

Incorporation case study: 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.

Legal effect

The 1996 Constitution indirectly incorporates rights from e.g. the UDHR, ICCPR, ICESCR, and UNCRC in its comprehensive Bill of Rights. Notably economic, social and cultural (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. For example, the CRPD, CRC, CEDAW and the UNCAT have been partially incorporated by ordinary statutes, thus ranking below the Constitution.

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 implementation of human rights laws and has drafted a separate NAP on business and human rights. Civil society and academia step in where the state has failed in implementation, for example, by filling gaps in poor data gathering on human rights through research.

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 that state duty-bearers progressively realise and implement these rights within their available resources, using reasonable measures to fulfil ESC rights. 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 case law on healthcare rights, for example. Efforts and campaigns to educate rights-holders on and raise awareness of human rights and advance cultural change on the front of gender equality of predominantly community-led.