

Analysis: Letter of the law provides little clarity on what is legally binding

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The Scottish Parliament is the creation of the Scotland Act 1998, and its powers are defined that statute. Whatever the rhetoric, all that matters is what the Scotland Act says.

Schedule 5 of the Act defines matters reserved to the UK Parliament, including:

"1. The following aspects of the constitution...
....(b) the Union of the Kingdoms of Scotland and England."

Section 29 states that an Act of the Scottish Parliament is not law so far as it falls outside the Parliament's legislative competence, including (section 29(2)(b)) if

"it relates to reserved matters".

Clearly, if the Scottish Parliament passed legislation purporting to dissolve the Union, it would be "not law". However, that is not what the Scottish ministers hope to persuade the Scottish Parliament to do. Rather, they seek legislation only for a referendum on a question of dissolution of the Union. This raises the question of whether legislation for such a referendum would be "not law".

Of course, no-one has seen the terms of the proposed legislation, but suppose that it purported to provide for a "legally binding" referendum. Clearly no such referendum could legally bind the Westminster Parliament to dissolve the union, so what does the phrase mean? - that the Scottish Ministers would be placed under a legal obligation to seek to dissolve the Union? This would be nonsense, both legal (a body with delegated powers cannot further delegate) - and practical: what if no satisfactory divorce terms could be negotiated? What if the United Kingdom Government or Parliament were not to play ball?

Suppose, however, succeed in making the referendum "legally binding", then it would certainly be arguable that by mandating the result of dissolution, it did fall under the restriction in Schedule 5, paragraph 1(b) and would be "not law".

However, the restriction under section 29 is a restriction on legislative

competence, but it is not a gag. The Scottish Parliament may (and frequently does) debate anything it takes a mind to, even reserved matters, but what it must not do is legislate on a reserved matter.

Therefore, the rhetoric that is deployed by the Scottish Ministers is that the referendum should be merely "consultative". This recognises the practical difficulties inherent in devising a referendum which could be truly "legally binding", and perhaps is designed to circumvent the section 29 elephant trap. But does it?

Lawyers are notorious for hedging their bets when advising by saying "it all depends", but in this case, it really does all depend on how widely the Court interprets the Schedule 5/ section 29 restriction. Legislation for a consultative referendum would not purport to dissolve the Union, but nonetheless it arguably (in the words of section 29) *relates to* the Union and would therefore be "not law".

If, indeed, it is not law, then anyone showing the necessary interest to sue could bring an action of Judicial Review in the Court of Session to have the legislation declared invalid. Any elector resident, certainly, in Scotland would have sufficient title and interest to raise such an action. Therefore, even if the UK Government decided not to intervene, there is a high probability that an individual elector might choose to do so. If that happened, the result of such a challenge would not be determined until after the case had made its way through the Outer and Inner Houses of the Court of Session and the UK Supreme Court, causing a period of uncertainty unlikely to be in anyone's interests.

Of course, all of these uncertainties could be removed at a stroke by an amendment (perhaps by an Order under section 30) to the Scotland Act. The First Minister does not seem presently inclined to take up the Government on its offer to do this, claiming that there would be strings attached. The political calculation which has to be made is whether those strings (if they exist) are a price worth paying for removal of the doubt and uncertainty which would surround the Scottish Parliament going full steam ahead and damn the torpedoes.

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