A Tale of Two Cities: Devolution, a Referendum and the Constitution

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(...) no nation could be held irrevocably to a Union against its will and the way it works should be reassessed from time to time, so that it continues to work for the good of all of us. Too often in recent years there has seemed to be in Scotland a genuine, if sometimes unformed, anxiety that the Union is in some way less relevant to Scotland and her aspirations.¹

The disparity between London and Edinburgh² is more than political; it is also constitutional. The election success of the Labour Party in 1997 resulted in a commitment to devolution which altered the constitutional arrangements of the United Kingdom forever. In slightly over a decade, the process of devolution has propelled Scotland from Scottish Office, to Scottish Parliament, to an impending referendum on Scottish independence and secession from the United Kingdom. The architects of devolution, hypnotised by the politics of the debate, overlooked the constitutional consequences of devolution,³ an omission permitted by the flexibility of the United Kingdom’s uncodified constitutional arrangements. The purpose of this paper is to provide a summary of the current status of devolution and to utilise the Scotland Act 1998 to provide a constitutional perspective on the referendum, focussing upon the rule of law and the manner in which authority for the referendum will be granted to Edinburgh by London.

1. Devolution

For Scotland, devolution was not a novel concept. The Kilbrandon Report⁴ and the Scotland Act 1978 which followed sought to achieve a level of political autonomy for the Scottish people but failed at the referendum stage.⁵ Nearly two decades later, on

¹ Foreword by the Rt Hon John Major in Scottish Office, Scotland in the Union: A Partnership for Good (Cm 2225, 1993).
² For the purposes of this article ‘London’ should be regarded as referring to Westminster and Whitehall, as the seat of the United Kingdom Parliament and government, whereas ‘Edinburgh’ should be regarded as referring to the Parliament at Holyrood and associated locations of Government offices in Edinburgh.
³ A consultation of Hansard for the relevant debates will show a preoccupation with sovereignty, at most.
⁵ 40% of the registered electorate had to vote in favour of devolution.
the 11th of September 1997, the Scottish electorate concluded John Smith’s ‘unfinished business’, voting in favour of a Scottish Parliament complete with tax varying powers. The legal objective of devolution was to codify and to provide democratic representation for what was already within the administrative purview of the Scottish Office by adding to its existing remit and creating a statutory framework in the form of the Scotland Act 1998. The political objective of devolution was twofold: to ‘bring government closer to the people’; and, more importantly from London’s perspective, to tame the beast of Scottish Nationalism. Indeed, the establishment of the Scottish Parliament presented the political opportunity longed for by politicians to ‘kill nationalism stone dead’. Devolution’s primary objective was a political one, despite representing a significant constitutional development for the United Kingdom by creating a legislative body with significant power outside of London.

Of course, even prior to devolution, Scotland has always been different. Depicted as ‘(...) a symbolic gesture to nationalistic grievances over the way the Union was handled in London’, the origins of the Scottish Office in 1885 were rooted in a desire to appease feelings in Scotland about direct governance from London. Greater representation in London of Scottish interests was granted a further incremental step in 1926 following the creation of the post of Secretary of State for Scotland. Despite the initial ‘symbolic gesture’ of the position to placate the nationalists, the Scottish Office amassed a gradual increase in functions so that ultimately when circumstances mandated it, a distinctly Scottish policy perspective could be achieved. The twentieth century oversaw an exponential increase in Scottish Office functions in keeping with the concept that ‘(...) in the absence of evidence to the contrary, the machinery of Government should be designed to dispose of Scottish business in Scotland’. This ‘machinery’ was ultimately constructed via five Scottish departments administering Scottish affairs from a base in St. Andrew’s House in Edinburgh. The twenty-first century oversaw further change for the Scottish Office: following devolution, it ceased to exist, replaced by the ‘Scotland Office’. Yet, despite the name change, the Scotland Office retained the historic quarters in Dover House, Whitehall and the status of a full ministerial department and presence in London.

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6 Of the 60% of those eligible who voted in the Scottish referendum, 74% supported the creation of a Scottish Parliament and 63.5% agreed it should have tax raising powers: see UK Parliament, ‘Devolution in Scotland’ (SN/PC/3000, 2004) 3


8 Quote attributed to former Shadow Secretary of State for Scotland George Robertson, cited by Lord Mackay of Ardbrecknish in HL Deb, 24 July 1997, vol 581, col 1575.


10 Secretary for Scotland Act 1885: ‘An Act for appointing a Secretary for Scotland and Vice-President of the Scotch Education Department.’

11 Secretaries of State Act 1926.

12 Cairney (n 9) 437.

13 Royal Commission on Scottish Affairs, Report of the Royal Commission on Scottish Affairs (Cmnd 9212, 1954) [12].

14 From 1st July 1999.
Subsequent to devolution, the Scotland Office appears to have struggled to define a constitutional role for itself. A current strategic objective of the Scotland Office is cited as advocating the ‘(…) best interests of Scotland within the United Kingdom’.\textsuperscript{15} Such a grand purpose is vague in its remit. However, the Scotland Office has been more focussed in recent months with the promotion of the constitutional role of the Advocate General. The post was created to fill the void in Scottish legal advice provided to London subsequent to the relocation of the Lord Advocate to the Scottish Executive as one of the collective Scottish Ministers.\textsuperscript{16} The Office of the Advocate General is emerging as an important factor in the early stages of the Unionist’s campaign against Scottish Independence. London’s ability to portray the legal aspects of the referendum as a distinct theme, excised from the political, has removed some of the more contentious elements from the debate and refocused minds on constitutional affairs.\textsuperscript{17}

A synopsis of devolution would be incomplete without reference to the Scotland Act 2012 (the ‘2012 Act’) which comprises the next stage in the process of devolution for Scotland. This Act was borne out of the Commission on Scottish Devolution (the ‘Calman Commission’) charged with the following task:\textsuperscript{18}

To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, improve the financial accountability of the Scottish Parliament, and continue to secure the position of Scotland within the United Kingdom.

The Calman Commission was convened in response to the SNP’s \textit{National Conversation}\textsuperscript{19} project and involved all the main political parties with the exception of the SNP. Following a final report,\textsuperscript{20} the recommendations and findings of Calman were ultimately codified in the Scotland Bill and formed part of London’s legislative programme.

The most significant powers devolved are financial in nature and will once again modify the relationship between the two cities and shape the next phase of devolution.\textsuperscript{21} Yet, the ultimate extent and applicability of the 2012 Act will be dictated by the success or failure of the referendum.\textsuperscript{22} The level of fiscal autonomy which the 2012 Act will grant Edinburgh when fully operational will see an unprecedented transfer of statutory authority from London to Edinburgh. The

\textsuperscript{16} Scotland Act 1998, s 87.
\textsuperscript{17} The House of Lords Select Committee on the Constitution have observed the lack of legal detail in the Scottish Government’s consultation paper into Scottish independence. See House of Lords Select Committee on the Constitution, \textit{Twenty Fourth Report: Referendum on Scottish Independence} (HL 2010-12, 263) [20].
\textsuperscript{20} Commission on Scottish Devolution (n 18).
\textsuperscript{21} See Part III of the Scotland Act 2012.
\textsuperscript{22} Due to the timetable under which the financial provisions are to be introduced.
purpose of the legislation is to decrease the financial worth of the block grant to Scotland from the Treasury in London and devolve specific taxes to Scotland to compensate for this financial deficit. Under the new arrangements the Scottish Parliament will be responsible for raising approximately 35% of its revenue, with the remainder supplied by London. The accountability of the Scottish Parliament to taxpayers will, therefore, evolve into a far more tangible connection between collection and expenditure.

The financial aspects of the 2012 Act and the Bill that preceded it, have dominated the headlines and the true constitutional significance of the Scotland Act 2012 has been underplayed. Within the confines of the Palace of Westminster, criticism of the disregard shown for the constitutional repercussions of the new legislation has emerged: ‘In short, this is a major constitutional bill which has huge implications for the people in Scotland (...) and the rest of the United Kingdom.’

The 2012 Act and corresponding creation of a class of ‘Scottish taxpayer’ will engineer hypothecation of tax receipts within the United Kingdom which has considerable potential to change the dynamic of the relationship between citizen and state.

Further, there are fundamental constitutional implications for the rule of law which stem from the devolution of substantial financial powers to the Scottish Parliament without a corresponding review of, (i) how that power is to be exercised; and (ii) how accountability for the exercise of that power is to be achieved. The exercise of power and accountability for that power’s exercise cannot be separated from the political process. The current position of the SNP within the Scottish Parliament is unforeseen - the architects of devolution designed a voting system to prevent any one party obtaining an outright majority - and the accountability mechanisms in Edinburgh reflect this. The results of the May 2011 election and subsequent SNP majority in the Scottish Parliament concentrates a significant amount of power in the hands of one party, for the First Minister, Alex Salmond, has:

(... total control of a party with an absolute majority in a very small Parliament. There is no second chamber to check his conceits and caprices. The opposition parties are each in such a state of disarray that only my colleagues in the political media community (...) can impose the necessary scrutiny. This they must do.

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23 Part III of the Scotland Act 2012.
26 Scotland Act 2012, s 25.
27 A combination of first-past-the-post and proportional representation.
The accountability within Holyrood was, therefore, never designed to operate in the circumstances which the 2011 election has created or which the 2012 Act will produce when fully operational. The significance of this accountability gap cannot be overstated: the rule of law demands that relationships of power and accountability are inextricably linked and must be appropriately balanced. Edinburgh has the potential to operate in an environment where constitutional checks and balances provided by Parliament holding the Executive to account are strained, leaving the courts to fill the void.

As evidenced by the recent *Axa* litigation, the courts are still defining their role post-devolution. Although the Supreme Court held that Acts of the Scottish Parliament are only subject to judicial review on statutory grounds and not on the common law grounds of irrationality, unreasonableness or arbitrariness, their Lordships did not bind the court and allowed room for manoeuvre, as will be discussed below. Therefore, the role of both the Scottish courts and the Supreme Court after devolution is still to be fully determined, particularly in relation to the Supreme Court as a final court of appeal. Hence, the practical constitutional consequences of devolution are no longer confined to the academic. The proposed referendum on Scottish independence will entail examination of more than the politics of devolution, it will focus attention upon both the rule of law and the separation of powers as these fundamental constitutional tenets are tested by the limits of Edinburgh’s authority and by the Scotland Act 1998 itself.

2. A Tale of Two Cities: the Referendum

A. The Constitution and Devolution

The Scottish Parliament is a statutory body – the source of all power and authority is a singular piece of legislation with prescribes the legislative competence of the Parliament. Section 29(1) of the 1998 Act states: ‘An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament’. As a result, the nature and exercise of power is statutorily controlled and, therefore, open to judicial interpretation through the civil courts in a way that Westminster’s acts and omissions are not. Naturally, there will be circumstances where the demarcation between reserved and devolved is not so clear: ‘It has been recognised that the scheme of devolution means that it is not possible for reserved and devolved areas to be divided into precisely defined, watertight compartments. Some degree of overlap will be inevitable (*Martin v HM Advocate* 2010 SLT 412: Lord Hope of Craighead at para 11)’. Matters of statutory interpretation aside, the Scottish Parliament is not an equal; it is a subordinate operating under the

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29 *Axa General Insurance Ltd and Others v The Lord Advocate and Others* [2011] CSIH 31 (Inner House) and [2011] UKSC 46 (Supreme Court).
30 This case will be considered further below.
31 As defined by the Scotland Act 1998.
constraints of an Act of Parliament. Of particular relevance to this article is section 29(2)(b) which prohibits the Scottish Parliament from legislating on reserved matters and, therefore, according to the list of reserved matters in Schedule 5: ‘The following aspects of the constitution are reserved matters, that is – (...) (b) the Union of the Kingdoms of Scotland and England’. Therefore, according to the Scotland Act 1998, Edinburgh cannot cleave Scotland from the Union without London’s assistance.

In constitutional terms, devolution has left sovereignty untainted. Critics may cite sovereignty as a solely English doctrine and that, notwithstanding Scotland’s Union with England and Wales in 1707, the adoption of sovereignty as an indisputable fact is not an automatic and foregone conclusion. Yet, this article would respectfully submit that the Treaty and Act of Union 1706-1707 abolished the two sovereign Parliaments and established a new sovereign Parliament at Westminster. The Scottish people became part of the sovereign nation of the United Kingdom and accordingly under the authority of Parliament who, through exercise of Crown powers, retained the sovereign right to legislate for the whole United Kingdom. Therefore, the traditional Diceyan view of sovereignty retains its integrity:

The principle then of Parliamentary sovereignty may (...) be thus described: Any Act of Parliament which makes a new law or repeals or modifies an existing law, will be obeyed by the Courts (...) There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament.

Accepting Dicey’s proposition, the Scottish Parliament may create problems for the political sovereignty of Westminster, in regard to the political capital that would require to be spent if Westminster was to legislate for Scotland over the wishes of the Scottish Parliament, but the legal sovereignty of Westminster remains untramelled. Therefore, despite the devolution of further financial powers and greater fiscal accountability of the Scottish Parliament under the new Scotland Act 2012, sovereignty remains unchanged. It is the political circumstances within which devolution operates which have altered. However, it would be a mistaken belief to regard these political changes as having no effect upon constitutional law.

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34 Scotland Act 1998, Sch 5 para 1 subpara (b). This section will be explored in further detail below.
35 See MacCormick v The Lord Advocate 1953 SC 396.
36 Union with Scotland Act 1706 and Union with England Act 1707.
37 The traditional Diceyan model has been criticised. For an alternative perspective see M Elliott, ‘Parliamentary Sovereignty under Pressure’ (2004) 2 IJCL 3 545.
B. The Referendum: “purpose” and “effect”

Both governments in Edinburgh and London have published consultation papers into the question of a referendum on Scottish independence\(^{39}\) and, as the House of Lords Select Committee on the Constitution has observed, ‘[T]he two governments’ respective consultation papers raise a variety of constitutional and legal issues, which cluster around two main points: the power to hold a referendum on Scottish independence and the nature and design of the referendum question’.\(^ {40}\) This article will focus on the former aspect of the referendum question, using the Scotland Act 1998 as a basis for the analysis.

As already noted above, the Scottish Parliament and Government therein, is statutorily prohibited from legislating outside its competence.\(^ {41}\) A referendum on Scottish independence would, therefore, likely conflict with the aforementioned provisions of the 1998 Act. The potential for an Act of the Scottish Parliament providing for a referendum on Scottish independence to be rendered \textit{ultra vires} is further substantiated when section 29(3) is referred to:

For the purposes of this section, the question whether a provision of an Act of the Scottish Parliament relates to a reserved matter is to be determined, subject to subsection (4), by reference to the purpose of the provision, having regard (among other things) to its effect in all the circumstances.

If the “purpose” and the “effect” of a piece of legislation providing for a referendum are considered, its purpose is to initiate the process of the deconstruction of the Union between Scotland and England and its effect is to provide the means for this procedure to begin. As already discussed, the Union between Scotland and England is a matter which is reserved to London and, therefore, strictly outside the Scottish Parliament’s powers. Consequently, this renders any such Act \textit{ultra vires} and capable of review by the Supreme Court under the processes delineated in section 33 of the 1998 Act.

Referring back to the Scotland Act 1998 and specifically section 29(2)(b), the question ought to be raised as to whether it was ever London’s will to allow such a referendum to be within Edinburgh’s purview. According to the late Donald Dewar, ‘A referendum that purported to pave the way for something that was \textit{ultra vires} is itself \textit{ultra vires}. That is a view that I take, and one to which I will hold’.\(^ {42}\) The purpose of any such referendum is clear: it represents a step on the road to independence, there is no other purpose. Indeed, it is suggested that any attempt to describe the referendum as “consultative” is misleading and constitutionally inept, particularly in view of the Inner House’s comments in \textit{Imperial Tobacco, Petitioner}.\(^ {43}\)


\(^{40}\) House of Lords Select Committee on the Constitution, \textit{Twenty Fourth Report: Referendum on Scottish Independence} (2010-12, HL 263) [3].

\(^{41}\) Scotland Act 1998, s 29(1) and specifically s 29(2)(b).

\(^{42}\) HC Deb, 12 May 1998, vol 312 col 257.

\(^{43}\) \textit{Imperial Tobacco, Petitioner} [2012] CSIH 9.
Per Lord Brodie: ‘(...) what section 29(3) makes determinative is the purpose of the provision in question. That has to do with the legislative objective as disclosed by the preparatory material’. The purpose and effect of any legislation on a referendum on Scottish independence is undeniable, an alternative interpretation is illogical and hence draws the subject matter firmly into ‘reserved’ territory. Furthermore, the status of referenda in the United Kingdom are such that they only have an advisory status; a referendum result may be regarded as politically binding, it is not legally binding. Therefore, it is submitted that interpreting any Bill on a referendum as having a consultative effect and purpose is invalid and lacks credence as a legitimate and decisive point of debate.

Yet, this paper would be lacking if the alternative perspective were not considered and rebutted. An argument does exist which, its proponents suggest, could potentially provide Edinburgh with the requisite authority to hold a referendum without London’s assistance:

If a question is carefully crafted, asking people whether or not their preference is for independence and making clear this would only be treated by the Scottish Government as a political mandate to enter negotiations, this would seem to fall within competence.

This approach is similar to that proposed by MacCormick in the early days of devolution, which went so far as to propose an appropriate question: ‘Do you advise and consent to the Executive opening conversations with the United Kingdom government to agree terms of Scottish independence on the basis of the constitution envisaged, or on such other basis as the people, by then, choose to put in place?’ Tierney also proposes that should such an Act be regarded outside the Scottish Parliament’s competence, that it would be possible to ‘(...) read legislation providing for a consultative rather than a binding referendum to be within competence using a liberal interpretation as invited by section 101’. Although Tierney appears to suggest that a wide reading of section 101 should be preferred, it is unlikely the courts would be sympathetic to such a proposal. Indeed, such an approach has been expressly rejected by the Inner House.

In Imperial Tobacco, Petitioner his Lordship, Lord Reed, emphasised that:

(... the power of the Scottish Parliament to legislate is limited by the Act of Parliament which established it. It is the function of the courts to interpret and apply those limits, when called upon to do so, so as to give effect to the intention of Parliament. In performing that function, the courts do not undermine democracy but protect it.

44 ibid [202] (Lord Brodie).
47 Tierney, ‘A constitutional conundrum’ (n 45).
48 Imperial Tobacco (n 43).
49 ibid [58] (Lord Reed).
Therefore, consequences of any decision about the validity of an Act of the Scottish Parliament will have constitutional implications in addition to the more immediate political ones. The rule of law must be respected and the courts are acutely aware of their role and responsibility as guardians of this fundamental constitutional tenet. Further, the judiciary must remain alert to the democratic mandate of the Scottish Parliament and the importance of the separation of powers. However, the politics of the referendum will not cloud the judiciary’s view; Westminster remains sovereign and in the absence of amending legislation, the Scottish Parliament must act in accordance with the rule of law.

C. Section 30 Order

In an attempt to provide Edinburgh with the requisite authority to conduct the referendum, London has proposed the use of a section 30 order. This provision of the 1998 Act specifies that, ‘Her Majesty may by Order in Council make any modifications of Schedule 4 or 5 which She considers necessary or expedient’. Orders in Council are a manifestation of the Royal Prerogative and are regarded as a form of primary legislation, although do not possess the full force of an Act of Parliament as they are subject to judicial review. Prerogative power exists as residue from the days of absolute monarchy and is a power which has gradually been claimed and refined by Parliament through a process that began with the Bill of Rights in 1689 and ended with the Reform Acts of the 19th century. Today the prerogative is exercised by the Government in the absence of effective parliamentary oversight and, therefore, effective accountability and can hence be regarded as ‘(...) no longer appropriate in a modern democracy’.

In 2009, in an attempt to address this lacuna in the accountability of the Executive to Parliament, the then Labour Government launched a Green Paper entitled The Governance of Britain which noted:

The flow of power from the people to government should be balanced by the ability of Parliament to hold government to account. However, when the executive relies on the powers of the royal prerogative – powers where government acts upon the Monarch’s authority – it is difficult for Parliament to scrutinise and challenge government’s actions.
In the interests of democracy, therefore, the circumstances in which the prerogative should be used are limited. Granted, a section 30 order is required to be laid before and approved by both Houses of Parliament and the Scottish Parliament. However, upon reading section 30, alongside the supplementary provisions in sections 112 to 116, it appears inappropriate that a procedure to enact legislation, via an Order in Council, should be used to grant power to the Scottish Parliament to conduct a referendum on Scotland’s constitutional future. Particularly so when the practical considerations of such an order are contained within Part VI, the ‘Supplementary Provisions’ section of the 1998 Act. These provisions were intended to ensure the practical operation of the Scotland Act. They cannot have been designed to effect constitutional reform or to initiate the secession of Scotland from the Union.

While London may regard the use of a section 30 order as ‘necessary’, when the constitutional consequences of permitting such an order are considered, it cannot be construed as expedient. Presumably such an order will be subject to the level of scrutiny normally accorded to subordinate legislation due to the pressures on parliamentary time. By enacting a piece of primary legislation, London would afford the referendum an appropriate level of political debate and corresponding scrutiny. In essence, democracy would be served. Furthermore, the potential for a legal challenge regarding such a referendum must not be discounted. By allowing the Scottish Parliament to pass a Bill under those circumstances, there exists scope for judicial consideration of the corresponding Act which would not be possible with an Act of the sovereign Parliament. Such a challenge would ultimately be decided in London by the Justices of the Supreme Court and would require sensitive handling, particularly following what some would regard as the SNP’s actions in recent years to undermine the authority of the Justices.

Evident from the recent Axa litigation is the courts’ traditional deference to the separation of powers. The judiciary have an inherent and constitutionally appropriate distaste for intervening on specific matters of devolution due to the Parliament’s legitimacy as a democratically elected body.

A sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty. But it shares with the devolved legislatures, which are not sovereign, the advantages that flow from the depth and width of the experience of its elected members and the mandate that has been given to them by the electorate. This suggests that the judges should intervene, if at all, only in the most exceptional circumstances.

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56 ‘Type A’ procedure is to be followed: see Scotland Act 1998, Sch 7.
57 Consideration of the issue during the Scotland Bill’s stages certainly does not point to it being used for such a significant issue.
59 Axa (n 29).
However, despite such respect for the separation of powers and with reference to these ‘exceptional circumstances’, there is a stronger force – the rule of law:\footnote{ibid [51] (Lord Hope).}

We now have in Scotland a government which enjoys a large majority in the Scottish Parliament. Its party dominates the only chamber in that Parliament and the committees by which bills that are in progress are scrutinised. It is not entirely unthinkable that a government which has that power may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.

Therefore, it is not inconceivable that should the rule of law come under pressure as a consequence of the actions of the Scottish Parliament and Government therein, the judiciary would, at least in theory, be prepared to intervene. Given the nature of the referendum proposed, MSPs must defer to the law and the statutory limitation of their powers. There is no other viable option.

\section*{3. Conclusion: The Constitution, Devolution and a Referendum}

It is a fundamental principle of the constitution that, irrespective of any party’s political mandate to form a Government, all governments must act in accordance with and subject to the rule of law. Likewise, the Scottish Parliament and may make law only within the limits of its competence.\footnote{House of Lords Select Committee on the Constitution (n 40) [13]-[14].}

Scotland could never be provided with a Parliament of the same status as that relinquished in 1707; the sovereignty of the United Kingdom Parliament proscribed it. However, devolution has achieved constitutional change on an unprecedented level, presiding over a transfer of powers from London to Edinburgh. The nature of this constitutional change engenders an exquisite fluidity to the arrangements – ‘devolution is a process, not an event’.\footnote{Attributed to Ron Davies < http://www.assemblywales.org/abthome/role-of-assembly-how-it-works/history-welsh-devolution.htm> accessed 12 June 2012.} The construction of devolution and the referendum as singularly political issues and not the concern of the constitutional is a false dichotomy. The constitutional significance of the nature and source of the devolved powers, hidden under the behemoth of political consequences which devolution entailed, has perpetuated the constitutional illiteracy which has plagued reform in the United Kingdom.\footnote{The unforeseen consequences of the Human Rights Act 1998 being a case in point.} The British tradition of muddling along, of believing our uncodified constitutional arrangements can survive forever has created a false sense of security.

It is the law which, in the end, may ultimately resolve these questions. The rule of law cannot be circumvented. In focussing upon the constitutional issues at the
centre of this debate, which in turn respects both the rule of law and the determined will of the Scottish people, the most appropriate conclusion to the referendum debate can be reached. Furthermore, this article has served to illustrate that, despite the parliamentary time devoted to the recent Scotland Act 2012, London would elect to utilise an Order in Council to grant Edinburgh the authority it requires to call a referendum and in seeking recourse to section 30, chooses to exercise a provision of the 1998 Act which cannot have been intended to facilitate such an event. The anti-democratic nature of the prerogative combined with the ability of the courts to adjudicate upon the Scottish Parliament’s acts and omissions demonstrate that it embodies an inappropriate exercise of such power. In the words of Lord Hope:

The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The United Kingdom Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament (...). Sovereignty remains with the United Kingdom Parliament.

UK constitutional law is precariously constructed upon relationships of power and accountability. Unlike the sovereign Parliament at Westminster, the Scottish Parliament is accountable both to Westminster and to the courts. The importance of the rule of law in this debate cannot be neglected and our politicians must have regard to the words of Lord Hope; the success or failure of a referendum and the future of devolution may well depend upon it.

Axan 60) [46] (Lord Hope).