the freedom of expression; the freedom of assembly and association; the right to an effective remedy; the prohibition of discrimination.*

Additional rights were ensured in the Protocols of the Convention (such as): protection of property, right to education, right to free elections, freedom of movement, prohibition of expulsion of nationals, prohibition of collective expulsion of aliens, prohibition of death penalty and general prohibition of discrimination.

How Additional Protocols Add to the Convention?



Until ***Additional Protocol No. 2.*** in 1970, the ECtHR had jurisdiction to interpret the ECHR and since then, it also has the power to decide legal disputes regarding States fully accepting its jurisdiction. Then in 1998, another important change took place, resulting in the present situation, which could be described in short as "*one Convention – one Court*".

In 1998, ***Additional Protocol No. 11 has abolished the European Commission on Human Rights,*** which acted as a *filtering mechanism* for the Court, which was the second component of this two-tier structure. With the abolition of the Commission, **the present unitary judicial structure of the Court was established**, wherein **47 judges** work in hearing cases.

Electing judges to the ECtHR
• national nominations (lists of 3) • election by PACE • non-renewable (9 yrs), • until 70 (ad hoc judges) • balanced distribution: *geography, gender, legal system*

In 2004, another Additional Protocol (No. 14) changed the system of admissibility criteria as well as the settings of the different formations, in which the judges work today. According to this: *"To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges."*

- A **single judge** can strike out the case or declare it inadmissible (on formal grounds, without further examination), in a final decision. If this is not the case, the judge will send it forward to a Committee (3-5 judges) or a Chamber (7 judges).

- **Committees** can also declare inadmissibility (in a *decision*) or strike them out, but in case there is a well-established case-law on the subject matter of the application, the Committee can deliver a *judgment* on the merits.

- If no decision is taken by any of the previous two instances, a **Chamber** shall decide on the admissibility and merits of applications. These decisions become final after 3 months, if the parties do not decide to engage the Grand Chamber (17 judges).

- Upon referral, the **Grand Chamber** might take a case as required, and might overturn the Chamber's judgment.

In examining any applications, the Court first establishes its jurisdiction under the ECHR, examines the content of the application, then declares (in)admissibility. There are two types of complaints that can be filed to the Court hereby distinguished as Interstate Claims (under Article 33 ECHR) and Individual Applications (under Article 34 ECHR). Only ***Article 34 applications will be discussed in detail*** *hereunder.*

Article 34 claims = Individual Applications (Who?)

Anyone (person, NGO, group of individuals)

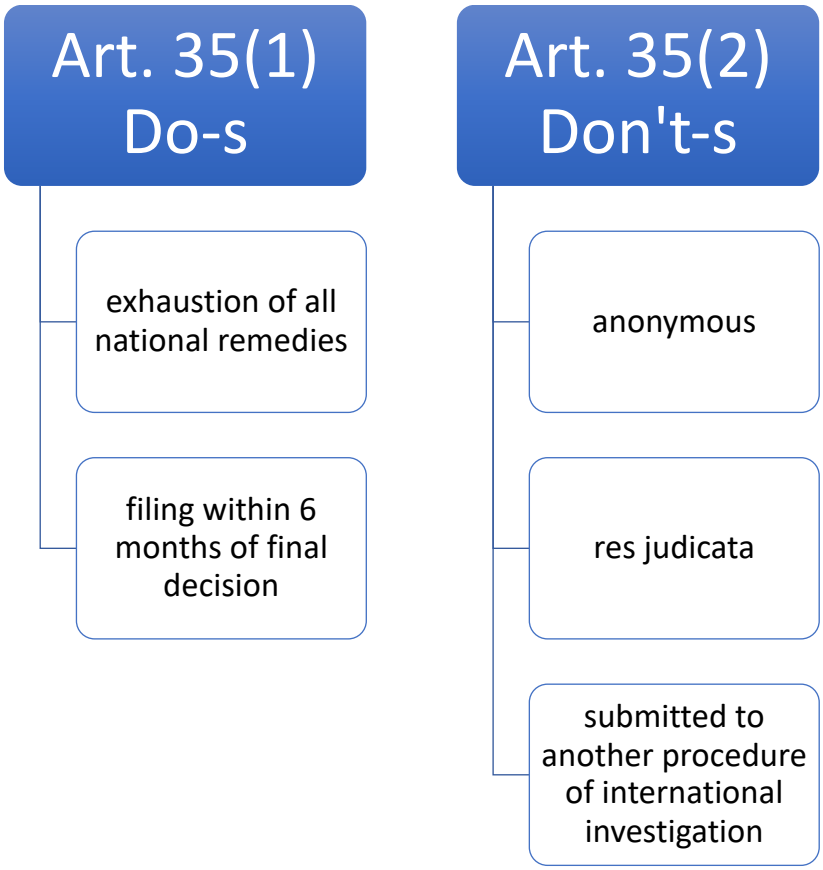
(Who is a) Victim

(of a) Violation

(of) Rights protected under ECHR

(by a signatory) State

Admissibility Do-s and Don't-s



Article 35 ECHR establishes that the Court may only deal with matters in case the conditions therein are met. Under the same rule, however, **inadmissibility is also declared**

(i) if the application is **incompatible** with the ECHR (i.e. the Court would have no jurisdiction under Article 34 or 35), or

(ii) if it is **manifestly ill-founded** (or *MIF*, e.g. it does not contain references to the ECHR), or

(iii) it constitutes an **abuse of the right of application** – for *frivolous* cases (e.g. in the case of "serial applicants"), or

(iv) if the applicant did **not** suffer a **significant disadvantage**.

*This latter criterion was also introduced into the ECHR with **Additional Protocol No. 14**, and it means that the applicants as victims of the alleged violations of their rights under the ECHR would also need to prove to have suffered a significant disadvantage, resulting from the violation. (Cf. Causality!)*

3.2. Admissibility in its Complexity – A Look at the Criteria

The first step of looking at admissibility is looking at 'Who' applied for protection, therefore let us first discuss who can claim to be Victims in the eyes of the Court. (In the following, outside of the specific procedural rules of the Convention, it is useful to rely on the well-established case-law of the ECtHR.)

A. Victim? Anyone

- **Those applicants, who were directly affected in person** by any action or omission of the respondent State can be considered victims without reservation.[1]

> The Court has mentioned on numerous occasions that the **notion of victim is susceptible to a dynamic** and practical **interpretation,** one that is **autonomous** and ***does not depend on any constraints flowing from national or international laws.*** (Examples to such autonomous interpretation: *Gorraiz Lizarraga and Others v. Spain, Aksu v. Turkey [GC], Micallef v. Malta [GC], Brumărescu v. Romania [GC], Monnat v. Switzerland, Stukus and Others v. Poland; Ziętal v. Poland, Siliadin v. France, Hirsi Jamaa and Others v. Italy [GC], Buzadji v. the Republic of Moldova [GC], Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC]*) On the importance of autonomous concepts aiding the work of the EctHR in interpreting the Convention, see *Letsas* in Recommended Reading.

- Obviously, this autonomous interpretation has also lead the Court to extend "victim status" not only to those directly affected by violations, but also to **those suffering from the indirect effects** of any violations (e.g. family members, next of kin – *if their suffering goes beyond what is normal or unavoidable or if their emotional distress is inevitable* – as it was established in the case-law of the Court.)

- "Victim status" was also extended to **those potentially affected**, who suffered under the mere menace of potential violations (mostly secret measures), where an imminent impact of the violation was impending, without clear proof. *(The "mere menace of surveillance" was actually considered a violation of privacy under the ECHR in Klass and Others v. Germany. In other cases, the "constant fear of prosecution" or "fear of persecution and prosecution" as an imminent danger to a right protected under the ECHR in extradition cases qualified for protection by the EctHR.)*[2]

- **Third Parties** *(typically next of kin)* can join the proceedings (e.g. in the event of the death of the applicant) in case they can show that they **have sufficient and legitimate interest in the outcome of the case** (in *access to justice cases* – e.g. *Micallef v. Malta),* or they have a **pecuniary or moral** interest (e.g. *compensation or closure*; *Mijanovic v. Croatia, Dalban v. Romania).*

- If anyone could be a victim (based on the above), being able to prove 'being personally affected' has strict restrictions in terms of certain rights. Article 8 protecting **private life**

---

[1] **IMPORTANT NOTE! Applicants themselves do not have to be citizens of a CoE MS, CoE MS are bound by the ECHR as Contracting Parties.** If the violation was committed against the applicant under the jurisdiction of any Contracting Party (usually within its territory), or when applicants will end up having their rights protected under the Convention violated (e.g. in extradition or expulsion cases).

[2] On the legal standing of companies' shareholders and their victim status see this Research Report on Art. 1 of AP 1.or a study by Sarah C. C. Tischler (here).

(privacy) contains such strictly personal rights, that no right to file an application for a violation of Article 8 can be inherited or passed down.

- When it comes to Article 3 (and **torture**), the suffering of one's own body or harm to one's physical integrity as also such core **privacy and dignity** issues, which entail strictly personal rights. (However, if Third Parties manage to prove sufficient and legitimate – be it financial or moral – interests in the outcome, they might be successful in arguing for victim status. *(In Kaburov v. Bulgaria, a wrongful death inflicted by police resulting in strong moral interests of surviving family members qualified them as indirect victims. In Bazorkinova v. Russia, the son of the applicant had mysteriously disappeared after being detained by members of Russian forces in Chechnya, but the mother qualified for "victim status" in reviewing admissibility.)*

- Besides dignity and privacy, **personality rights** are also such rights which are strictly personal. If there is a possibility (or risk) for harm to someone's goodwill or reputation e.g. pending the outcome of a trial ("reputation-bias" regarding a criminal conviction), then *the next of kin are also allowed to apply if applicant dies pending the outcome of the trial and the heirs have a moral interest in the outcome (i.e. restoring the good family name in Gradinar v. Moldova.)*

- ***Like with every rule, there are exceptions that make it.*** Here, one such exception is that of **"sufficient redress".** Redress, i.e. a legal remedy for the violation, is considered sufficient, if the violation was expressly acknowledged in the national jurisdiction and adequate and actual, effective compensation was given to the applicant. *(The "sufficient redress" requirement also connects to the **"significant disadvantage"** criterion, as they are **mutually exclusive**.)* (Regarding sufficiency, e.g. in *Tanase v. Romania it was declared that in the spirit of subsidiarity, the first level of state dispute resolution shall always be engaged. However, in turn, in Gafgen v. Germany, it was said that not every final, domestic decision or ruling deprives the applicant of his victim status.*)

- In conclusion, those who did receive sufficient redress for the alleged violation, thus did not suffer a **significant disadvantage** cannot be considered victims in the eyes of the Court. This complementary admissibility criterion, as said, has been introduced by AP14 into the work of the ECtHR for reasons of increasing the efficiency of decision-making by easily disposing of meritless cases. The rationale behind this approach can be traced back to the Latin phrase *"de minimis non curat praetor"* (loosely translated to "judges do not care for the little things".)

  It is obvious that ***any kind of disadvantage can be considered significant from the applicants' subjective point of view***, but there are also **objective factors** that need to come into play when applying this admissibility criterion.

  This inquiry centers around important matters of principle, regardless, among others, of pecuniary interests. Significance of the disadvantage might depend on:

  (i) **the nature of alleged violation** of a protected right

  (ii) **the seriousness of the impact** of alleged violation

  (iii) **the possible effects on applicant's personal situation**

  It might happen that a *few days of involuntary medical and psychiatric treatment* fall into the category of significant disadvantage, due to the serious deprivation of liberty, or in other cases *termination of employment for a petty offense* might also qualify as significant disadvantage due to the gain diminished by betting fired.

It is another issue when the *significance of a financial disadvantage* comes into play.

When does financial harm cause significant disadvantage? What decides admissibility?

(Admissible or inadmissible?)

1. *Korolev v Russia (2011)* – inviolability of the home under Art. 8 – stolen goods – destruction of property – wanted reimbursement: 350 EUR

2. *Pavel Uhl v Czech Republic (2012)* – Prague public transport, smart cards – privacy concerns – wanted reimbursement (for extra tram tickets): 47 EUR

3. *Bock v Germany (2010)* – reimbursement for unnecessary medication – 8 EUR

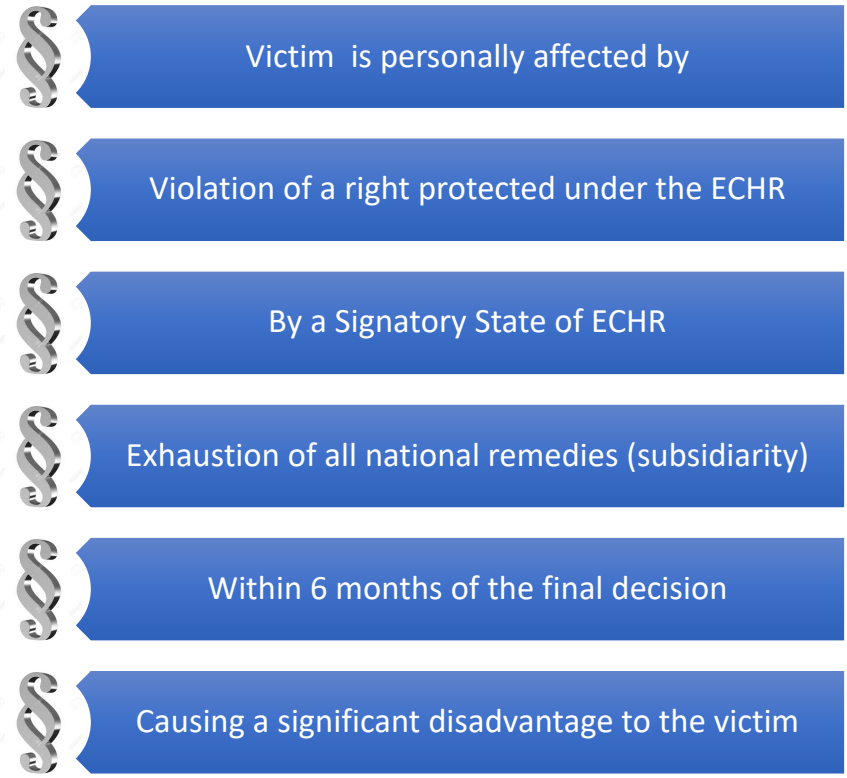
In the Italian case, ***Gagliano Giorgi v. Italy*** (handed down in 2012), the Court has come to an interesting conclusion putting an end to legal proceedings in motion since 1994. After once declaring the applicant's application inadmissible, the Court took on the case once again. The reason for this was that after the first application has been thrown out, new domestic remedies have been introduced in the Italian legal system to sufficiently redress violations subject to the case (excessive length, Pinto proceedings). Because of the fact that all national remedies need to be exhausted before turning to the Court, the applicant could argue that he once again fulfilled this requirement due to the new national remedies that have been introduced. The Court took on the case and decided on it this time in light of the **significant disadvantage rule**. Besides the fact that this decision was the first, in which the Court used this new admissibility criterion in a **criminal case** for bribery, it was also important regarding the decision that Court has reached.

In their judgment, the Court argued that while **there had been a violation of Article 6** protecting the right to a fair trial regarding undue delays in the underlying judicial proceedings, **the applicant did not suffer a significant disadvantage** (Gagliano Giorgi v. Italy, extracts, para 57-58):

"the Court notes that, because of the duration of the proceedings in question, on 11 June 1998 the Court of Appeal declared the charge of bribery to be time-barred. This evidently led to a reduction in the applicant's sentence because, of the two offences with which he was charged, that was the one that carried the harsher penalty, even though the material before the Court does not indicate the exact extent of that reduction or clarify whether there was ultimately any connection between the reduction and the violation of the "reasonable time" requirement.

The Court further observes that ***the applicant decided not to waive the time bar, which he was entitled to do under Italian law*** *[…]. In those circumstances, the Court considers that* ***the reduction of his sentence at least compensated for or significantly reduced the damage normally entailed by the excessive length of criminal proceedings.*** *[…]* ***The Court accordingly considers that the applicant has not suffered a "significant disadvantage" in respect of his right to a hearing within a reasonable time."***

Summary of Admissibility Criteria



B. Interference? Justifiable

When States argue against a Violation alleged by applicants, they normally resort to the scope of justifiable interference under the ECHR. All of the ECHR provisions granting rights contains some frame of reference in terms of what can justify interference in a democratic society.

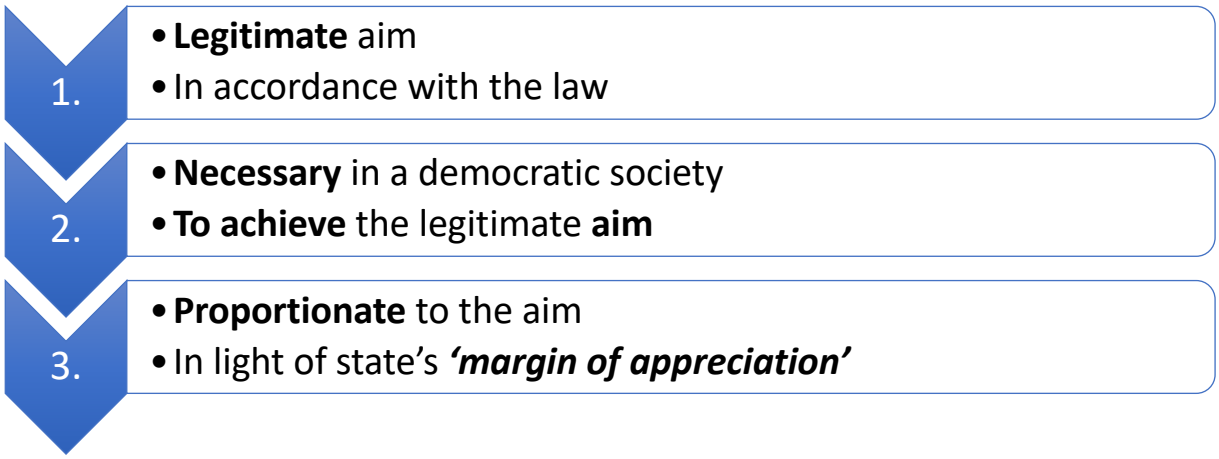
Article 10(2) FREEDOM OF EXPRESSION

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such [interference] as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The **first decisive issue** is:

- ***Are there appropriate and effective procedural guarantees against abuse – balance of competing interests***
-

Testing Justifiable Interference



3.3. Theory Becomes Practice –Doctrines Developed by ECtHR

Now that 'margin of appreciation' appeared in our analysis of justifiable state interference with rights protected under the ECHR (above), we should turn our attention to some key doctrines worked out in the case-law of the ECtHR, influencing the work of the Court as well as the interpretation of the ECHR over time. In 1976, in *Handyside v UK*, the ECtHR argued for a *"variable notion not susceptible to a clear definition"*, whereby it defines the scope of its review. This not-so-clear notion is **"margin appreciation"**.[3] It basically defines what in ECHR needs to be weighed up against other aspects of the public interest regarding a State's actions (amounting to an alleged violation). This margin refers to a necessary and sufficiently broad legroom for legal and political maneuver within the national legal system, where first-instance solutions need to be born to regulate and protect human rights – in the spirit of subsidiarity. Any balancing exercise regarding the competing interests of states vs. individuals is firstly and largely devolved to national courts for this exact reason.

Three years later, in 1979, the Court came forth with the doctrine of **"living instrument"** in the controversial family law case (*Marckx v. Belgium*), stating that the ECHR and the case-law of the Court live together and are to be applied as one, as all questions of interpretation pertain to the ECtHR. At present, this approach also requires that the judges have a state-of-the-art mindset in and on the application and interpretation on the ECHR. *(Article 8 jurisprudence is a good example, in which technological advancements have brought about a significant change regarding protections awarded for privacy.)* A good ten years later, in 1989, another leading case arose, Gaskin v. UK, also relevant to Article 8. While it is usually less clear what the Court understands under **positive obligations**, a reference to which also appears in this decision, in Gaskin, the Court said that (when determining the existence of a positive obligation) "*a fair balance has to be struck between the (competing) interests of the individual and the interest of the community at large*". (The ambit of negative obligations – as in what sort of actions should states refrain from – is much clearer.)

---

[3] For further reading on the topic, see Kratochvíl, Gerards, Lemmens

Self-Check Questions

1. What is the role of Additional Protocols in developing the functioning of the ECtHR?
2. What are the conditions of the election of judges to the ECtHR?
3. Can a single judge issue a judgment on the admissibility of the case and on the merits as well?
4. Enumerate the conditions of individual applications under Article 34 ECHR.
5. When does Article 35 allow for declaring inadmissibility?
6. How would you describe what the autonomous interpretation means?
7. With which admissibility criterion is "sufficient redress" mutually exclusive?
8. Enumerate the admissibility criteria of individual applications.
9. How does the ECtHR interpret "victim status"? How many different types are there?
10. In what cases can an interference with a right protected under ECHR be justifiable?

This teaching material has been made at the University of Szeged, and supported by the European Union. Project identity number: EFOP-3.4.3-16-2016-00014