

Incorporation case study: Switzerland

Switzerland has a monist legal system where international instruments become part of Swiss law and are binding on state authorities when ratified. Switzerland has ratified the ECHR, ICCPR, ICESCR, CERD, CAT, CEDAW, CRPD and the UNCRC. These treaties are therefore applicable in Swiss law and must be followed by public authorities.

Legal effect

Although treaties become part of domestic law after ratification, this does not automatically mean they are justiciable in courts, unless they are self-executing. Self-executing rights are ones that have a sufficiently clear and tangible content to form the basis of a decision. Direct incorporation, therefore, is necessary in order to ensure more accessible human rights frameworks upon which domestic human rights policy can be built. Switzerland practices 'bottom-up federalism', whereby all matters should be dealt with at the lowest political level possible - municipal, cantonal, or federal. There are four sources of fundamental rights protection which can be invoked before the courts: rights contained in the Bill of Rights in the Federal Constitution; self-executing provisions of international human rights treaties ratified by Switzerland; fundamental rights in the Constitution of the right-holder's Canton; and some rights contained in the federal constitution outside the Bill of Rights. The Bill of Rights contains two unique features, home-grown rights and the social minimum principle. The former reflects economic and political rights that have a long history in the Swiss cantonal constitutions. The latter dictates that ESC rights must contain minimum core requirements for duty-bearers to guarantee at least a basic dignified existence to rights-holders.

Enforcement by duty-bearers

Public authorities are required by the Constitution to play a central role in enforcing human rights when making and interpreting law and policy. The government (Federal Council) must accompany bills submitted to parliament (Federal Assembly) with an explanatory note justifying the bill, and whether a bill might affect any human rights. Substantive comments clarifying the bill's effects on, and conformity with, human rights obligations must be included. Further human rights conformity checks are done when a draft bill is accepted in the Federal Assembly. Switzerland has also introduced a National Action Plan (NAP) on the UN Guiding Principles on Business and Human Rights, with the current one running from 2020-2023. The NAP includes human rights due diligence requirements on businesses. Enforcement shortcomings remain, for example, Switzerland does not have an independent human rights monitoring body, a National Human Rights Institute (NHRI).

Enforcement in courts

Being a monist state, the Federal Swiss Supreme Court can hear claims of violations of both the Constitution and international treaties directly. In either instance, the provision that offers the most support is applied, ensuring the highest possible level of human rights protection. The Constitution states that rights contained within it must be directly justiciable in courts.

Awareness and ownership of rights

Extensive public consultations and the referendum held on the adoption of the 1999 Constitution increased rights-holders' awareness and ownership of human rights. The participatory approach increased the legitimacy of the new Bill of Rights, although some scepticism remains around how powerful international treaties are in Swiss law.