Note on the Incorporation of the European Convention of Human Rights in France, Germany and Spain

France

As a monist system\(^1\), in French law, treaties such as the ECHR are supra-legislative and infra-constitutional.

France has a strong principle of separation of powers, leading to a general prohibition of judicial review of statutes. However, in practice, "[T]oday, the Constitutional Council alone reviews the constitutionality of laws, while the civil and administrative judges control the compliance of laws with the Convention." If a judge finds non-compatibility with the ECHR, they can refuse to apply the law.

*Mazurek v France, (Application Number 34406/97, ECHR, 2000):*

French law provided for a child born of an adulterous relationship to receive a reduced entitlement to a parent's estate when competing with a legitimate child or spouse. M challenged this as incompatible with article 8 ECHR and article 1 of protocol 1, in conjunction with article 14 ECHR. M progressed through the domestic court system, culminating in an appeal to the Court of Cassation, but the courts held that there was no breach of the ECHR as France was pursuing a legitimate aim, and intended to protect the interests of an adulterer's legitimate children and spouse. At the ECHR, a violation of art 1 protocol 1 was found in conjunction with article 14. The issue of article 8 was not considered. Following this judgment, France proceeded to change the law to remove the discrimination between adulterine and other children.

Germany

Germany has a dualist system\(^2\), and treaties such as the ECHR have the status of ordinary federal law. The ECHR does not have constitutional status.

Technically the ECHR can be overridden by new federal law. It is possible for judges to read ECHR rights as public international law with priority over ordinary statutes, but only some of the ECHR rights have been recognised as customary international law. Courts can also use the ECHR as an interpretive tool, reading German laws in the light of ECHR. The Constitutional Court has held that German laws should be interpreted in harmony with the country's international treaty law commitments, as it can be assumed that the legislature did not intend to violate those obligations.

"Today, the ECHR serves as an interpretative tool of German norms of a constitutional nature." As Germany is keen to preserve their sovereignty, they clearly state that treaty law may be deviated from if required to avoid violation of the fundamental principles of the German constitution.

The ECHR is binding on executive bodies and the courts, and "all German authorities and courts are obliged – under certain conditions – to observe and to apply the ECHR."

*Niedzwiecki v. Germany (Application Number 58453/00, ECHR 2005):*

N was unable to claim child benefits as he did not have a permanent residence permit, only a renewable provisional residence permit. N argued a breach of his right to family life, beginning in

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\(^1\) National and international laws are considered to form one body of law and international law can be directly applied by a national judge, without needing to be translated into national law.

\(^2\) There is a clear separation between national and international law, and the latter is required to be translated into the former.
the Labour Office and progressing through to the Federal Constitutional Court. He then argued a breach of article 8 in conjunction with article 14 at the ECtHR. Germany argued that child benefits were not engaged at 8 rights, but the Court found a violation. Following this judgment, the relevant legislation was amended to remove discrimination between different categories of foreigners.

Spain

The moderately monist system of Spain provides that treaties such as the ECHR are in force as national law once officially published, and are binding on courts and administrative authorities. The ECHR ranks below the constitution, and is open to review by the Constitutional Court, but ranks above any other conflicting statutes. "Domestic laws cannot modify and suspend all or part of an international convention".

The ECHR has become an important interpretive tool for constitutional rights and freedoms. "National courts and all other national authorities are obliged to follow the case law of the European Court of Human Rights"

López Ostra v. Spain (Application Number 16798/90, ECHR 1994):

L. complained that the nuisance caused by a waste treatment plant near her home was an interference with her home life. Initial proceedings relied upon fundamental rights contained in the Spanish constitution, but it was held that the nuisance was insufficient to constitute a violation. An appeal to the Supreme Court raised the issue of article 8 ECHR, but the appeal was dismissed. L. appealed to the Constitutional Court, which held that there was no breach of the right to inviolability of the home under the Spanish constitution. The ECtHR held that there was a violation of article 8, and that insufficient action had been taken to protect L.’s right to effective enjoyment of her home, private and family life. Although Spain complied with the ECtHR’s award of damages to L., it does not appear that any other changes were made by Spain as a result of the judgment.

Sources:


European Court of Human Rights Country Factsheets