

HUMAN RIGHTS PROJECT WRITTEN-INTERVIEW QUESTIONS

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

In terms of South African law, unborn babies are not considered 'humans'. In the case of *S v Mshumpa and Another* (CC27/2007) [2007] ZAECHC 23; 2008 (1) SACR 126 (E) (11 May 2007) the Eastern Cape High Court (East London Local Circuit Division) held that the intentional killing of an unborn child did not amount to murder for the purposes of South African criminal law. The court held at paragraph 53 of the judgment that the 'present definition of the crime of murder is that it consists in the unlawful and intentional killing of another *person*' (my own emphasis). The court went on to say that this 'has always been understood as requiring that the person killed had to be born alive. In terms of the present application of the definition of murder, the killing of an unborn child by a third party thus does not amount to murder'. The court declined to extend the definition of murder to include the intentional killing of an unborn child, i.e. a foetus in the womb, due to the principle of legality, which requires that the accused not be 'convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted' in terms of section 35(3)(l) of our Constitution. This was at paragraph 54. The court held furthermore that the 'Constitution does not expressly confer any fundamental rights, most importantly the right to life, on an unborn child' at paragraph 55 of the judgment.

Therefore, the court found that a 'person' (i.e. a human) does not include an unborn baby for the purposes of South African (criminal) law. Following from the precedent set in this case, it is submitted that a 'human' in the concept of modern human rights would include any person who has been born alive.

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 balancing is done when a right uncouncted in the Constitution is interfering with a constitutional right?

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 ?

South Africa is party to a number of International Human Rights documents/treaties. One of these is the International Covenant on Economic, Social and Cultural Rights (the ICESCR). While South Africa signed the Covenant in the 1990s it was only ratified in 2015.

The South African Constitution (Constitution of the Republic of South Africa 1996) speaks of the 'progressive realisation' of rights in the Bill of Rights (Chapter 2 of the Constitution). The following is an example thereof: Section 26: Housing – '(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.' Therefore, our Constitution does place an obligation on the State to 'progressively realise' the right through 'reasonable legislative and other means' but there is no minimum standard required. Furthermore, in terms of sections 26 and 27, the Constitution provides the *right to have access to* such things as adequate housing and healthcare services. To have access to these rights means that the State must create the system so as to allow everyone in time to be able to enjoy that right. This can be contrasted with the *right to* housing, healthcare, etc. which immediately entitles the holder to these things. Therefore, the language of our Constitution departs from the language of the ICESCR which speaks of a person's *right to* certain socio-economic rights. It is clear that the provisions of the ICESCR, which also establish a 'minimum core' concept, are more onerous than the South African Constitution's Bill of Rights.

Furthermore, in the case of *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009), the Constitutional Court (our apex court) held that, following cases such as *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) and *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) the courts have 'rejected the argument that the social and economic rights in our Constitution contain a minimum core which the state is obliged to furnish, the content of which should be determined by the courts'. [*Mazibuko* para 53]

This case dealt with the right to water (included as part of section 27 of the Constitution) and the court held that the 'obligation requires the state to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim "sufficient water" from the state immediately'. [Para 57]

It has therefore been held by our highest court on a number of occasions that South Africa, while party to the ICESCR, does not prescribe to the 'minimum core' concept of socio-economic rights but instead the State is obliged to 'take reasonable legislative and other measures, *within its available resources*, to achieve the progressive realisation of these rights'.

4. In your legal system, is the jurisdiction an actor itself to move forward human rights standards?

The State must progressively realise certain socio-economic rights, as required by the Constitution (e.g. the section 27 right to have access to health care services, sufficient food and water, and social security). In terms of branches of government, the State is required to 'take reasonable *legislative* and other measures' meaning that the legislature can pass laws regulating access to basic rights such as housing and healthcare.

The executive would consider the provision of services as well as things like social security (grants) in terms of their budget, and the judiciary is responsible for ensuring that both the legislature and the executive act in compliance with the Constitution, i.e. if the executive was doing nothing to further the provision of basic socio-economic rights like water and housing then the judiciary could hold them to their constitutional obligation to progressively realise those rights. However, the State has a discretion on how best to achieve the progressive realisation of these rights, i.e. the fact that the Constitution states 'within available resources' means that the State may use their resources as they see best, and provided they are complying with their constitutional obligations, the courts cannot interfere with the decisions made.

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?

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

I believe our Constitution is very ambitious in terms of what it envisages democratic South Africa to be, but at the same time it is realistic in respect of the limited resources that government has. For instance, as mentioned earlier, there is only a right of access to adequate housing, food and water and other basic amenities, and no direct entitlement to these socio-economic rights. Social reality unfortunately often stands in stark contrast to the ambitions of the Constitution and especially the Bill of Rights. Poverty and inequality are still a reality for many previously disadvantaged people. Furthermore, due to the high crime rate that exists in South Africa, the rights envisaged by the Constitution do not always translate into reality.

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

If a person's fundamental rights have been violated by a private person they may seek a remedy in either private or public law, depending on the matter. For example, if someone assaults and injures another person, the victim would be able to lay a criminal charge against the perpetrator (i.e. having them prosecuted for assault) but they could furthermore seek a remedy in the law of delict, for pain and suffering and possible loss of earnings if their injury made them unable to work for a period of time. The remedy in delict is in the form of damages (payment/compensation) to try to restore the *status quo ante* or the position that existed immediately prior to the crime and delict. I do believe these mechanisms are effective but the problem comes in with the cost and time involved, in that it is expensive to access civil courts and furthermore it can take a long time for a matter to be finalised as courts are overburdened.

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

9. What do you think is the most current human rights problem in your country?

I believe the most current human rights problem in our country is that there is a disregard for the sanctity of human life, despite the fact that the right to life is guaranteed in section 11 of the Constitution. This is illustrated in the murder rate which is one of the highest in the world, and includes high rates of femicide.

I also believe the manifestation of inequality in our country undermines people's rights to basic social services. While everyone has the right to access certain social services, the reality is that due to the inequality in South Africa, the most vulnerable people in our society are unable to access these rights.