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Are UK Courts bound by the European Court of Human Rights?

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The Human Rights Act 1998 (HRA) was passed to 'bring rights home' to the UK and it allows the UK courts to enforce rights under the European Convention on Human Rights. Section 2(1) of the HRA is critical to the workings of the HRA. This section requires UK courts to 'take into account' decisions of the European Court of Human Rights (Strasbourg) in cases concerning the Convention rights. However it is not clear what this means for the relationship between UK courts and the Strasbourg Court. Does the HRA require that UK courts follow or apply Strasbourg decisions in giving effect to the HRA? Does it instead allow for a more flexible relationship between the two sources of law?

Section 2(1) of Human Rights Act 1998:
A court or tribunal determining a question which has arisen in connection with a Convention right must ***take into account*** any … judgment, decision, declaration or advisory opinion of the European Court of Human Rights … whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

The Mirror Principle

The UK House of Lords and Supreme Court have generally favoured an inflexible approach to the interpretation of s 2(1), under which relevant Strasbourg cases will be applied. This approach is referred to as the ***'mirror principle.'*** According to the mirror principle, UK courts should generally follow 'clear and constant' case law from Strasbourg and should provide 'no more, but certainly no less' rights protection than would be provided by the Strasbourg Court.

The 'mirror principle' - through permitting the content of domestic human rights laws to be effectively determined by an external source of law - has given rise to the suggestion that the European Court of Human Rights wields excessive influence over UK laws.

‘There is a danger in domestic courts adopting an overly slavish attitude to Strasbourg jurisprudence’

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Criticisms of the ‘Mirror Principle’

Masterman argues that this rigid approach is not prompted by the HRA itself, but is a product of judicial interpretation which impedes the ability of UK courts to fully contribute to the development of human rights law. He supports a flexible approach and argues that amendment or repeal of the HRA is not required for courts to develop rights which are receptive to domestic as well as international influence.

Must the Supreme Court ‘mirror’ the European Court of Human Rights?

Rigid adherence to the ‘mirror’ principle has been defended on practical and constitutional grounds. But the rigid approach is practically and constitutionally flawed.

Practical Arguments

- The mirror approach is not required by the HRA.
- Strasbourg Court decisions tend to make broad declarations and are not specific enough to be directly applied to individual local cases.
- The Strasbourg Court takes into account differences between European states and sometimes sets different requirements depending on the state. Again, this makes it difficult for UK courts to simply mirror Strasbourg decisions.
- The mirror principle does not account for recent decisions in which UK courts seem to go beyond the rights protection that the Strasbourg Court requires.

Constitutional Arguments

- European Convention requirements change as society’s morals change, so UK courts should not be tied to outdated case law from the European Court.
- The European Court looks to domestic courts to discover new consensus on rights issues. This practice is undermined if domestic courts seek to automatically mirror Strasbourg jurisprudence.
- The HRA is an attempt to find a way to blend national rights protections with European rights protections.
- The ‘mirror’ model diminishes the distinctively national characteristics of judicial human rights decisions.

The Mirror Crack’d?

The current Bill of Rights debate is partly premised on the suggestion that the ‘mirror principle’ permits the ECtHR too great an influence over UK laws. Yet there is growing evidence that domestic courts are willing to depart from Strasbourg case law, for instance:

- If the Strasbourg court has misunderstood UK law (*Horncastle* (2009));
- If the Strasbourg case-law is incompatible with a ‘fundamental substantive or procedural’ aspect of our law (*Pinnock* (2010));
- If the Strasbourg case-law is dated (*Quila* (2011));
- If a substantially similar result could be achieved through application of the common law (*Osborn* (2013)).

If domestic courts are already developing a ‘home grown’ human rights under the HRA then a core element of the case for a UK Bill of Rights is considerably weakened.

Research findings

Masterman argues that the development of a domestic law of human rights is possible under the HRA. The movement away from the ‘mirror model’ demonstrates (i) that s.2(1) permits dialogue with the ECtHR and (ii) that it affords courts sufficient flexibility to utilise Strasbourg decisions alongside national laws in the development of rights (so that the latter does not override the former).

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