



Name of collection

Rights Enshrined

Contributors name:

Rights Enshrined discussion

[Music]

ROSEMARY MCKILLEN:

This is the Rights Enshrined podcast from the Open University. I'm Rosemary McKillen, lecturer in law. With me in the studio are Jessica Giles and Hugh McFall who are also lecturers in law. We will be discussing how rights are enshrined in the European Convention on Human Rights and protected by the European Court of Human Rights, and the relationship between these and the UK. This relationship is explored further in the Rights Enshrined case study videos which accompany the podcast. So, Jessica and Hugh, we're going to talk about the European Convention on Human Rights. I think to start with it would be interesting to think about how that came about, what the politics were, what was happening in society at the time.

HUGH MCFALL:

I think it's an important issue, really, because the convention itself, I think, was borne out of the terrible circumstances of the Second World War, and how, within Europe, we saw nation states turn against their own citizens and the way that the Jews and other minorities throughout Europe were treated by the Nazis, etc. Basically, out of the rubble of the Second World War, I think nations decided that they needed to have some kind of standard by which states could be held to account.

JESSICA GILES:

So what we do see, interestingly, in the convention, is a drawing together of the various traditions of rights protection in the member states. What this sometimes does... it can lead to conflict, or grumblings, if you like, about what's going on and the decision the courts make, because different states have different traditions of rights protection and different citizens have different ideas about the type of individual rights that need to be protected.

ROSEMARY MCKILLEN:

I think it's interesting in that it's set up to protect individuals from abuses by the state. It was never really intended to protect individuals from other individuals. It's about that balance of power where if the state holds all the power it can then potentially abuse citizens. It was to prevent those abuses from ever happening again.

HUGH MCFALL:

Really the focus is on the fundamental freedoms that individuals enjoy, basically the right to life and the right not to be tortured. These rights were violated during the Second World War. This is intended to draw a line under that and to give real concrete protection to the citizens of states.

ROSEMARY MCKILLEN:

For me one of the interesting things is how the convention that was written in 1950 is now interpreted in modern society. I think we've seen some of the challenges with that in the Diane Pretty case.

Dianne Pretty had been diagnosed with motor neuron disease. She appealed for a change in the law so her husband Brian could help her die without fear of prosecution.

BRIAN PRETTY:

Diane felt that she was being degraded because she had to have people look after her, like myself, nurses, social people coming in to help clean her up, wash her, dress her. She felt like she was being tortured by having to be kept alive longer than what she feels that she needed.

ROSEMARY MCKILLEN:

So we've got that right to life that was written in 1950 thinking, you know, the Holocaust and that kind of thing, so that we must protect the state from executing its citizens. Now we're getting discussions about, well, actually, does a right to life also incorporate a right to die with dignity? That, for me, is a really interesting question.

HUGH MCFALL:

Yes, I suppose because, you know, the way that medical technology is developed, people are in a position where they can be kept alive for longer. The issue that we're all debating in society is to what extent should people be allowed to choose when to end their own life? So what you had in the Pretty case was an attempt to utilise the convention rights that were written, I suppose, in a different political and historical context, and to use those to try and develop a set of rights in relation to choosing the time and the place of your own death. So using Article 2, the right to life, to flip that round and say, 'Does the right to life also enshrine a right to choose how to die?' Now, that case wasn't successful in itself. The argument wasn't accepted, but there were implications from that case, I think.

JESSICA GILES:

Yes. Interestingly it can be frustrating for the individual who brings a case when they don't have a concrete result to rely on, if you like, but it can result in a policy change. Subsequent to the Pretty case, the Crown Prosecution Service gave some guidelines as to when it would or would not take action in the event that an individual assisted another individual, for example, to travel abroad to enable them to take their own life.

ROSEMARY MCKILLEN:

I think that case really demonstrated the real challenges about how we deal with end of life issues so that people are able to die with dignity and feel respected in the choices that they make.

HUGH MCFALL:

These are very difficult issues. What you see with the convention is, although it was written in the 1950s, in many ways it is still a living document, because, through the interpretation of the European Court of Human Rights, in seeing how these principles apply in the modern world you can see how there can be some movement, really, in the way these rights are interpreted. It could be the case that we might see in the future some movement on this particular issue.

ROSEMARY MCKILLEN:

I think it's worth bearing in mind that the European Convention on Human Rights was always intended to be a minimum standard of protection. There's nothing to stop states going further to protect their citizens and to understand what's needed within their society for their particular citizens. Some really interesting issues around discrimination under Article 14 as well, talking about somebody who has a disability. I think for the judges in that case that was a really difficult decision. We go back to also the political ramifications of a legal convention and how do you take account of the culture and the ethics of any particular country?

JESSICA GILES:

In the Pretty case, of course, especially, the court has to think about the consequences for everyone for a decision. So it might look at the individual in a particular case and think, 'Well, this individual could make that decision,' but, having made that decision, it is then applied Europe-wide. It has to think, 'Well, in what circumstances could this cause individuals real difficulty, real trauma?' Moral or ethical problems, as it were. So the court always has that in mind, especially with human rights decisions. We do hit a problem with the decisions of the European Court of Human Rights. They apply what's called the Margin of Appreciation. So this means that, when they make a decision, they have to look at the decision that was made within the national courts of the member states. They have to allow that state to decide their

human rights cases in accordance with the political and social and economic conditions within that state.

The European Court of Human Rights itself will then only change a situation in terms of human rights protection if it feels there is more or less a Europe-wide consensus which enables that change to be made. That can sometimes be frustrating for individuals. So, in the Hatton case, for example, where you have individuals who are really seeking to have their rights protected.

John Stewart chairs HACAN, which represents people living under the Heathrow flight paths. The group fought a long battle with the British government over night flights, and in 2001 went all the way to the European Court of Human Rights.

JOHN STEWART:

We were relying on Article 8 of the Convention on Human Rights which said that people were entitled to the peaceful enjoyment of their own home. The court ruled in our favour. Shortly after that, the government announced that it would appeal the decision of the European Court. They found, by a majority, in favour of the government. In my view, the decision of the appeal court could well have been a political decision.

HUGH MCFALL:

So, I suppose, in that sense, the court is quite sensitive to not imposing a Europe-wide standard where one doesn't exist. They take their lead, I suppose, from member states. For certain areas, especially for issues to do with moral issues, I think there can be quite a wide degree of margin of appreciation.

ROSEMARY MCKILLEN:

One of the interesting things about the make-up of the court, when you've got judges coming from across Europe and they're bringing their own culture and their ethics and their tradition from their own legal system, it creates a very rich discussion at the court about, 'What do rights mean? What does it mean to enshrine rights?'

HUGH MCFALL:

That's right. I mean, because that notion of balance is written right into the convention, because some rights, such as expression in Article 10 or Article 8 privacy, they can be balanced against one another. Whereas other rights, like Article 3, the right not to be tortured, is an absolute right. The right to privacy and the right to expression, we've seen that in our own jurisdiction in the UK in some very important cases to do with the press. To what extent should our newspapers be able to print whatever they like even though it might infringe the privacy of certain celebrities, and so on? That's where the court has to be quite sensitive to the particular traditions, moral and ethical traditions within the member states. We're talking about quite a diverse group of states when you think about the number of states who are signatory to the convention with distinct traditions, but that's, as I said, written into the DNA, if you like, of the convention, the idea that one right, in most circumstances, has to be balanced against the other.

ROSEMARY MCKILLEN:

I think that's one of the similarities between the European Court of Human Rights and our own court system. Once the judges are there, they're expected to be independent and impartial and apply the law as it stands, you know, drawing from case, that kind of thing. The judges there are experienced judges in their own national jurisdiction and bring that experience to the court and then apply it in deciding on how the convention should be applied.

JESSICA GILES:

I wonder perhaps whether it would be interesting to look at some of the enforcement mechanisms, or the remedies under the convention, because within a national court we're used to the idea, or the concept, if you like, of an individual going into the court, making a claim, and having some sort of remedy, some sort of concrete remedy in terms of damages, or perhaps an injunction to stop someone doing something. Human rights protection works slightly differently. Certainly at a European level, and then when it's translated, so when the

European Convention, which is annexed to the Human Rights Act, is then translated into national law.

ROSEMARY MCKILLEN:

I think we see that in the case study around Vinter. What are the ramifications if a country refuses to implement a judgment?

[Music]

Simon Crighton is a lawyer with Bhatt Murphy Solicitors in London. He represented Gary Vinter, one of a small number of British prisoners serving a whole life sentence. A change in the law in 2003 removed the right for such prisoners to have their detention reviewed at some point in the future. Vinter and two others argued that this breached their human rights under Article 3 of the convention.

SIMON CRIGHTON:

The English courts decided that the imposition of a whole life sentence was lawful, even if there was no prospect of release. The judgment, when it was given, was that there had been a breach of Article 3, and the court gave a very strong indication that a 25-year review should be automatic in the sentence. The difficulty is that European Court judgments are not directly enforceable in English law. There's been a lot of noises from the senior judiciary that we should no longer be deferring to Strasbourg on those decisions.

[Music]

ROSEMARY MCKILLEN:

There are obviously political issues. Other countries will say, 'Well, this judgment's been held against you. Why have you not implemented it?' Ultimately, it raises questions about withdrawal, which is kind of where the UK's at, at the moment. Sort of saying, 'Oh well, we don't want the European judges saying how we should be, so let's just withdraw,' which goes against the whole ethos of the convention coming back to creating that baseline of minimum rights that everybody's entitled to, preventing those atrocities from happening again. Those issues have been forgotten in the backlash against human rights.

HUGH MCFALL:

Yes, because I think sometimes the impression can be given that when a decision is made in Strasbourg, in the European Court of Human Rights, the UK has no choice but to follow that direction. Our own domestic judges in the Supreme Court are not obliged to follow. They're not bound by the decisions of the European Court of Human Rights. More often than not they will take these decisions into account, but they're not bound by it. So, in that sense, the UK still is free to choose whether or not to comply with elements of the convention. In that sense there is a lot more flexibility within the system that might appear in some of the comments that you see in the media.

JESSICA GILES:

There is a flipside of that, if you like, in that before we had the European Convention of Human Rights, we had a system whereby judges in court could look at rights protection and expand it incrementally within the courts. Now we have a situation where we have this set number of rights and they're put into national law and judges, to a certain extent, can feel that that's the extent of rights protection available. There have been calls recently, and there are calls, really, that there shouldn't be a limitation in that way of rights protection, and that the convention does go some way to limiting the power of judges.

ROSEMARY MCKILLEN:

I think it's quite interesting, actually, because if we go back and look at Vinter, we have a situation where in English law we had really good rights protection. It was then taken away. That was challenged at the European Court of Human Rights and they said, 'No, you should have that protection. You need to put it back in place.' Then what we see is the media lashing out saying, 'These European Court of Human Rights judges are saying that we shouldn't be doing things and actually what they were doing was taking us back to where we had been that

we already had good protection that had been eroded.' I think that flags up maybe some of the misconceptions around the European Court of Human Rights and how it interacts with the UK system.

I think that's quite interesting in terms of public perception of how the process works, because going back to the way the process was envisaged was you still have to go through the domestic courts and exhaust your national remedies before you can go to the European Court of Human Rights in Strasbourg. I think sometimes people think of that as it's an appeal court, or a supreme court above the UK court system, and that's not how it was envisaged. It's a parallel system. So you finish your case in the UK courts and then you start a new case against the UK as a state for failing to protect your rights under the European Convention. I think there's maybe some misconceptions around that.

HUGH MCFALL:

The whole point about the way in which the Human Rights Act was put together was that the need to go to Strasbourg should be far less, because you have access to the convention rights within domestic courts. So because the courts have got an obligation as far as they can to comply with the convention rights and to apply them, you would hope that you wouldn't need to wait to get to Strasbourg.

ROSEMARY MCKILLEN:

I think that's maybe one of the benefits of the Human Rights Act, but one of the frustrations of the European Convention on Human Rights, because you get your judgment at the European Court of Human Rights and hopefully you won, and then you think, 'Well, what difference did it make?' It didn't really change what happened in your case, because you've then go to wait for the UK as a state to implement the judgment. We've already talked about how sometimes the UK doesn't implement the judgment. So more what you get is that moral satisfaction of having won, and maybe influence future policy, but actually not masses of change in your own individual circumstance. I think that people sometimes find that quite frustrating.

JESSICA GILES:

I think another interesting point to look at is what we call the horizontal application of human rights. So this is where the convention can be applied between private parties. We've been talking a fair bit about the fact that the human rights legislation and international protection is to protect the individual against oppressive behaviour of the state. If you look at the Eweida case, for example, there was a case of an employee who wanted to bring a case against their employer to be able to wear a cross at work, so a member of their check-in staff. In that case, the way inaction can arise is that the courts are bound to protect rights under the convention. The courts are part of the state. They need to protect rights under the convention. So they have to give a ruling on whether or not there is sufficient legal protection, so whether the state has created sufficient protection of that right in law. That's how one can find cases between private individuals coming to the courts based on a human rights argument.

ROSEMARY MCKILLEN:

I think what's interesting in that case is the discussion about reasonable accommodation for religion and that whole concept of proportionality.

[Music]

HUGH MCFALL:

The clear article we were always going to use would be Article 9, which is everyone has the right to freedom of thought, conscience and religion, but in particular the right to manifest that belief in worship or in observance or in any other way which is intimately linked to the religion. Nadia is a fighter and she made it very clear that she would take it as far as it was necessary to take, hence the decision to continue the case and take it to the European Court of Human Rights.

JESSICA GILES:

It's very difficult, especially when issues arise around freedom of thought, conscience and religion, because the balancing that takes place has to be very carefully weighed. Throughout

Europe, of course, we have very, very different traditions. So we have some Catholic states. Within England we have the established church. Of course that then has to be balanced. So, in the Eweida case, it was the wearing of a crucifix at work, but there were other cases that came up that were heard at the same time where there were issues about beliefs, very strongly held beliefs of individuals and they had to be balanced against the rights of same sex couples. The state really there is looking to foster, as much as possible, tolerance between individuals. Then it becomes difficult because, of course, the court's almost tasked, if you like, with assessing how society's views are moving, and how to balance those rights in the best way to engender that tolerance.

ROSEMARY MCKILLEN:

I think one of the things about the system is that, okay, we have that statement in that case, but in future that issue can be revisited, and I think potentially will be revisited and we'll see further nuanced discussion about how do you balance those rights, not just within the UK, but across the whole of Europe?

HUGH MCFALL:

Yes, because, I mean, the issue of religious symbols is one that's come up several times in terms of, you know, different expressions of different religious faith traditions, for example in Islam to wear headscarves, and so on, can be very important. We've seen cases like that within schools, and so on, within uniform policies. So this is a developing area of law.

ROSEMARY MCKILLEN:

In the UK at the moment there's quite a lot of debate about the status of the European Convention on Human Rights, what's going to happen with the Human rights Act, whether we need a Bill of Rights, and how best should rights be enshrined in the UK? I think that raises lots of interesting issues, not least should we withdraw from the European Convention on Human Rights, and what the implications of that might be?

HUGH MCFALL:

Some people are arguing, you know, that the protection of human rights within our own system isn't strong enough at the moment because the current position is we've got a European Convention on Human Rights that is a treaty within international law, essentially. This has been incorporated into our system via the Human Rights Act. Interestingly, the rights within the convention can still be overridden by government if parliament agrees. If an act of parliament is passed, either doing away with the Human Rights Act, or limiting any of the particular rights under the convention, whether it's privacy, or right to a fair trial, which is something that's been discussed a lot in relation to terrorism cases. The point is that, at the moment, you could argue, because it's relatively easy for parliament to decide to ride roughshod, if you like, over certain rights, and that can actually happen within our system.

So, interestingly, some people would say, you know, the impact of the human rights culture, and so on, and the European Convention on Human Rights has been too much in our system, but other people would argue that rights aren't protected enough. So should we have a bill of rights?

ROSEMARY MCKILLEN:

With the UK having an unwritten constitution, we have various documents that maybe are deemed to have constitutional status, including the Human Rights Act, some would argue, but because we haven't got one document that says, 'These are the rights and this is how our country will work,' that has that enshrined status that Jessica was talking about, then it makes it very difficult to have this conversation. So if you look at France or the US, they have written constitutions. So you can go and say, 'It's my constitutional right to have x.' They also have human rights protection under international law and the various treaties that have been signed up, but you've got that fundamental baseline document that articulates your rights. It's very difficult for us to have a conversation about how our rights are enshrined, because we haven't got that.

JESSICA GILES:

In fact, that's one of the major advantages of us having our own Bill of Rights in that we can develop not just extra rights, but we can develop rights in a way... or the judges within our courts can develop rights in a way that are suitable for our economic and political social situation in this country. However, there has recently been brought into the European Convention on Human Rights this concept of subsidiarity, which, to a certain extent, allows the states to develop rights on this principle. It's a new principle which says if something can be better done at a national level, then it should be left to nation states to do that. It's also used within European Union law.

ROSEMARY MCKILLEN:

I think also one of the interesting things about the discussion about Bill of Rights and what you do with the Human Rights Act, the culture shift that this has created within our legal systems. So even if we repealed the Human Rights Act, I think you'll find that thinking about human rights is so enshrined now within our legal system. Judges are so used to using human rights as a lens when they look at their cases, to some extent it doesn't matter if the Human Rights Act is there or whether we have a Bill of Rights. That thinking is now there and will be applied essentially no matter what.

HUGH MCFALL:

Yes, and I think it's important not to underestimate the change that that's had, because I think if you compare the approach of the common law system to individual rights, as we talked about before this idea of negative liberty, I think you're right to say that there has been a shift in focus, and also there's a real awareness amongst the population at-large, amongst the public about this idea of rights. I think, you know, for me it would be difficult to imagine that we could actually repeal the Human Rights Act and then not replace it with anything at all. I think that would be politically very impressive if that could be done. I'd probably doubt that it could. The question really for me is not whether we have a conversation about rights really as a nation. It's what form does it take? So do we want to have something that's a little bit more fit-for-purpose for our own set of circumstances, or do we want to be part of a wider European project on it?

ROSEMARY MCKILLEN:

If you repealed the Human Rights Act, would you then say, 'We're going to withdraw from the European Convention on Human Rights as well, that international treaty'? As we talked about before, there are political ramifications of doing that. Then the question arises, do you withdraw from all international human rights treaties, or actually do you say, 'Well, we're having the UN treaties, but not the European treaties'?

HUGH MCFALL:

I think it's important to realise that just by repealing the Human Rights Act it doesn't mean to say that we would no longer be a signatory to the European Convention on Human Rights. The two things are distinct. It would be a very big step for us to withdraw from the convention politically. In terms of our status internationally, it would send a strong signal, I think.

JESSICA GILES:

The thing we must bear in mind is the importance of the positive protection of human rights. Once rights are actually written into some form of charter, or legislation, there's more public awareness of rights. This has been argued as one of the major advantages of a Bill of Rights, over and above the Human Rights Act even, because more rights would actually be enshrined. Whilst there is already a culture within the courts and the judiciary in rights thinking, if you like, it's important that individuals bring those cases to the courts when their rights are infringed. Having those rights set out in some form of document, particularly at a national level, means that there is an individual awareness of those rights.

ROSEMARY MCKILLEN:

I think probably we're all agreed that to some extent it doesn't matter whether it's the Human Rights Act or the European Convention on Human Rights, or the Bill of Rights, or any other international treaty, what's really important is that somewhere rights are enshrined to protect everybody.

HUGH MCFALL:

Yes, because otherwise it would be too easy, I think, for the executive, for the government, for reasons that they might feel appropriate at the time, to encroach on these important freedoms.

ROSEMARY MCKILLEN:

Thanks to my colleagues Jessica Giles and Hugh McFall. I'm Rosemary McKillen. You've been listening to this Rights Enshrined podcast from the Open University. For more information about these issues, go to www.open.edu/openlearn.

[Music]

(End of recording)