

# Human rights incorporation in South Africa



South Africa must adopt new legislation before an international human rights treaty becomes part of national law and is directly enforceable in courts. The state has both indirectly and partially incorporated several international human rights treaties into domestic law.

## Human rights incorporation in South African law

### Indirect constitutional incorporation

The 1996 Constitution indirectly incorporates rights from e.g. the UDHR, ICCPR, ICESCR, and UNCRC in its comprehensive Bill of Rights. Notably ESC rights are translated from the ICESCR on housing, healthcare, food, water, and social security.



The Constitution is the highest law in South Africa, and laws or conduct inconsistent with it are invalid, theoretically giving these human rights a supreme legal status. The Constitution mandates that courts must interpret the Constitution and domestic law in conformity with international law, to guarantee consistency between domestic law and the state's international obligations.

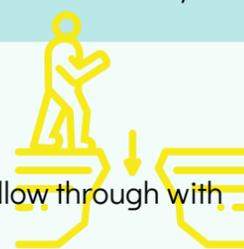


### Partial incorporation

Many international human rights treaties, like the UNCRPD, UNCRC, CEDAW and the UNCAT have been partially incorporated in ordinary statute, ranking below the Constitution. Some rights, concepts, or terms have been taken from the treaties and made into domestic law, without incorporating other rights in that treaty.

## Enforcement by duty-bearers

A large gap exists between human rights protections in law and in practice. Overall, South Africa does not have effective policies and actions plans in place to follow through with implementation.



On a local level, implementation sometimes leads to game-changing initiatives, such as in countering violence against women by implementing partially incorporated CEDAW rights.

Currently, there exists no statewide national action plan (NAP) on human rights. The South African Human Rights Commission (SAHRC) is South Africa's National Human Rights Institution (NHRI), and it oversees the implementation of human rights laws, and has e.g. drafted a separate NAP on business and human rights.

Civil society and academia step in where the state has failed in implementation, e.g. by filling gaps in poor data gathering on human rights.



## Enforcement in courts

The Constitutional Court has repeatedly reinforced the justiciability of ESC rights, although this has often not been followed through in implementation. Famous cases on housing and healthcare have mandated duty-bearers to progressively realise and implement these rights within their available resources, using reasonable measures to fulfil ESC rights.



In the Treatment Action Campaign (TAC) case, TAC, a civil society organisation, brought a case on behalf of women denied preventative treatment of mother-to-child transmission of HIV. An antiretroviral drug was administered only at certain sites, making it inaccessible for people unable to reach these sites, thus creating an unequal balance as to who could access lifesaving treatment.

The Constitutional Court found that this policy was inconsistent with the constitutional human right to healthcare. TAC made a huge difference in everyday life, with HIV transmission rates from mother to child going down immensely.

The Constitutional Court may strike down laws that are unconstitutional due to contravention with the Bill of Rights as well as with the state's international obligations.

## Awareness and ownership of rights



Challenges from a lack of implementation by duty-bearers translate into difficulties for rights-holders in claiming their legal human rights.

Organised civil society groups are often key to rights-holders taking ownership of their rights, shown through e.g. case law on healthcare rights.



Community-led efforts and campaigns educate rights-holders on and raise awareness of human rights and advance cultural change on the front of gender equality.

Local grassroots movements created by rights-holders challenge old norms and empower rights-holders to take ownership of their legal human rights.



Difficulty in accessing legal aid acts as a significant barrier to accessing justice for rights-holders.



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