CAN HOLYROOD BIND ITS SUCCESSORS?

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Introduction

In *AXA General Insurance Ltd v Lord Advocate*,[1] the Supreme Court held that Acts of the Scottish Parliament (ASPs), and by implication also of the Welsh Parliament and Northern Ireland Assembly, are a species of primary legislation, akin to Acts of the United Kingdom Parliament,[2] albeit Westminster is a sovereign legislature, whereas the devolved legislatures clearly are not. As primary legislation, ASPs may therefore (within the general constraints of devolved competence) amend earlier statutes (including UK legislation), confer delegated authority, operate with retrospective effect, breach rules of international law, reverse judicial decisions or repeal common law rules, and they are not subject to challenge on grounds of irrationality, improper purposes or other standard common law grounds.

The question to be addressed in this note is whether Holyrood also has the power to bind its successors. In other words, can it seek to entrench, either as a matter of procedure or substance, particular pieces of legislation against future amendment or repeal? This, famously, is the one thing that the UK Parliament *cannot* do, according to the orthodox doctrine of Parliamentary sovereignty.[3] Because sovereignty is understood to be *continuing*, legislation purporting to bind a future Parliament is valid at the point of enactment, but *ineffective* to prevent a future Parliament amending or repealing it. What, though, of the devolved legislatures? As *non-sovereign* law-makers, are they able to achieve what Westminster cannot, or are there other constraints on their legislative competence, or legislative capacity, which prevent them too from binding their successors?

This is not merely an interesting hypothetical question. Two bills are, at the time of writing, before the Scottish Parliament which seek to condition future Holyrood law-making by incorporating international instruments into Scots law. The European Charter of Local Self-Government (Incorporation) (Scotland) Bill (the "Local Government Bill") adopts a Human Rights Act (HRA)-style model of incorporation – i.e., a strong obligation to interpret legislation compatibly with the Charter Articles, coupled with a power for the higher courts to issue non-binding declarations of incompatibility if it is impossible to do so.[4] The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill ("the UNCRC Bill") goes further. It permits judicial strike down of legislation – both ASPs and UK Acts, so long as within devolved competence –enacted *before* the Bill comes into force.[5] However, for post-enactment legislation, it too adopts the HRA model of a strong interpretive obligation plus declarators of incompatibility.[6]

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[1] [2011] UKSC 46; [2012] 1 AC 868.

[2] See Lord Reed, 'Scotland's Devolved Settlement and the Role of the Courts', *Inaugural Dover House Lecture*, 27 February 2019, at p 19 (available at: https://www.supremecourt.uk/docs/speech-190227.pdf).

[3] AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 10th edn, 1959), ch 1.

[4] Local Government Bill, ss 4 and 5. Section 2 also places a duty on the Scottish Ministers to act compatibly with the Charter.

[5] So-called "strike down declarators" – UNCRC Bill, s 20.

[6] Ss 19 and 21. Again s 6 of the Bill also imposes obligations on public authorities to act compatibly with the UNCRC.

In both cases, it is clear that the Bills' promoters would have liked to have gone further to permit judicial strike down of *all* incompatible legislation, both pre- and post-enactment, but they considered such a provision to be beyond Holyrood's legislative competence.[7]

In this note, I explore the reasons why a "full constitutionalisation" model[8] is considered to be outwith devolved competence, and argue that the issue is less clear cut than it might initially appear.[9] Instead, I argue that the question may be better viewed as one of legislative capacity or effectiveness, rather than competence or validity; in other words, whether a primary, but non-sovereign, legislature ought, *as a matter of principle*, to have the ability to bind its successors. Finally, though, I argue that the difference between a full-constitutionalisation model and an HRA-style model may be relatively unimportant in practice.

Legislative Competence

The Policy Memorandum accompanying the UNCRC Bill states (at paragraph 138) that "Provision requiring future legislation to be compatible with UNCRC would effectively change the power of the Parliament and is, therefore, beyond its current powers." Aspects of the Scotland Act 1998, including the provisions defining and limiting the Parliament's competence (ss 28 and 29) are protected enactments under Sch 4 of the Act, which by virtue of s 29(2)(c) Holyrood is not permitted to modify.

In the *Scottish Continuity Bill Reference*,[10] the Supreme Court explained the significance of the decision to protect a statute under Sch 4, rather than to reserve a policy field under Sch 5.[11] Whereas a Sch 5 reservation occupies the entire policy field, such that Holyrood cannot legislate in that area at all, a protected statute does not. The Parliament therefore has the power to enact legislation relating to the same subject matter as a protected enactment, provided that the new legislation *supplements* but does not *modify* it. The Court explained:

> Without attempting an exhaustive definition, a protected enactment will be modified by a later enactment, even in the absence of express amendment or repeal, if it is implicitly amended, disapplied or repealed in whole or in part. That will be the position if the later enactment alters a rule laid down in the protected enactment, or is otherwise in conflict with its unqualified continuation in force as before, so that the protected enactment has to be understood as having been in substance amended, superseded, disapplied or repealed by the later one.

Thus, for example, in the *Continuity Bill Reference* itself, the provisions in the Bill which treated retained EU law differently to the equivalent provisions in the European Union (Withdrawal) Act 2018 (a protected statute) – such as the inclusion of the European Charter of Fundamental Rights within the definition of retained EU law, which was expressly excluded by the UK Act, or differently-worded ministerial powers to rectify deficiencies in retained EU law – were held to be ultra vires. But a power

[7] Local Government Bill Policy Memorandum, paras 55, 77; UNCRC Bill Policy Memorandum, paras 59, 107. N.b., the Scottish Government is seeking a s 30 Order to permit it to incorporate the UNCRC in full – ibid, para 111.

[8] Local Government Bill Policy Memorandum, para 54, referring to a speech by James Wolffe QC, 'Economic and Social Rights in Scotland: Lessons from the Past; Options for the Future' (2014) (available at: https://www.scottishhumanrights.com/media/1469/wolffe2014lecture.pdf).

[9] I assume that a power to strike down *past* legislation gives rise to no competence issues, as this operates, in effect, as a form of indirect repeal or amendment; a sort of judicial Henry VIII power.

[10] *Reference re the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* [2018] UKSC 64; [2019] AC 1022.

[11] Ibid, para 51.

for the Scottish Ministers to keep pace with changes in EU law post-Brexit, which had no counterpart in the UK Act, was *intra vires.* Nevertheless, where exactly the line is to be drawn between permissible supplementation and impermissible modification may not always be clear cut.

For instance, a statutory provision empowering judges to strike down future Holyrood legislation might be argued to amount to a modification of s 29 of the Scotland Act by, in effect, altering the limits on the Parliament's legislative competence expressly set out in that section. Alternatively, though, this could be seen as a permissible supplementation of s 29. After all, the reason for preventing the Parliament from modifying the existing competence limits in s 29 was presumably to prevent it from trying to *weaken* those limits so as to *expand* its own competence. It is not necessarily inconsistent with s 29 to allow Holyrood to create *additional* constraints which have the effect of *narrowing* its legislative competence.[12]

However, in the *Continuity Bill Reference*, the Supreme Court also held that s 17 of the Bill was outwith competence as an unlawful modification of s 28(7) of the Scotland Act, which preserves the unlimited power of the UK Parliament to legislate for Scotlan). Section 17 provided that delegated legislative powers affecting retained EU law conferred on UK Ministers by future UK legislation could only lawfully be exercised with the consent of the Scottish Ministers. Although the Supreme Court accepted that s 17 did not affect the UK Parliament's sovereignty, as the consent requirement could be repealed or set aside, it nevertheless held that the effect of s 17 was to *condition the future exercise* of Westminster's legislative power, and hence this amounted to a modification of s 28(7).

By analogy, the problem in the case of a Scottish Bill attempting to create additional competence constraints seems to be, not with s 29 itself, but rather with s 28(1). This reads that "Subject to section 29, the Parliament may make laws, to be known as Acts of the Scottish Parliament." Accordingly, the objection would be that, by adding further constraints on legislative competence, Holyrood would be seeking to *condition the exercise* of the law-making power conferred by s 28(1), contrary to the intention of the UK Parliament.

If this is correct, it would mean that further limits on Holyrood's legislative competence can only be achieved through an amendment of the Scotland Act itself – either via direct amendment of s 29, or by amending Sch 4 to make clear that Holyrood legislation creating judicial strike down powers does not amount to a modification of the Scotland Act.

But is this correct? There are two potential objections. First, s 17 of the Scottish Continuity Bill could be distinguished from a future strike down power. Whereas the former sought to condition the exercise of the *UK Parliament's* legislative powers, the latter would seek to condition the exercise of the Scottish Parliament's *own* powers. In other words, the former was about attempting to protect devolved autonomy against Westminster encroachment; the latter would be about how devolved autonomy is to be exercised. It is at least arguable that whereas the former is inconsistent with the scheme of devolution established by the Scotland Act, the latter is not, since the conferral of a plenary legislative power such as that enjoyed by the Scottish Parliament[13] includes the power to decide *whether* as well as *how* to legislate.[14]

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[12] A similar point is made by Kenneth Norrie in his supplementary evidence to the Equalities and Human Rights Committee during its Stage 1 inquiry into the UNCRC Bill - https://www.parliament.scot/S5_Equal_Opps/General%20Documents/Kenneth_Norrie_-_Incorporation_Bill_Comments.pdf.

[13] See Lord Reed in *AXA*, n 1 above, at para 147.

[14] See, e.g., Lord Brodie in *Whaley v Lord Advocate* 2004 SC 78, at p. 102 – "I find the notion of a democratic parliament having an obligation to enact anything to be a strange one."

Secondly, as Lord Hope noted in *AXA* (at paragraph 45), s 29 in fact "does not … bear to be a complete or comprehensive statement of limitations on the powers of the [Scottish] Parliament." In that case, the Supreme Court held that, although ASPs are not subject to judicial review on standard common law grounds, they could be struck down in an extreme case for breach of the Rule of Law or fundamental rights, in addition to the grounds set out in the Scotland Act. If, therefore, additional limits on devolved competence can be found in the common law, then it seems at least conceivable that they might also be imposed by Holyrood upon itself.

In *AXA*, Lords Hope and Reed approached the question as to the limits of devolved competence as one of the nature of the power conferred on the Scottish Parliament by the Scotland Act. For Lord Hope, as a matter of principle, even a body with primary legislative competence could not legislate contrary to the Rule of Law; for Lord Reed, applying the principle of legality, Westminster was presumed not to have intended to confer such power on Holyrood.[15] Thus, even if it were to be decided that legislation creating new judicial strike down powers is not incompatible with the statutory limits on Holyrood's legislative competence, it would still remain to be decided whether a body with the kind of legislative authority enjoyed by the Scottish Parliament is able – as a matter of principle – to bind its successors. As with the UK Parliament, this would not be a question of legislative *validity*, but rather one of legislative *effectiveness.*

Legislative Effectiveness

A legislature might attempt to entrench statutory provisions against future amendment or repeal in different ways: through a requirement of *form*, such as an obligation to use express words or a special amending formula; though a requirement of manner, i.e., the creation of a special, more onerous amendment procedure; or through a requirement of substance, i.e., an absolute prohibition on legislating inconsistently with the entrenched provisions. The UK Parliament's inability to do any of these things is normally understood as being a consequence of its sovereign status. However, it is questionable whether this is in fact the case.

On the one hand, there is perennial debate over whether the UK Parliament is in fact unable to bind its successors. For instance, some academics have argued since the 1930s that it is able to achieve entrenchments of manner and form, since sovereignty includes the capacity to redefine what counts as a valid Act of Parliament;[16] a view which gained some *obiter* support in *Jackson v Attorney General.*[17] Similarly, the New Zealand Parliament, which is also a sovereign legislature, is generally assumed to be bound by the special procedures for reforming electoral law laid down in the Electoral Act 1993, albeit the point has not been conclusively determined.[18] More concretely, by enacting ss 2(1) and 2(4) of the European Communities Act 1972 (ECA), the UK Parliament appeared, following the decision in *Factortame*,[19] to have bound its successors as a matter of *substance* to legislate compatibly with EU

[15] Above n 1, at paras 51, 151-3.
[16] E.g., WI Jennings, *The Law and the Constitution* (London: University of London Press, 5th edn, 1959), pp 151-63; RFV Heuston, *Essays in Constitutional Law* (London: Stevens & Sons, 2nd edn, 1964), ch 1; M Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford: Hart Publishing, 2015). Cf HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.
[17] [2006] 1 AC 262, per Lord Steyn at para 81 and Lady Hale at para 163.
[18] See T Shields and A Geddis, 'Tracking the Pendulum Swing on Legislative Entrenchment in New Zealand' (2020) 1 *Statute LR* 207.
[19] *R v Secretary of State for Transport ex p Factortame* (*No 2*) (1992) 3 WLR 285 (HL).

law, albeit later cases tended to read this down to a mere entrenchment of form – an obligation to use particularly explicit language to override EU law so long as the ECA remained in force.[20]

On the other hand, similar issues have arisen in relation to Commonwealth legislatures, influenced by Westminster's traditions of representative democracy, but which (like Holyrood) enjoy plenary, but not uncontrolled legislative competence. In a series of cases, such legislatures have been held to be bound by validly enacted manner and form provisions.[21] Typically, however, they cannot bind their successors as to substance. Detmold describes this as flowing from a "principle of intertemporal equivalence: a legislative will may not bind a later legislative will of otherwise equal status."[22] More pragmatically, a prohibition on substantive entrenchment allows future legislatures to correct the mistakes and injustices of their predecessors.[23] Conversely, manner and form provisions have either been defended as being compatible with democratic principles, or else justified as a means of guarding against potential abuses of power by temporary democratic majorities, although these justifications are in turn controversial, and become more where procedural requirements are so onerous as to shade into substantive entrenchment.[24]

Which types of entrenching provisions may be justifiable and in what circumstances thus seem to turn as much on questions of democratic principle as on technical questions about the relevant legislature's constitutional status. These are also difficult matters on which people may reasonably disagree. Hence, in answering the question whether Holyrood can bind its successors, courts may prefer to take refuge in an approach grounded in the text of the Scotland Act – i.e., to treat it as a question of legislative competence or validity, rather than legislative effectiveness. According to Lord Reed, such an approach has advantages of both predictability and political impartiality.[25] However, this may both overstate the determinacy of statutory interpretation, and fail to do justice to important questions of principle (from which the Supreme Court did not shy away in *AXA*) about the nature and limits of democratic law-making in the devolved context.

Indeed, even without seeking full constitutionalisation, such questions arguably cannot be avoided in relation to the Local Government and UNCRC Bills. For example, some see an HRA-style interpretive obligation as a type of entrenchment of form, since it forces future legislatures to adopt particularly clear words in order to override the protected provisions.[26] More importantly, s 6 of the UNCRC Bill imposes a duty, based on s 6 HRA, on public authorities to act compatibly with the UNCRC. However, it omits the defence in s 6(2) HRA that the authority could not have acted differently because of the

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[20] *Thoburn v Sunderland City Council* [2003] QB 151; *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324.

[21] See *McCawley v The King* [1920] A 691 (PC) (Queensland); *Attorney-General for New South Wales v Trethowan* [1932] AC 526 (New South Wales); *Harris v Minister of the Interior* 1952 (2) SA 428 (South Africa); *Bribery Commissioner v Ranasinghe* [1965] AC 172 (Ceylon); *R v Mercure* [1988] 1 SCR 234 (Saskatchewan). For discussion of the Commonwealth cases, see J Goldsworthy, 'Manner and Form in the Australian States' (1987) 16 *Melbourne Univ LR* 403; HR Zhou, 'Revisiting the "Manner and Form" Theory of Parliamentary Sovereignty' (2013) 129 LQR 610, pp 615-22.

[22] M J Detmold, *The Australian Commonwealth: a Fundamental Analysis of its Constitution* (Sydney: Law Book Company, 1985), p 208.

[23] J Goldsworth, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge: Cambridge University Press, 2010), p 138.

[24] See generally Gordon, above n16, chs 2 and 7.

[25] Above, n2, p 12.

[26] See, eg, H Fenwick, G Phillipson, and A Williams, *Text, Cases and Materials on Public Law and Human Rights* (London: Routledge, 4th edn, 2017), pp 176-9. Arguably, though, such provisions can be accommodated by an orthodox understanding of the doctrine of implied repeal – see AL Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart Publishing, 2009), ch 2.

provisions of primary or secondary legislation.[27] Under the UNCRC Bill as it currently stands, a future Scottish Parliament could conceivably legislate to place duties on public authorities which are incompatible with the UNCRC, in which case the courts would have to decide whether the absolute duty in s 6 of the UNCRC Bill had been overridden by the later legislation, and if so whether this could occur impliedly as well as expressly.

Does Entrenchment Matter?

The answer to the question whether Holyrood can bind its successors to comply with fundamental rights or other constitutional values by authorising judicial strike down of future incompatible legislation is ultimately inconclusive – whether approached as a matter of legislative validity under the Scotland Act, or as a question of legislative effectiveness in a constitutional order based on principles of representative democracy. However, by way of conclusion, it is worth reflecting briefly on how much, in practical terms, is at stake if it cannot do so.

The extent and significance of the gap between an HRA-style and a full constitutionalisation model depends on two factors. The first is how many violations are found and how judges choose to remedy them. Both the Local Government and UNCRC bills seem likely to produce less successful litigation than the HRA, given their narrower focus, more open-textured standards, and the absence of a body of accompanying jurisprudence. In any case, under the HRA, there has been far greater reliance on the s 3 interpretive duty to resolve incompatibilities than on s 4 declarations of incompatibility.[28]

The second factor is how strenuously political actors – and their legal advisors – seek to comply with the relevant standards, both in preparing legislation, so as to avoid disputes arising,[29] and in responding to adverse judgments. Again, under the HRA, there is a very good record of remedying identified breaches of Convention rights.[30] As under the HRA, both the Local Government and UNCRC bills require legislative proposals to be accompanied by compatibility statements,[31] and create fast-track remedial procedures.[32] Moreover, the UNCRC Bill contains some welcome innovations. Compatibility statements must be prepared for *both* primary and secondary legislation; legislative proposals from the Scottish Ministers will have to be accompanied by a Child Rights and Wellbeing Impact Assessment;[33] and they will have to report within six months of a strike down or incompatibility declarator being made on what steps they propose to take in response.[34]

These measures are an important reminder that achieving a culture of respect for fundamental rights or other constitutional values is not only – or even mainly – about what happens in the courts, but rather about the ways in which these standards are embedded into public decision-making more generally. An HRA-style model need not be seen as a second best option, necessitated by constraints

[27] In this respect, it resembles Scotland Act 1998, s 57(2), which places an absolute duty on the Scottish Ministers to act compatibly with Convention Rights, even when relying upon incompatible UK legislation.
[28] See Ministry of Justice, *Responding to Human Rights Judgments: Report to the Joint Committee on Human Rights on the Government's Response to Human Rights Judgments 2019-20*, CP 347, December 2020, Annex A.
[29] In New Zealand, the unbroken record of compliance with the special procedural requirements for amending electoral law since these were first introduced in 1956 is the key reason why the question whether these are legally binding remains unresolved – see M Palmer and D Knight, *The Constitution of New Zealand: a Contextual Analysis* (Oxford: Hart Publishing, forthcoming), ch 4e.
[30] See n 28.
[31] Local Government Bill, s 8; UNCRC Bill, s 18.
[32] Local Government Bill, s 6; UNCRC Bill, Part 6.
[33] UNCRC Bill, s 14.
[34] UNCRC Bill, s 23.

on legislative competence or capacity, but rather one which promotes respect for constitutional values whilst avoiding the democratic costs associated with full constitutionalisation.[35]

[35] For discussion of the merits of this general approach, see J Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013).