HOUSE OF LORDS

HOUSE OF COMMONS

JOINT COMMITTEE ON DRAFT CONSTITUTIONAL RENEWAL BILL

Memorandum by M J Bowman, Director of the University of Nottingham Treaty Centre

RATIFICATION OF TREATIES

A. Issues of Principle

The following observations are for the most part presented on the basis that the proposed reforms are both desirable and likely to go ahead. The former proposition is not one, however, that can simply be taken for granted: the proof of the pudding will be in the eating, and much will depend upon the extent to which Parliament ensures that it has equipped itself with the necessary mechanisms and expertise to enable it to fulfil its functions effectively.

Question 31 - Balance of Powers

On the assumption that the present composition of the two Houses is to be retained, a reasonable balance would seem to have been struck regarding their respective powers. The next two questions, regarding the relationship between the Legislature and the Executive, are inextricably inter-related: the proposed power of the Commons to delay treaties indefinitely should certainly be conditional on the right of the Government to re-introduce particular instruments.

Question 32 - Scrutiny Prior to Signature

It would seem essential here to maintain a clear distinction between two very different scenarios involving signature: (a) where signature is essentially a preliminary to ratification; and (b) where signature actually represents the means by which consent to be bound by the treaty is expressed.

As regards (a), a case could possibly be made for greater Parliamentary involvement in the processes of treaty elaboration prior to the ultimate expression of consent to be bound, and in particular for some form of scrutiny of treaties immediately prior to signature: this might, indeed, both help to minimise the risk of the Legislature and the Executive subsequently finding themselves at odds over the desirability of ratification and serve as a means by which Parliament could enhance its expertise in relation to the treaty-making process generally. Furthermore, it is not to be overlooked that, even as a mere preliminary to ratification, signature entails the potentially significant legal obligation to refrain from action that might defeat the object and purpose of the treaty pending a definitive determination whether or not to ratify. It is less clear, however, that such matters need to be addressed as part of the instant process - it might be preferable for the mechanics

of such a system to be explored on an informal basis, perhaps by means of a trial or pilot study, with a view to possible enshrinement in legislation at a later stage.

(b) The second scenario raises altogether different considerations, however. It is certainly possible in principle, and not uncommon in practice, for consent to be bound by treaties to be expressed by signature alone, at least if the treaty in question does not exclude that option. There is, moreover, nothing to prevent this from occurring in circumstances which raise potentially significant implications for, say, civil liberties.[1] Although the legal consequences (in terms of the undertaking of commitments which are formally binding upon the UK under international law) are the same as where consent is expressed by ratification or accession, the process whereby treaties are accepted by signature alone will not be governed by the proposed arrangements at all - not even the attenuated set of safeguards in section 22(3) - since signature does not appear to fall within the definition of "ratification" in section 24. It may be that a plausible case can be made for allowing this process to remain unregulated, though I am unsure what it might be.[2] Rather, even without any presupposition of the likelihood of skulduggery, this looks like a significant loophole. It is not clear, however, whether the problem is best remedied by amending section 24 to incorporate the expression of consent by signature - I am inclined to think not, as I suspect it might create considerable practical difficulties. An alternative solution might be to seek to establish criteria to govern the exercise of the power to express consent by signature alone: at the very least, perhaps a provision could be adopted extending the safeguards of section 22(3) to cases where consent is expressed in this way.

Question 33 - Extension of the Statutory Period

It is difficult to rule out the possibility that some instance of unusual complexity might arise that would require a longer period for consideration than the standard 21 days. It could even be argued that that period is in any event unduly short. The optimal solution might entail the possibility of formal suspension of the statutory period (up to a certain time limit) to enable appropriate procedures to be completed, but I have no firm views or specific suggestions on this.

Question 34 - Ratification without Parliamentary Approval

Most of the relevant points regarding this issue are addressed in Part B of this paper. For now, it suffices to note that there is considerable attraction in the suggestion that the Secretary of State should pursue appropriate consultations in these circumstances, and that it might well facilitate the consultation process if some new Parliamentary mechanism were to be established to serve as the appropriate vehicle. The proposal envisaging a duty to report back also has much to commend it.

Question 35 - Definitions

The definitions now seem acceptable: the concerns raised in my previous paper regarding the definition of ratification have been fully addressed (though the point raised above in relation to signature under question 32 should not be overlooked).

Question 36 - Parliamentary Mechanisms

In Cm 7342-1, para.164, the Government suggests that it "would welcome any institutional change which would enhance the capacity of Parliament to contribute to the scrutiny of treaties within the statutory framework proposed", but regards it as being "for the Houses themselves to decide upon such arrangements". My only thought is that it is vital to ensure that two distinct forms of expertise are incorporated within any emerging institutional framework. The first relates to the substantive issues which form the subject-matter of the treaty under consideration (legal co-operation, human rights, the environment, finance, trade etc., or any combination of the foregoing). Cm 7329 provides some useful information on the role of the Joint Committee on Human Rights with regard to treaties falling within its remit, and careful consideration should be given to the extent to which the existing committee structure provides adequate foundations for the effective discharge of this function more generally.

Taken alone, this is unlikely to prove sufficient, however, as it will also be necessary to ensure the availability of specific expertise regarding the effective utilisation of the treaty as a technical mechanism for the recognition, protection and enhancement of relevant interests under international law. This expertise will be required to cover both the law of treaties and the practice of treaty-making. My experience of the academic world is that much contemporary commentary on international legal instruments is undertaken by those who are predominantly experts in the relevant provisions of their respective national legal systems (regarding human rights, the environment etc.), with the result that bizarre misconceptions tend to abound when they turn to discuss the specifically international, treaty-oriented aspects of their subject. Even genuine international lawyers tend nowadays to be specialists, with limited awareness of the development of practice regarding utilisation of the treaty-mechanism across the broad spectrum of international law. It is, with respect, difficult to believe that those who are not guaranteed to be legal experts at all will be any less prone to fall victim to such misapprehensions; yet failings of this kind could critically debilitate the potential of Parliament to enhance, rather than impede, the prospects of successful participation by the UK in the ever-expanding, rapidly developing and increasingly structurally-sophisticated network of international treaty arrangements. Accordingly, the institutional development of the requisite expertise should be seen as a priority, if not a pre-requisite to the success of the entire operation.

B. Questions of Drafting

Some tentative suggestions are offered regarding the drafting of Part 4 of the proposed bill.

Section 21

Some minor stylistic problems could profitably be addressed, viz:

Sub-section 1

"unless conditions 1 to 3 or conditions 1 to 4 (as the case may be) are met"

The drafting is less than ideal as the dichotomy posed is a false one: since, according to section 21(4)(b), condition 4 is itself expressed as a contingent element of condition 3, the two sets are not true alternatives.

The phrase "unless the following conditions are met" is shorter, simpler, and avoids this problem.

Sub-section 5(b)

"if the House of Commons resolved as mentioned in subsection (4)(b)"

This formulation seems flaccid, inelegant and open to possible misinterpretation. If it is thought desirable to invoke the specific provision which is the source of the power in question, would it not be preferable to provide

"if the resolution referred to in subsection(4)(b) was that of the House of Commons" ?

Alternatively, if such invocation is not necessary, might it not be clearer simply to state

"if [it was the case that] the House of Commons resolved that the treaty should not be ratified" ?

Section 22

There would seem to be some significant substantive problems here.

Sub-section 1

"exceptionally"

It seems surprising, as Question 34 implies, that no criteria of any description are specified to govern the exercise of this discretion. Is there not a risk that some hypothetical future Secretary of State might routinely submit to Parliament all treaties that seem likely to prove unproblematic, but choose to treat as exceptions certain cases where it was suspected that approval might not be forthcoming? It is to be remembered that, by virtue of the current sub-section 3, (s)he will be entitled to delay even laying a copy of the treaty before Parliament until after ratification. Obviously it is not difficult to envisage that situations might arise in relation to treaty ratification where time is of the essence, so that advance Parliamentary scrutiny might become impracticable, but surely it

would be possible to cater for these by means of some rather more restricted form of wording, e.g., "for reasons of exceptional urgency". It cannot, of course, be ruled out that there are additional situations apart from pressure of time that legitimately require to be addressed, but it would be useful if some indication could be given of what they might be, so that alternative forms of wording might be considered that would enable them to be adequately catered for, while still falling short of the sweeping terms currently proposed.

Sub-section 2

"But...."

It seems inappropriate to begin a sentence in this way.

"...after either House has resolved, in accordance with section 21(4)..."

It may be that I have missed something here, but the wording of this reference to section 21(4) seems baffling in its context. That provision establishes the power of either House to reject ratification of a treaty within a period of 21 sitting days after that treaty has been laid before Parliament, whereas the present provision surely embraces situations where the treaty may never have been laid at all (since that could be the very condition that the Secretary of State has chosen, on this occasion, to dispense with.) This formulation therefore appears inadvertently to negate the power of Parliament to "overrule" the Secretary of State in such circumstances, as the specified condition will be impossible of performance. (I.e., Parliament must act within 21 days of a non-existent date. This problem will not arise, of course, where it is a different condition - e.g. publication - that the Secretary of State has decided to disregard.)

Surely it will be necessary to make appropriate provision for the situation where the treaty has never been laid - viz.,

"A treaty may not, however, be ratified by virtue of subsection 1 if either House resolves, at any time prior to ratification, but in no event later than the expiry of the period referred to in section 21(4) [or alternatively ... the expiry of a period of 21 sitting days, beginning with the first sitting day after the day on which a copy of the treaty has been laid before Parliament], that it should not be [so] ratified."

On the other hand, it might prove highly embarrassing if such Parliamentary intervention were to occur at the very last moment, and especially once the ratification process had irrevocably been set in train, albeit technically not completed. If this is a significant concern, some form of words would need to be found to indicate that the cut-off time was the initiation of the process, rather than its completion, or to identify some other, more appropriate, date for this purpose.

Sub-section 3

"If a treaty is ratified by virtue of subsection 1, the Secretary of State must, ...before ... the treaty is ratified"

Again, the wording here seems inelegant in terms of the temporal relationship between the clauses highlighted, even though the complete sentence caters also for other situations in respect of which there is no such problem. A more appropriate form of words is, however, not at all obvious. Perhaps

"In any case of [or involving] ratification of a treaty by virtue of subsection 1, ..."

Paragraph (b)

The phrase "is of that opinion" appears a regrettably long way from the original reference to the opinion in question, which appears in the first line of sub-section 1. This might be regarded as unlikely to raise serious problems of interpretation, though any perceived difficulty could be mitigated by reversing the order in which sub-sections 2 and 3 appear, which would in any event seem to give a more logical and coherent flow to the entire section.

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[1] In the case of the 1985 Council of Europe Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches, for example, the UK was one of several countries that expressed its consent to be bound by signature alone. The convention was adopted in great haste in the aftermath of the Heysel Stadium disaster (unusually for Council of Europe treaties, there was no accompanying Explanatory Report) and it was evidently regarded as urgent to bring it into force as soon as possible. This is precisely the sort of context in which a treaty might generate unforeseen and unintended implications for civil liberties (which is not to suggest that it has necessarily done so here), and where some additional element of scrutiny might therefore be regarded as especially important.

[2] The Government itself has doubted the practicability of routine Parliamentary involvement prior to signature, but does not specifically address the (? relatively small) sub-set of cases where consent to be bound is to be expressed by that means.