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Christine Bell: The Legal Status of the 'Edinburgh Agreement'

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On Monday 15 October 2012, the Prime Minister of the UK government and the First Minister of the Scottish Parliament, publicly signed in a formal ceremony a document entitled simply ‘Agreement between the United Kingdom Government and the Scottish Government on an Independence Referendum for Scotland, now known colloquially (in Scotland at least) as the ‘Edinburgh Agreement’ (for discussion of its content see Aileen McIarg’s earlier post). The signing ceremony placed emphasis on the agreement between the Scottish and UK governments as resting not in the meeting of minds of David Cameron and Alex Salmond, but on the existence of a text defining in legal terms their respective commitments (the Scottish government website refers to its signing as ‘the ratification’ of the agreement). But did this text have any legal status, and if not does it matter?

Why should anyone care?

It is unlikely that either side will want to breach the agreement, so why should we care whether it is legally binding or not? Well it is interesting, is it not, to know? Is the Edinburgh Agreement a legal agreement? Or just a political agreement? If a legal agreement, what sort of agreement is it, and how might it be enforced? If a political agreement, what are the social and political mechanisms for enforcement and do any legal methods of enforcing it remain? If it was not a legal agreement why did the parties almost seem to present it as such? Similar questions have been important in similar agreements elsewhere – the legal status of agreements between sovereign governments and sub-state actors present legal conundrums the world over, and for this reason alone the matter merits some thought.

From a more esoteric point of view, the legal status of the Edinburgh Agreement is important to questioning the predisposition of lawyers to view law as always available to those who wish to create binding obligations, and to view legal agreements as always more binding than non-legal alternatives. As I will argue, the Edinburgh Agreement challenges this legal perspective.

Finally, and more provocatively, if Scotland were to vote yes and separation of Scotland from the UK were negotiated, a whole host of non-legal alternatives. As I will argue, the Edinburgh Agreement challenges this legal perspective.

The structure of the agreement

The Edinburgh Agreement comprises a main agreement signed by David Cameron Prime Minister, and also Michael Moore, Secretary of State for Scotland, on behalf of the UK Government, and Alex Salmond, First Minister, and Nicola Sturgeon, Deputy First Minister, on behalf of the Scottish Government. This main agreement sets out in broad terms the principles to which the two governments have committed – it reads more like a ‘Declaration of Principles’ from which more detailed commitments flow (see the similar structure of Middle East Peace Accords!). To this front-piece agreement, a memorandum of agreement and a draft section 30 Order are attached, which the front-piece agreement states ‘form part of this agreement’. Technically speaking therefore, the ‘Edinburgh Agreement’ comprises all three documents.

The second part of the document, the Memorandum of Agreement, has clauses and tight drafting and looks much more ‘legal’ than the opening agreement. It sets out ‘elements of the agreement that require legislative provision in the section 30 Order’, but also ‘the elements that have been agreed between the governments on a non-statutory basis.’ The third document, the draft Section 30 Order is a draft piece of legislation (but of course must still pass through processes of affirmation by the UK and Scottish Parliaments to become law).

With this attention to detail, the pervasive legal language, a set of clear commitments, and the signature of government representatives, surely this is a legal document? It does not look like a mere ‘political pact’; and indeed one need only compare with the famous political pact – the Coalition Agreement - to see the differences. The Coalition Agreement was between two political parties rather than government representatives, and although it set out commitments to policies affecting the constitution, the content of the agreement was not itself a constitutional matter. The nature of the commitments to broad areas of common policy meant that, while coherently drafted, they were not written in the precise terms of legal obligation found in the Edinburgh Agreement – this was not the nature of the thing.

So if not a political pact, what is it? The difficulty of legal status is the difficulty in deciding what sort of legal document it is.

Is it a bird (that is: a treaty)?

The word ‘ratification’ and the ceremony attaching to the signing of the Edinburgh Agreement indicated a treaty-like process. This was an agreement between two heads of two governments, and their senior Ministers. However it was not of course a treaty in law because a treaty, according to the Vienna Convention on the Law of Treaties, ‘is an international agreement concluded by states.’ International law adds that the parties must intend to create legal obligations on the international plane. In the case of the Edinburgh Agreement only one party was a sovereign state.

Was it nonetheless perhaps an international agreement of some sort? The Vienna Convention does make some provision for ‘international agreements concluded between states and other subjects of international law’. However, who constitutes a ‘subject of international law’ is not defined, and again both parties would need to have intended their agreement to be binding as regards international law, and it seems clear that this is not the case.

It is interesting to note that the question of the legal status of documents signed between the UK government and sub-bits of the jurisdiction is
In other areas a deliberate choice seems to have been made to leave enforcement to the sphere of politics. For example, one role of the Scottish Parliament's devolved power. The Scottish Government to produce a referendum Bill which is to be debated and passed by the Scottish Parliament. In Government from ignoring this advice? The answer appears to be, 'public opinion, and political debate'. The Agreement provides for the position as that which technically applies to the UK government as regards Electoral Commission advice. What then, is to stop the Scottish government from unilaterally introducing 'a third question' by this mechanism), is dealt with in the frame of the section 30 Order. Article 3 makes it clear that power is only a speculative one (in the absence of the Scottish Parliament to do so). The Election Act 2014, for example, then the Agreement would effectively be rescinded and everyone would be back to the negotiating table. Could foot-dragging could be argued to frustrate legitimate expectations, particularly as no fixed timetable is given for the passing of the order in the Agreement, unless this was so extensive that it pushed the commitment to a fixed timetable of the Agreement itself, namely to provide for a poll before 'the end of 2014’. Again, this would require re-negotiation of the Agreement and a return to the status quo ante. As regards other possible forms of breach, key commitments are locked-down by different forms of legal enforcement, meaning that enforcement of 'legitimate expectations' is not necessary. The Memorandum of Agreement commitment, for example, that the Scottish Government 'will respond to the report, indicating its response to any recommendations that the Electoral Commission may make' (but note no legal obligation to affirm a decision). It is difficult to imagine the facts in which a doctrine of legitimate expectations could play out with respect to the Edinburgh Agreement – even if it were legally sustainable (and there are differences in the doctrine in Scottish and English courts). If either side were to refuse to affirm the section 30 Order, for example, then the Agreement would effectively be rescinded and everyone would be back to the negotiating table. The Agreement with the Scottish Parliament to the status quo ante in the capacity of the Scottish Government to hold a referendum. If outright breach is unlikely, what about, for example, for foot dragging: what if implementation of the section 30 Order were just to be delayed? (See the Devolution Matters blog for an interesting discussion of timetables relating to the section 30 Order) It is difficult to see how foot-dragging could be argued to frustrate legitimate expectations, particularly as no fixed timetable is given for the passing of the order in the Agreement, unless this was so extensive that it pushed the commitment to a fixed timetable of the Agreement itself, namely to provide for a poll before 'the end of 2014’. Again, this would require re-negotiation of the Agreement and a return to the status quo ante. As regards other possible forms of breach, key commitments are locked-down by different forms of legal enforcement, meaning that enforcement of 'legitimate expectations' is not necessary. The Memorandum of Agreement commitment, for example, that the Scottish Government 'will respond to the report, indicating its response to any recommendations that the Electoral Commission may make' (but note no pre-commitment requiring the Scottish Government to fully implement any recommendations of the Commission). Strictly speaking, therefore, the Agreement does not commit the Scottish Government to holding a referendum on the same day (effectively introduce 'a third question' by this mechanism), is dealt with in the frame of the section 30 Order. Article 3 makes it clear that power is only devolved if one poll is held, meaning that introducing a new poll would lead to arguments that the entire process is outside the scope of the Scottish Parliament’s devolved power.

In other areas a deliberate choice seems to have been made to leave enforcement to the sphere of politics. For example, one role of the Electoral Commission is to examine the referendum question and issue a report to be laid before the Scottish Parliament. The Scottish Government 'will respond to the report, indicating its response to any recommendations that the Electoral Commission may make' (but note no pre-commitment requiring the Scottish Government to fully implement any recommendations of the Commission). Strictly speaking, therefore, the Agreement does not commit the Scottish Government to holding a referendum on the same day (effectively introduce 'a third question' by this mechanism), is dealt with in the frame of the section 30 Order. Article 3 makes it clear that power is only devolved if one poll is held, meaning that introducing a new poll would lead to arguments that the entire process is outside the scope of the Scottish Parliament’s devolved power.

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If it is not legally binding, why did the parties therefore present it so formally as a 'super-agreement'? The role of 'political enforcement' may start to explain why the parties presented an Agreement in legal writing, legal form and with full signing ceremony. Paradoxically, the Agreement may have been presented so formally precisely because it had no binding legal status. The main mechanism for enforcing agreements of this type is through two dynamics: fashioning reciprocal agreements which it is the parties' self-interest to implement, and creating costs to a party's reputation in the event of breach.

As with all agreements, a key mechanism for enforcement is that of reciprocity – I will abide by my side, if you abide by yours. Here the Agreement legalizes itself to the extent that it provides for commitments for most eventualities, with clear timetables, and fashioned in precise language.

As regards reputation, whichever party breaches this agreement will look bad, be seen as unreliable in the future, and will be less likely to have people sign credible agreements with it. These costs of breach are real for the UK Government, which holds itself out as a credible
The Belfast Agreement (similarly lacking in any legal status) got through some of its darkest days because no-one wished to be seen as the party who breached first. Where parties did renge, they always tried to present their rejection of an obligation as an alternative reading of Agreement commitments rather than breach. Public debate and response acted as the court deciding whether they got away with this.

Interestingly, however, eventually a court of law did find the Belfast Agreement to have a quasi constitutional status that affected the interpretation of its implementing legislation – the Northern Ireland Act 1998 where that legislation was ambiguous (Robinson v Secretary of State for Northern Ireland, 2002 UKHL 32). There seems little that is ambiguous about the draft section 30 Order, but it would be likely that any ambiguity would be resolved by recourse to the background Agreement text, as definitive of the parties' intentions.

Who cares anyway: is this not a ridiculously academic discussion?

Well yes: lawyers love to consider hypotheticals and it is 99.99% likely that this discussion is a purely hypothetical one. To be super-clear: I am not suggesting or trying to suggest that the Edinburgh Agreement is flimsy, likely to be dishonoured, or does not settle the questions it purports to settle. But while an academic discussion, perhaps it is not ridiculously so. Hypotheticals are not merely fanciful intellectual exercises; they assist us in understanding what the legal consequences of a factual situation are. And surely it is interesting to consider whether law matters or does not matter in the context of two governments wanting to commit to a common resolution of an issue of immense constitutional significance?

The discussion challenges our legal sense of the availability of law. The Edinburgh Agreement could not be signed in a legally binding form because no easy, appropriate legal form exists for this type of agreement in our legal system. This is not so important in Scotland where violence and instability is not an issue. But it has been very important in other contexts where negotiations between governments and sub-state actors (governments or would-be governments) take place against a backdrop of violence, and where central governments change mid-process between pro- and anti- peace agreement parties and may wish to renege on the commitments of their predecessors without reputational loss.

The lack of legal status also challenges ideas about the usefulness of law. No-one much cares whether the Edinburgh Agreement has legal status or not because it simply matters. The Agreement has perhaps all the ingredients for successful auto-enforcement: tight legal drafting, a culture of governments honouring formal commitments, and reciprocal self-interest locked down by the reputational costs of breach. It is difficult to see how the 'added-value' of a legal agreement - court enforcement - would help. These ingredients will either remain or will not: if the Agreement self-executes no court is necessary, while if a party for some presently unpredictable reason pushes a 'destroy' button, no court is sufficient.

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