

## **1. Who is "human" in the concept of modern human rights?**

In the concept of modern human rights, *anyone* is human. That is the essence of human rights, after all. Complete equality and universality regarding the benefits created by human rights law for every person to enjoy.

However, a lot of controversy exists nowadays regarding the moment from which a human being exists from a human rights law perspective. This moment is especially important as far as the right to life is concerned. In this field, religious views and secular views are at odds. Both ideologies claim to have the absolute truth. On one hand, the pro-life movement believes that the foetus is a person and enjoys the right to life from the moment of conception, which is why abortion should be banned. On the other hand, the pro-choice movement argues that the autonomy of the woman, as a part of her right to private life, is more important than the life of the foetus, which is why abortion should be permitted under certain conditions. Perhaps the answer should be found in each case without having to impose one extreme view or the other in a general manner. I personally believe that even though abortion is not a desirable course of action, law should not impose standards of morality on persons. Because it is a gray area, the woman should have the ability to choose and be responsible for her choice.

Given the controversial character of this matter, the European Court of Human Rights failed to specifically state when the right to life begins. In the case of *Vo v. France*, the Court, having regard to the absence of any European consensus on the scientific and legal definition of the beginning of life, held that the issue of when the right to life begins comes within the margin of appreciation of the States<sup>1</sup>. However, although abortion is not recognised as a right under the Convention, in the case of *P. and S. v. Poland*, the Court stated that once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion<sup>2</sup>. In other words, if national law allows for abortion, the state should not impede women to obtain it in practice due to the anti-abortion religious mindset of the national authorities.

## **2. How is carried out of the protection of a right which is not regulated in the Constitution in your legal system? What kind of**

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<sup>1</sup> [https://echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://echr.coe.int/Documents/Guide_Art_2_ENG.pdf), § 59, p. 16 (accessed August 14, 2019).

<sup>2</sup> Case of *P. and S. v. Poland*, § 99, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-114098%22%7D>, (accessed August 14, 2019).

### **balancing is done when a right uncounted in the Constitution is conflicted with a constitutional right?**

To answer the first question, if a right is only regulated by law and not by the Constitution, its protection mechanisms are also regulated by law and they can vary depending on the nature of the right in question. Generally, any right regulated by law can be protected by access to a court, which has the competence to remedy the violation of that right according to law.

To answer the second question, in the Romanian legal system the Constitution has a higher legal force than any other source of law. However, I find conflicts between constitutional rights and legal rights hard to imagine because constitutional rights are more general in character and legal rights are, as a rule, either particularisations of the constitutional rights either additional rights to the ones prescribed in the Constitution of lesser importance that could not very often enter into conflict with constitutional rights. In the first situation, there should normally be no conflict between the two categories of rights. Legal rights, which are particularisations of constitutional rights, should be interpreted in accordance with the Constitution, as it is interpreted by the Constitutional Court. However, if a legal right is regulated in a manner contrary to the Constitution, the said regulation can be declared unconstitutional by the Constitutional Court. In the second situation, even though the possibility of a conflict between the two categories of rights is unlikely, given the higher legal force of the Constitution, the constitutional right will prevail over the legal right or the legal right could receive an interpretation which could remove the conflict between the rights in question. At the same time, if the legal right is regulated in a manner contrary to the Constitution, the said regulation can be declared unconstitutional by the Constitutional Court.

### **3. Do International Human Rights Documents applied in your country represent minimum standards that are already provided or the must-reach aims? Are there any regulations in your legal system above international human rights standards? If there are, would you please explain?**

According to Article 20 of the Romanian Constitution, constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to (1). Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions (2).

As it is obvious from Article 20 of the Romanian Constitution presented above, constitutional provisions concerning human rights will be interpreted in accordance with the international human rights documents that Romania has ratified. This means that international human rights treaties have the same legal force as the Constitution. According to paragraph (2) of the same article, if inconsistencies exist between the treaties in question and national laws, the treaties will prevail, which means that they have a higher legal force than national laws. The only exception to this rule regards the situation when the Constitution or the national laws comprise more favourable provisions than the international documents.

Accordingly, from a legal point of view, it is possible that the Constitution or national laws could comprise more favourable provisions than those included in the international documents and this is true regarding some specific rights. So legally speaking and from the perspective of the European Court of Human Rights, international human rights treaties and the European Convention of Human Rights should represent only minimum standards<sup>3</sup> regarding the protection of human rights. The national Parliament is by no way prevented from creating higher standards in this field by adopting legislation.

However, from a practical point of view, the reality is that in Romania the standards enshrined in human rights treaties represent only must-reach aims regarding most of the fundamental rights. This is proved, for example, by the high number of violations of the European Convention found against Romania by the European Court of Human Rights. In 2018, 71 judgments finding at least one violation against Romania were given by the European Court<sup>4</sup>, which demonstrates that there is a high disparity between the legal enshrinement of the human rights and their effective protection in Romania.

With the exception presented above, namely when the Constitution or the national laws comprise more favourable provisions than the international documents, there are no other regulations above international human rights standards.

**4. In your legal system, is the jurisdiction an actor itself to move forward human rights standards? If it is, would you please explain?**

I believe that jurisdiction should be the most important actor responsible for moving forward human rights standards. To this end, on the basis of article 20 paragraph (2) of the Romanian Constitution, which I cited

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<sup>3</sup> See Article 53 of the European Convention on Human Rights, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf) (accessed August 17, 2019).

<sup>4</sup> [https://echr.coe.int/Documents/Stats\\_violation\\_2018\\_ENG.pdf](https://echr.coe.int/Documents/Stats_violation_2018_ENG.pdf) (accessed August 17, 2019).

above, judges have the legal competence to apply international human rights treaties in spite of contrary national legislation. Given the fact that the European Court of Human Rights is the official interpreter of the European Convention, which is the most important human rights treaty applicable in the Romanian legal system, it follows that national judges also have the competence to apply the Court's case-law in spite of contrary national legislation. However, due to a deficient mindset of subservience to the state and due to a misunderstanding of the principle of separation of powers, judges usually avoid going against national law by applying the hierarchically superior human rights standards. At the same time, it is important to underline that most of the human rights violations in Romania are not caused by deficient legislation, but by deficient practices. In many cases, judges are not impeded by legislation to award damages, for example, in case of a human right violation. However, there is a prevalent reluctance to do so due to the communist mindset still existing in the judicial system which causes the judges to avoid holding the state accountable for its failures. For example, in the case of *Florea v. Romania*<sup>5</sup>, even though the applicant suffered inhumane treatment due to overcrowding in prison and being exposed for 23 out of 24 hours a day to passive smoking, which led to his hospitalisation for three periods of time in a row, the national court rejected his request for compensation stating that there is no causal connection between his lung illnesses and the exposure to passive smoking, even though a medical report to that effect existed. In my opinion, the restrictive interpretation of the concept of causality in this case was the result of the mindset described above.

In conclusion, jurisdiction does not play a sufficient role in moving forward human rights standards in Romania. I surely hope the next generations of judges will change that.

**5. Are there values and issues in your country that are not covered by human rights documents but need to be protected under the concept of human rights? If your answer is yes, would you please explain?**

I don't believe there are values and issues in Romania not covered by human rights documents, given the fact that the international human rights treaties are part of the national legal system on the basis of Article 20 of the Constitution and they cover extensively fundamental human rights issues. However, problems exist whenever the state fails to legislate in order to solve particular human rights issues and implement the case-law of the European Court. In some areas, detailed national legislation is needed and the case-

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<sup>5</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-100357%22%7D> (accessed August 19, 2019).

law of the European Court cannot be used by national courts to fill legislative voids. For example, in the case of *Oliari v. Italy*<sup>6</sup>, the European Court set the strong precedent that Council of Europe states that fail to provide same-sex couples with some form of legal recognition (other than marriage) may be in violation of positive obligations under Article 8 of the Convention<sup>7</sup>. In Romania, even though several legislative proposals regarding civil partnerships for same-sex couples were submitted to the Parliament, none were adopted to this day due to the general reluctance to same sex couples caused by religious mindsets.

**6. Are there such human right regulations in the legal system of your country that is protected by the constitution but contradicts social reality and justice?**

Generally speaking, I don't believe there are any human right constitutional regulations in the legal system of Romania grossly contradicting social reality and justice. However, the state authorities' practices, for example excessive bureaucracy or inertia, cause severe violations of human rights.

**7. Are there any social realities contradicting international human rights concept based on individualism?**

Generally speaking, social realities do not contradict international human rights concepts based on individualism. However, there are certain fields where problems exist from this point of view. For example, domestic violence against women remains an important problem in Romania, stemming from a patriarchal mindset according to which women are inferior to men and should depend on them<sup>8</sup>. A relevant case highlighting this issue is *Bălșan v. Romania*<sup>9</sup>, in which the applicant alleged that the authorities had failed to protect her from repeated domestic violence and to hold her husband accountable, despite her numerous complaints<sup>10</sup>. At the same time, social realities contradicting individualistic human rights values exist in the

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<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22oliari%22%5D,%22display%22:%5B%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22002-10668%22%5D%7D>, (accessed August 21, 2019).

<sup>7</sup> <http://echrso.blogspot.com/2015/07/ground-breaking-judgment-of-european.html>, (accessed August 21, 2019).

<sup>8</sup> <https://theblacksea.eu/blogs/marital-rape-the-secret-atrocity-of-romanian-domestic-abuse/>, (accessed August 23, 2019).

<sup>9</sup> <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-173619%22%5D%7D>, (accessed August 23, 2019).

<sup>10</sup> [https://www.echr.coe.int/Documents/FS\\_Domestic\\_violence\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf), p. 13, (accessed August 23, 2019).

midst of the Roma population. For example, forced child marriages in Roma communities remain a problem from this point of view<sup>11</sup>.

**8. In your legal system, are there legal mechanisms to protect human rights if fundamental rights are violated by private persons? Are these mechanisms effective?**

In the Romanian legal system, there are many legal mechanisms aimed at protecting human rights in case they are violated by private persons. For example, the majority of the Civil Code and the Criminal Code's provisions aim at protecting human rights from a horizontal perspective. In this context, it is important to underline that the general aim of a legal system should be to protect human rights. However, the effectivity of the existing legal mechanisms depend on the actual way that the justice system works in Romania. And from this point of view, there are many problems, such as excessive formalism, procedures which last an excessive amount of time, denial of effective access to justice and other violations of the right to a fair trial. According to the statistics published on the site of the European Court of Human Rights, out of a total of 1273 of judgments given against Romania finding at least one violation of the Convention, 640 regarded the violation of the right to a fair trial and 25 the violation of the right to an effective remedy<sup>12</sup>. In these circumstances, given the fact that the effectivity of the legal mechanisms protecting human rights depends on the effectivity of procedural rights, it is obvious that the horizontal protection of human rights in Romania suffers greatly.

**9. Are there groups in your country who have their own national, ethnical, religious and linguistic identities? Could you please give some information about them (especially if you feel yourself one of them)?**

There are several groups in Romania that belong to the categories mentioned in your question.

The largest minority in Romania that has its own ethnical, religious and linguistic identity is the Hungarian minority. Because of the fact that Transylvania belonged to the Austrian-Hungarian empire until 1918, according to the data from the last census in 2011, 6,5 % of the population belongs to the Hungarian ethnic group<sup>13</sup>. From the perspective of their

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<sup>11</sup> <https://cs.coe.int/team20/cahrom/9th%20CAHROM%20Plenary%20meeting/Item%2009%20-%20Early%20and%20Forced%20Marriages%20in%20Roma%20communities%20in%20Romania.docx>, (accessed August 23, 2019).

<sup>12</sup> [https://echr.coe.int/Documents/Stats\\_violation\\_1959\\_2018\\_ENG.pdf](https://echr.coe.int/Documents/Stats_violation_1959_2018_ENG.pdf), (accessed August 24, 2019).

<sup>13</sup> [http://www.recensamantromania.ro/wp-content/uploads/2013/07/REZULTATE-DEFINITIVE-RPL\\_2011.pdf](http://www.recensamantromania.ro/wp-content/uploads/2013/07/REZULTATE-DEFINITIVE-RPL_2011.pdf), p. 5 (accessed August 28, 2019).

religious identity, the Hungarian ethnic groups belongs to the Roman Catholic or Protestant religion. In terms of the rights of the minorities, it is important to underline that according to Article 6 paragraph (1) of the Romanian Constitution, the state recognizes and guarantees the right of persons belonging to national minorities to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity. At the same time, according to Article 32 paragraph (3) of the Constitution, the right of persons belonging to national minorities to learn their mother tongue, and their right to be educated in this language are guaranteed. In this context, it is important to mention that the Hungarian ethnic group exercises the right in question, having numerous educational institutions in which the majority of the subjects are taught in Hungarian.

The second-largest minority in Romania that has its own ethnical and linguistic identity is the Roma minority group. According to the data from the last census in 2011, 3,3 % of the population belongs to the Roma minority group<sup>14</sup>. The group in question speaks the Romani language and belongs to various Christian denominations, from Orthodox Christians and Roman Catholics to different Protestant denominations.

From a religious point of view, anyone in Romania who doesn't belong to the Orthodox Christian religion belongs to a religious minority, given the fact that 86,5 % of the Romanian population is Orthodox Christian. Accordingly, the religious minorities in Romania are Roman Catholic (4,6 %), Reformed Protestants (3,2 %), Pentecostals (1,9%), Greek Catholics (0,8 %), Baptists (0,6 %), Adventists (0,4 %) and other religions (1,8 %)<sup>15</sup>. According to Article 29 of the Constitution, freedom of religion is guaranteed in Romania and all religions shall be free and organized in accordance with their own statutes, under the terms laid down by law.

**10. What is the definition of the notion “minority” according to your constitutional system? What is your opinion on this concept? Do you think that minority rights should be protected broadly by the constitutional level? Do you think that constitutional regulations that would broaden the rights of minorities will solve the conflicts between majorities and minorities?**

The concept of minority is not defined as such in the Constitution of Romania, even though it is mentioned in certain articles, as we previously showed. Neither is it defined in any other laws. Regarding national minorities, the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages

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<sup>14</sup> Idem, p. 5.

<sup>15</sup> Idem, p. 6.

were ratified by Romania in 1995 and 2007. However, these instruments do not contain an explicit definition of the concept of minority, adopting a pragmatic approach regarding the concept in question.

Regarding the second question, in my opinion, the concept of minority should not exist in a human rights paradigm, given the fact that according to the paradigm in question no person is fundamentally different from another in terms of his/her intrinsic value. Even though people are different from many perspectives, those differences do not justify, in my opinion, their separation in distinct categories. Each person has its own individuality, whether it is ethnical, religious, linguistic or of another nature, and is equal to other persons, who possess the same unique qualities. However, we do not live in an ideal world, but in a world full of judgment, which is why people separate themselves in majorities and minorities. Given the fact that the majority sometimes has the tendency to dominate the minorities, the latter developed a resistance towards the majority in order to preserve their rights related to the distinctive features of the group. In this context, I believe that in a democratic society it is important to pay attention to the protection of minority rights, given the aforementioned dominating tendency of the majority. However, this protection should not be excessive, becoming in its turn a form of discrimination towards the members of the majority.

Regarding the third question, I do not believe that a very broad protection of minority rights at the constitutional level is critical to ensure the effectivity of the protection in question. I think that constitutional provisions should be more focused on protecting human rights in general. As I said earlier, in an idealist society towards which we should strive, special protection of minorities should not exist. Each and every person should be protected by the Constitution in an equal manner. However, given the fact that there are special problems to be regulated, such as the right to be educated in one own's mother tongue in the case of national minorities, additional protection of the minorities should be regulated by law.

Regarding the last question, I believe that in most cases, in which there is a sufficient human rights protection for the minorities at the constitutional level or at the legal level, constitutional regulations broadening the rights of minorities would not solve the conflicts between majorities and minorities. I believe those conflicts stem most of all from judgmental mindsets and not from lack of legal protection. That is why I believe that the conflicts in question can be surpassed by education and learning tolerance towards persons that are perceived as different.

- 11. What do you think on the notion and the concept of minority rights in international law? Could the international regulations/treatments be a response to the reality and problems of the peoples in your country? In other words, do they cover the**



**reality in your country from the view of the state and the view of peoples?**

Given the fact that I am not a specialist in international law, as I research and teach only constitutional and ECHR law, I will omit to answer this question.

**12. What you think is the most current human rights problem in your country?**

Many specific current human rights problems could be discussed as a response to your question. However, I choose to tackle a systemic problem, which I believe, gives rise to the other problems. There is a general attitude of the Romanian authorities of inertia, carelessness and insensibility towards people, which is an unwanted inheritance from the former communist state. For example, the persons representing public authorities do not feel sufficiently responsible for their actions or omissions and have a mindset that prevents them from actually solving problems. They always find excuses as to why it is impossible or very complicated to solve the citizen's requests.

To sum it all up, as a rule, Romanian authorities do not have genuine respect for human rights, as they were not educated in that spirit. For the Romanian state, human rights problems are just issues that have to be solved in order to avoid the judgments of the European Court of Human Rights. I believe that the mindset in question contributes greatly to the majority of the human rights violations in Romania.