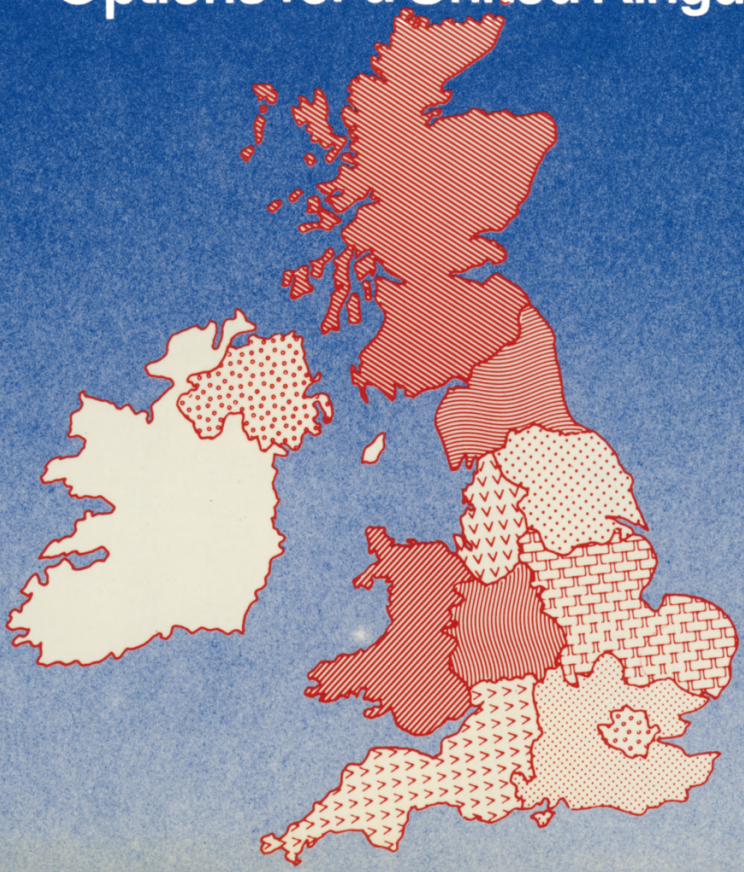
Bernard Burrows
& Geoffrey Denton

DEVOLUTION
OR
FEDERALISM?

Options for a United Kingdom



DEVOLUTION OR FEDERALISM?

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Also by Geoffrey Denton

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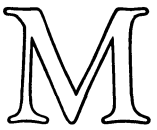

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Foreword

This book is the result of a study initiated in 1977, and conducted, in the tradition of the Federal Trust for Education and Research, by means of group discussion, contribution and comment. We would like to express our very warm thanks to all those who spared their time to take part in study group meetings or personal discussion or who gave us written material and comments. Their names are as follows: Ota Adler, Ralph Bancroft, Professor Birch, Lord Campbell of Croy, Jenny Chapman, Sir John Colville, Diane Dawson, Professor Douglas Dosser, Neville March Hunnings, Nevil Johnson, Dr James Kellas, Sir David Lidderdale, Kenneth Lindsay, Mrs Patricia Elton Mayo, Geoffrey Smith, Dr Alasdair Stewart, Professor Maurice Vile and Mrs Lucy Webster.

We have not necessarily accepted all the views expressed to us. Equally, none of our contributors are responsible in any way for the comments or conclusions which we have incorporated in the book and for which the co-authors alone are responsible.

We would also like to express warm thanks for a generous donation received from the Esmee Fairbairn Trust towards the expenses of the study and which gave us great encouragement in pursuing this task.

April 1979

BERNARD BURROWS
GEOFFREY DENTON

Preface

'Devolution is dead: long live Federalism' or 'Devolution is dead: now we can go to sleep again'? This is a rather stark way of posing the alternative choices now open to politicians and public opinion following the failure to implement the Scotland Act and the Wales Act. In determining which choice to make it will be necessary to be clear on two sets of considerations: how strong, in spite of this reverse, are the nationalist, regionalist, autonomist, or separatist tendencies, not only in Scotland and Wales but in the rest of the United Kingdom? Could federalism provide a system of government which would avoid some of the criticisms and weaknesses of devolution?

The answer to the first question will be for political analysts, opinion pollsters and party managers to investigate as time goes on and we cannot pretend in this book, going to press in the immediate aftermath of the referendums, to contribute to the answer. We would, however, urge that whatever the state of opinion is judged to be, the political reaction to it should be based on broad long-term considerations, and not, as so often in the past, on calculations of short-term electoral advantage.

Our purpose in this short book is rather to provide some material for the answer to the second question: would a federal system for the UK be better and more acceptable than the devolution proposals?

It may seem odd at first sight when the comparatively modest proposals in the two Acts have been rejected (by referendum in the case of Wales, by the balance of political forces in the case of Scotland), to propose that a more radical rearrangement of government may be more acceptable. There are three reasons why it may be so.

A federal system for the UK as a whole would accord more worthwhile powers to the provincial executives and assemblies. Secondly the units in a balanced federation (with English regions) would be more nearly equal to each other, and the establishment of the system would be the result of a long process of negotiation

between future partners, rather than a revocable grant from an immensely more powerful unit (the UK) to two of its smaller components (Scotland and Wales).

Thirdly the 'West Lothian Factor' would be avoided. This was the argument, which cost devolution a good deal of support, that under the Scotland Act Scottish MPs at Westminster would be able to continue to vote about purely English concerns, such as education in England, whereas English MPs would not be able to vote about Scottish education because this was a subject reserved to the Scottish Assembly. Under a proper federal system each Assembly would have power on matters allocated to the provincial level within its own geographical area but not in that of any other province. The federal Parliament would have power on matters allocated to it over the whole area of the federation without discrimination and subject to the checks and balances of provincial representation in an upper chamber.

It could be argued therefore that the federal system is more likely to last, less abrasive in its effects and less likely to be used as a springboard for complete separation.

Two further morals could perhaps be drawn from our present discontents. The UK is faced by a persistently disappointing performance of the economy and an apparent unwillingness of the British people either to accept a reduced standard of living or to work harder to avoid this. In such circumstances there may be greater readiness than usual to accept even radical changes in the system in which we live, in the hope that these may help us to break out of the vicious circle. The only two constitutional changes currently on offer—a revised devolution proposal or a reform of the committee system in the House of Commons—are unlikely to seem adequate for this purpose. Federalism, by bringing some aspects of government nearer to individual people, might succeed in involving them more closely in the search for constructive and adequate reforms in other parts of the system.

Secondly, and perhaps more tentatively, more attention needs to be paid to the non-governmental aspects of federalism. Would the UK economy fare better if institutions other than government and parliament were divided, for some purposes, into smaller units? For example, parts of industry, public utilities, trade unions? Some tendency in this direction has already been visible in 1979, in so far as the intensity of industrial disputes and the consequent effect on industrial performance and the functioning of public services have

varied conspicuously from one part of the United Kingdom to another. Would it be right to go further in this direction, so that the whole country could not be brought to a halt by the failure of a single industry or the obstinacy of a single management or of the unions operating in a single public utility or public service undertaking?

An implication of this kind of development would be to encourage freedom of choice in which part of the federation to live, and a further spur to mobility and readiness to exchange one dwelling for another, as in one case already occurs: parents choose to live where they think the schools are best for their children. Mobility between provinces of a UK federation for these or other reasons, would be welcome in strengthening mutual comprehension and the coherence of the system as a whole.

Finally, if there seemed to be popular support for the idea of a federal system, where and how would one begin to give it form and substance, and how long might this take? Are we talking about the next Parliament or the next century? One of the early dilemmas is this: can one hope for a political decision to explore federalism for the UK in advance of having a fairly extensive blueprint of what it would be like? Can one get such a blueprint without setting up a Royal Commission, or something like it, with a mandate to produce a model of a federal system? In fact, a lot could probably be done by building on and extending the work of the Kilbrandon Commission, particularly the Minority Report. The fact that the proposals based on Kilbrandon have failed does not mean that all the analyses in these reports need doing all over again. It would be relatively simple to describe the essential elements of a federal system, to estimate how far they meet the feelings which gave rise to the Kilbrandon enquiry and then to invite political, academic, industrial and public comment. Federalism is so much misunderstood, and regarded with so much suspicion for what it is not, that a great effort of dissemination and explanation is required before relevant and significant comments can be expected. Emphasis and time should be given to this process of exposition and consultation rather than to new analyses and detailed institutional diagrams.

If the principle gained adherence regional consultative bodies would have to be set up, not only in Scotland and Wales but in the potential English provinces and in Northern Ireland, and the process of constitution building could then begin. This could be done at first without final commitment to any particular system, but

perhaps with a fairly definite timetable for agreement to be reached. If the programme slipped too badly this would have to be taken as an indication that the country was not ready for such a system at all and the attempt would be abandoned. In such a case it would be better to decide to make the best of present institutions, with minor reforms, rather than to flounder indefinitely in a constitutional limbo with existing institutions under attack but no agreement on what should be put in their place.

1 Introduction

This book arose out of the dissatisfaction evident on all sides about the likely outcome of the Devolution Acts. For a variety of reasons, many of which emerge later on, the legislation failed to satisfy either the supporters or the opponents of devolution. This result may to some extent be written off as the normal outcome of democratic politics, where the best compromise is often the one that completely satisfies nobody. But there are strong reasons for believing that the constitutional structure emerging from the devolution debate is far from being optimal. The most solid opposition in Parliament to devolution came from the Conservative Opposition. It is therefore appropriate to quote as the starting point of this paper from a speech by the then Conservative spokesman on devolution. Mr Pym was reported (*Financial Times*, 24 July 1978) as fearing that the Devolution Bills could lead to 'federalism by stealth', and that the 'quasi-federal system' that would be introduced would 'bear the hall-marks of instability, inconsistency and confusion'. Mr Pym was at pains to emphasise that, in calling for a discussion of federalism, possibly by an all-party Conference, he was not himself advocating federalism, but that: 'if we are to end up with quasi-federalism I would rather we did so on the basis of a scheme founded on federal practices and principles than one that is internally inconsistent'. It is in this spirit of concern about the consequences of the half-baked approach to devolution, and of a desire to investigate the merits, and the problems, of a fully worked out federal system, that this paper has been written.

The chief object of this paper, then, is to examine what federalism has to offer as a method of dealing with the pressures now being felt in the UK for a change in the relationship between the centre and (some of) the regions, and to analyse what are the essential differences between federalism and other constitutional proposals.

It is not within our purpose or capacity to analyse fully what the pressures for constitutional change are, still less their strength and

the necessity or desirability of change. They present a shifting scene, in which the competition between national parties and the search for short-term electoral success have played a complicating and distorting part. However, estimating which changes, if any, would best satisfy the various kinds of pressure which have prompted this debate requires an understanding of the whole range of possibilities for change in the relation between the component parts of the United Kingdom. Such an understanding has been absent, especially with respect to the meaning of federalism as a constitutional form.

We consider in occasional references the relevance to the debate about constitutional change in the UK of the half-century experience of a separate assembly and government in Northern Ireland. However, we do not examine federalism as a solution to the political and constitutional problems in Ireland itself. Northern Ireland would, of course, be seriously affected by the adoption of a federal system for the UK, and so would the Irish problem as a whole. It is also possible that the search for a solution to the Northern Irish problem could act as a catalyst for constitutional change in the UK as a whole. However, this problem is so complicated by demands that the province should be united with a sovereign state outside the UK, that it appears sensible to leave the Irish question entirely out of the present discussion. This paper, therefore, though it refers to the United Kingdom, essentially deals only with Great Britain, and nothing said here should be taken as implying any proposals or comments on the situation in Northern Ireland.[1]

A further complicating issue is that of the constitutional relations between the UK and the European Community. It has been accepted since the Treaty of Accession, and underlined by recent decisions of the European Court, that, in the areas covered by the Treaty, European Community law is superior to UK law. This leads to the conclusion that, in discussing UK constitutional arrangements it must be borne in mind that in certain areas there are limitations deriving from UK membership of the European Community. The point is sometimes expressed in terms that the Treaty of Accession is the beginning of a written constitution for the UK, overriding the normally assumed supremacy of Parliament. However, the areas covered by that Treaty are so far largely restricted to economic matters of international import. The Treaty provides for a continuing legislative process, but each Member

government has an effective veto, and the process of transfer of authority to European Community institutions by unanimous agreement is so little advanced that it would, in our judgement, be wrong to allow Membership in the EEC to dominate the discussion of the UK's internal constitutional arrangements. We proceed, therefore, by first examining the UK's internal constitution without reference to the EEC, and the implications of EEC Membership are only discussed at the end, in Chapter 8.

Objections are expressed to federalism from two entirely opposite directions. Those who object to greater integration of the European Community say that in doing so they are rejecting federalism. For example, Anthony Eden in 1952 rejected British membership of the European Defence Community on the ground that it implied a federal structure. Similarly, direct elections to the European Parliament were opposed as creating the parliamentary basis for a European federation. By contrast, in the debate on devolution inside the UK, federalism has been opposed as destroying the unity of the Kingdom. Thus in the European debate 'federal' is taken to mean integrated or centralised, while in the UK debate it is held to mean excessively decentralised or fragmented.

The common factor in the two attitudes may be no more than objection to constitutional change of any kind, and especially to what is feared may be irreversible change. In devolution, as proposed in the original Scotland and Wales Bill introduced in the Session 1976/77, and in the later separate Scotland and Wales Bills in 1977/78, Westminster would grant certain powers to smaller units and Westminster, therefore, as a matter of constitutional right could take these powers back. Much of the objection to devolution lies in the more realistic supposition that once such powers are granted and new institutions set up, these will be used as instruments of political pressure to obtain still greater powers, regardless of the constitutional position. Paradoxically, objections are sometimes made against federalism on the ground that in federal systems the central (federal) government tends to increase its powers relative to the provinces.[2]

The apparently contradictory opposition to federalism as being both centralising and decentralising reveals an important truth about this system of government. Political scientists have great difficulty in defining the characteristics of federalism. However, it is necessary to have some working definitions in order to avoid repetitious explanations, and the possibility of misunderstanding.

The definitions found in the Glossary are therefore purely for the purposes of clarity in this discussion, and do not lay claim to scientific precision. Appendix I contains brief accounts of some existing federations, as background to a number of references made in the text. It is at least clear that the essential feature of any federal system is an agreed distribution of authority among different levels of government. Those who cling to the unitary nation state as the single centralised sovereign political entity exercising all authority are right to be fearful of federalism. A federal Europe would be one in which more decisions would be taken, on a certain limited range of subjects, at the level of the European Community. It would also be a Europe in which other decisions were taken at a level below that of the nation state, by the provinces. An extreme version of a federal Europe envisaged by some federalists would consist of only these two levels: the Community and the provinces.[3] But that would be widely regarded as improbable, at least for the next half century, given the immense continuing significance of the nations.

2 The Federal Idea in UK History[1]

Reactions to federalist proposals for solving current problems in the UK are often coloured by an assumption that federalism is a system which may be excellent for Americans, Canadians, Australians, or even Swiss or Germans, but is unknown and alien to the British people. Such a prejudice reveals a lack of historical knowledge and imagination on the part of the English, for federalism has been under discussion in the context of the constitutional arrangements in the British Isles at least since the beginning of the eighteenth century, long before the US federation was created. Moreover, several proposals for establishing a federal system have been debated in the UK Parliament during the last one hundred years. The federalist idea is thus by no means alien to the UK, even if the centralising tendencies have so far predominated.

At the time of the negotiations leading to the Union of the Parliaments of Scotland and England, proposals were made to introduce a federal system rather than an incorporating union. But

> the negotiations of 1706 were largely . . . a hollow show, with any appearance of hard bargaining on the part of the Scots commissioners made largely to secure prestige at home. Thus, they countered the demand for an incorporating union with a weak plea for federalism which they did not sustain.[2]

This 'federal' proposal did not resemble modern federalism with central and provincial parliaments and governments, but rather a confederal league of states with equally sovereign Parliaments in Scotland and England. From an allusion to the 'States General' in the records it seems that the Scots Commissioners had the Dutch Confederation in mind.[3]

Historians have noted widespread popular opposition in Scotland in 1707 to the 'incorporating union'. However, the Union

settlement contained some concessions to Scottish nationalism, in the form of 'quasi-federal' features, such as the perpetual guarantees for an independent Scottish legal system, the Established Church of Scotland, Scottish universities, and royal burghs.[4] But the Union settlement contained no procedure for judicial review, no amending procedure, nor any explicit limit on the powers in Scotland of the Parliament at Westminster. Scottish judges have in recent years pronounced on some of these matters, as in *MacCormick and Another v. The Lord Advocate* (1953). Lord Cooper stated that the unlimited sovereignty of Parliament 'is a distinctively English principle which has no counterpart in Scottish constitutional law', and the Scottish Supreme Court, the Court of Session, *was* prepared to pronounce on breaches of the Act of Union in terms of unconstitutionality. However, it has never ruled an Act of Parliament unconstitutional. Other Scottish lawyers have been impressed by the special nature of the Act of Union as a 'fundamental law of the Constitution', which Parliament should not treat as an ordinary Act of Parliament.[5]

During the nineteenth century 'Home-Rule' movements developed in Ireland, Scotland and Wales, coming together in the 'home-rule-all-round' campaigns of the 1880s and continuing up to the First World War. These demands were for separate parliaments (not always explicitly governments) in the component nations of the UK, with England in the ambiguous position of sharing its Parliament with that of the United Kingdom. Gladstone's Home Rule Bills of 1886 and 1893 proposed home rule for the Irish, while private Members of Parliament proposed Scottish and Welsh Bills. Federalism was supported explicitly for a time by Joseph Chamberlain, Gladstone's Cabinet colleague, until he split with the Liberal leader over his Home Rule Bill in 1886. Chamberlain wrote:

> In the Bill the Government have proceeded on the lines of separation or of colonial independence, whereas in my humble judgement they should have adopted the principle of federation as the only one in accordance with democratic aspirations and experience.[6]

It is questionable, however, whether Chamberlain really wished to go as far as federalism when he opposed more limited home rule.

At the close of the First World War some English Conservative MPs were converted to federalism as a means of restricting the scope of Irish Home Rule. They somewhat confused the issue, however,

by calling for 'Federal Devolution'.[7] Supporters were F. S. Oliver, L. S. Amery, Lord Brassey and Lord Selborne. But it was not proposed to create 'anything in the nature of a strict federation like that of the United States' (Lord Charnwood), and it seems that only 'subordinate' legislatures were intended. The Speaker's Conference of 1919–20 produced two devolution schemes, each of which received the support of 13 members. The second scheme, for subordinate legislatures in England, Scotland and Wales, with corresponding 'Executive Committees', has been described as 'frankly federal': 'Save only in the subordination of the local legislatures to the "Centre", it followed the lines of existing Federations. The legislatures might not be called "Parliaments", but they were comparable with the Legislative Assemblies in Canadian Provinces or Australian States, separate bodies, separately elected by the people of their respective states. Their executive organs, whatever their names, would in fact be Cabinets and chiefs thereof Prime Ministers, appointed by the King.'[8] Despite this description, the scheme is more appropriately described as 'devolution' than 'federalism', since it retained the sovereignty of the UK Parliament and Crown.

During the inter-war period, various Home Rule Bills were introduced, and by 1927 the Rev. James Barr, Labour MP for Motherwell, was proposing Dominion Status for Scotland, that is, a self-governing sovereign state. Most Liberal and many Labour MPs continued to press for home-rule-all-round, but not explicitly on federal lines. After 1945 a petition, the 'Scottish Covenant', demanding a Scottish Parliament 'within the framework of the United Kingdom, with adequate legislative authority in Scottish affairs', was reputed to have been signed by two million out of an adult population of 3½ million Scots, and seemed to represent federalist feeling, though no federal system of government was described. The Liberal Party alone called explicitly for federalism, and introduced Private Members' Bills in the 1960s and 1970s. The Party was undecided on the question of England; the Scottish Liberals pressed for an English Parliament, while the English Liberals supported English *regional* Parliaments, with no English Parliament. In some versions of Liberal policy, the UK Parliament would also act as an English Parliament.

In the late 1960s and the 1970s, confusion once more set in regarding the distinction between 'devolution' and 'federalism'. Thus, John P. Mackintosh wrote that his proposed system of

subordinate regional governments 'is a simplified and realistic version of what federalism has come to be in practice in the USA, Australia and Germany, and would provide the regions with the maximum autonomy possible in a country which has (and this includes Eire) an economy and financial system directed from one central point'.[9] The majority of the Kilbrandon Commission on the Constitution claimed in October 1973 that their scheme of 'transferred' legislative powers to Scottish and Welsh Assemblies was distinct from federalism, in that ultimate sovereignty remained at Westminster; in practice, however, legislative sovereignty in the 'transferred' matters would normally pass to Scotland or Wales. In 1974 and 1975 popular feeling in Scotland moved sharply towards giving a Scottish Assembly and Government practically all the powers associated with a province in a federation. Thus, the survey option: 'Have a Scottish Parliament which would handle most Scottish affairs, leaving the Westminster Parliament responsible for defence, foreign affairs and international economic policy', was supported by 16 per cent of respondents in May 1974, but by as many as 28 per cent in December 1975, the highest percentage of any of five options ranging from the status quo to independence.[10] Independence and 'federalism' together received 49 per cent. 'The Scotsman', the principal quality newspaper in Scotland, campaigns vigorously for federalism, and even the London 'Times' believed that 'the best solution may be to have a United Kingdom federation' (24 October 1975). The Labour and Conservative Parties are, however, still, in general, opposed to federalism, though there is support for it among a minority of MPs in both parties. There is no clear support for federalism among the general public in England, but no clear opposition either.

3 Alternatives Open to the United Kingdom

Following this historical summary it may be useful to outline alternative forms of government that are, in principle, open to the United Kingdom. To outline them is not to say that they are all politically practicable at present or even in any foreseeable future. However, unless all the possible alternatives are brought under examination, it is impossible to arrive at a comprehensive review of constitutional possibilities, and any conclusions about devolution or federalism could be faulted for not taking into account other systems for achieving the same objectives. We therefore explain briefly the different kinds of system, from the present constitutional structure at one extreme to complete independence for some parts of the UK at the other. We assume that the option of even more centralisation than exists at present is not worthy of consideration.

ADMINISTRATIVE DECENTRALISATION

Broadly speaking, this system has operated since the 1920s with regard to large parts of the administration in Scotland. The Secretary of State for Scotland, while remaining a member of the UK Cabinet, also controls Junior Ministers and a civil service in Edinburgh. (Two Scottish Law Officers supervise the separate Scottish judicial system.) The Scottish Office has considerable powers in various areas of administration. With 7000 officials, it is small relatively to the whole UK civil service, though it may be noted that its numbers are about the same as the Commission of the European Communities in Brussels. The Scottish Office administers either general UK laws, or laws specifically for Scotland, passed by the UK Parliament at Westminster. Legislative separation exists only in the form of the Scottish Committee of the House of Commons, which is consulted about Scottish legislation before it is

submitted to the House of Commons as a whole. Since 1964 a lesser degree of administrative devolution has been extended to Wales. The Secretary of State for Wales is also a member of the UK Cabinet, and with Junior Ministers controls a small Welsh Office in Cardiff.

Constitutional reform by further development of this system of administrative decentralisation has not been suggested as an option in the present political juncture, because it does not appear to go far enough in meeting the demands of the nationalists and others who desire some degree of real self-government for Scotland. The almost complete absence of legislative devolution under the present system is its major deficiency in the eyes of those who want to reform it. With the failure of the Scotland and Wales Acts it is conceivable that further administrative decentralisation could be one of the options to be discussed in inter-party talks, even though in some quarters this would be regarded as inadequate.

CAUTIOUS DEVOLUTION

The option preferred by the then UK Government and proposed for both Scotland and Wales in the Devolution Bill in the 1976/77 Session, and in the separate Bills for Scotland and for Wales passed in the 1977/78 Session, is to change from the present system to a devolution of both legislative and administrative functions, which would be broadly similar to that applied to Northern Ireland when the Assembly and Government at Stormont were functioning, between 1922 and 1972. Powers to legislate in Scotland, in respect of a delimited range of matters, would be devolved to a Scottish Assembly in Edinburgh. All other areas of legislation would be reserved to the UK Parliament. Executive powers would be exercised by an executive responsible to the Scottish Assembly, and not, as at present, by a Minister of the UK Government. In Wales there would be no independent executive but committees of the Assembly would fill a similar role.

Apart from this exercise by Scottish and Welsh Assemblies of limited powers to make laws, and devolution to executives or committees of powers to implement them, the powers of the Parliament and Government of the whole UK would have continued as before. This implied that the UK Parliament would retain the right to modify the arrangement, or even to bring it to an

end. Thus the ultimate authority would not have been shared between Westminster and Edinburgh, or Cardiff, but would have remained centralised at Westminster.

ADVANCED DEVOLUTION

The devolution so far proposed in the Scotland and Wales Acts was extremely cautious, when considered against the perspective of the range of constitutional systems open for inspection. More advanced types of devolution, still falling short of federalism, are worthy of consideration. The minority on the Kilbrandon Commission, consisting of Lord Crowther Hunt and Professor Alan Peacock, wanted a form of devolution that would be both broader and deeper than what was proposed by the Government.[1] They wanted assemblies to be established for the English regions as well as for Scotland, Wales and Northern Ireland. Secondly, they proposed to give these assemblies greater legislative powers over a wide range of matters, and the executives would similarly exercise more power than would the Scottish executive under the present Devolution Act. Thirdly, the regional assemblies would be represented in the second chamber of the UK Parliament, which would have the specific duty of ensuring that the rights conferred on the regional assemblies and executives were not interfered with by the UK Parliament or by the UK Government. These proposals were thus far-reaching, and in terms of political reality could, if implemented, create a highly decentralised constitutional structure for the whole UK. Such proposals are often labelled 'quasi-federal'.[2] But we find this term confusing. Under the Minority Report's proposals the ultimate power of the UK Parliament, acting alone, to amend or end the system would remain unaffected, and the UK would therefore remain in constitutional terms a unitary state.

Sir John Colville proposed an even more advanced form of devolution in 1977.[3] Assemblies and executives would be established for the English regions as well as for Scotland, Wales and Northern Ireland, with even larger powers than those proposed by the Kilbrandon Minority. The existing Houses of Parliament would be abolished, and replaced by a Council of State consisting mainly of representatives of the regional assemblies. A Bill of Rights would assure the liberties of the subject, enforced by a National Court of Appeal. This Court would also rule on differences between the

Council of State and the regional assemblies. Despite the abolition of the Westminster Parliament in its present form, the new Council of State, though representing the regional assemblies, would constitute a new central sovereign parliament. Ultimate power would reside in the Council of State, and would not be shared between it and the regional assemblies. The Council could therefore be described as a sovereign, though indirectly elected, Parliament.

This proposal is, therefore, properly defined as a proposal for advanced devolution, not federalism. It is certainly far-reaching, but has a number of weaknesses, and is therefore unlikely to be seriously considered. The abolition of the Westminster Parliament would be far too radical a measure to be politically realistic. Also, its replacement by an indirectly elected Council of State could be criticised as a move away from fully representative democracy.

FEDERALISM

Devolution then may in principle take widely different forms, ranging from the grant of very limited legislative powers to assemblies for one or two selected provinces only, to a comprehensive decentralisation of government to assemblies in all provinces, wielding extensive powers to legislate and to control provincial governments, and therefore implying a great reduction in the scope of the central legislature and government. However, devolution is more acceptable to constitutional conservatives than federalism, for two reasons. First, devolution is in practice usually a limited and partial decentralisation, which may conveniently alleviate political discontent in provinces with special historical, cultural or economic conditions, without impairing the essential unity of the nation. Secondly, however wide and deep devolution may go, ultimate power is still reserved to the centre, which in constitutional principle may revoke any powers it has granted to the provinces. Thus unionists may take comfort from both the practical limits on any devolution that is likely to receive the assent of Parliament, and from the constitutional right to undo what has been done if it should prove damaging to the nation as a whole. Thus, for example, Northern Ireland enjoyed a large measure of devolution for half a century after 1922, but direct rule from Westminster could be reimposed overnight when, in 1972, conditions in the Province made this appear necessary.

By contrast, the essence of the federalist alternative is that the constitutional arrangements result from an agreement among the component provinces of the federation. This agreement may grant to the provinces powers as limited as those of the most cautious devolution proposals. However, a federal system certainly requires a complete reassessment of the constitutional structure, since the consent of all provinces is needed to establish it. The distributed powers could therefore not be restricted to certain provinces. More important, a federal structure, once created, can be altered only with the consent of the provinces, obtained by procedures laid down in the constitution, as interpreted by a supreme or constitutional court. Removing the power to amend the constitution from the central government, acting alone, is the most essential feature that distinguishes federalism from devolution. The consent of *all* the provinces may not be necessary, since the constitution could stipulate that some kind of qualified majority would be adequate. The powers conferred on the individual provinces by federal constitutions have not normally included the unilateral right to secede, as has been proved in several bloody secessionist wars. Nevertheless, under federalism the provinces as a group of political entities secure a degree of constitutional independence such that not only do they enjoy powers to legislate year by year in matters assigned to them, but the ultimate authority to alter the distribution of power within the state is effectively shared among them. For this reason federalism is more difficult to reverse than is devolution, which may account for the fact that it is much less readily accepted than is devolution in a previously unitary state. Since the major part of this paper is devoted to a description and assessment of a federal system for the UK, further discussion of the relative merits of federalism compared with devolution is left until Chapter 5.

INDEPENDENCE

In addition to the two systems, devolution and federalism, which are compared and contrasted in this paper, a third option exists for the UK: to grant independence to those provinces that are discontented with the results of their inclusion in the UK. Since independence is an option supported by a substantial minority of the Scottish electorate, and one to which other Scottish electors could rally in the event that their aspirations were not satisfied by

adoption of a form of devolution or federalism, it is certainly worthwhile to consider what Scottish independence would imply.[4] Independence is also sometimes considered as a possible outcome of the Northern Ireland problem, though not one that would be welcome to all, or even any, of the protagonists within that province, in the UK, or in Eire.

Although sovereign independence obviously would be a most radical solution to constitutional problems of the UK, it need not be entirely unqualified. An independent Scotland would still be under strong economic pressure to retain close links, especially in monetary policy, industrial policy, trade, labour markets and capital movements, as Eire has done since becoming an independent state. Continuing economic interdependence could result in the establishment of special international commissions by the two independent states to regulate and foster economic cooperation. The existence of the European Economic Community, and the probability of an independent Scotland becoming a Member, would of course link both states, with the other members of the EEC, under international treaties with far-reaching implications for the exercise of independent sovereignty in economic matters.[5]

CRITERIA FOR THE CHOICE OF SYSTEM

A number of criteria can be used to assess the relative value and the viability of the constitutional alternatives outlined above. Unfortunately they do not all point in the same direction, nor does any single one of them provide a clear pointer to the choice of system for the UK at the present time. The basic questions are the following:

Which system will provide the greatest degree of popular participation and thus satisfy the feelings of provincial allegiance, which, at least in Scotland, Northern Ireland and Wales, have begun to play a significant part in forming political opinion and influencing the strength of rival political parties at United Kingdom level?

Which system would produce the optimal balance of financial independence with the maintenance of an acceptable equalisation of economic conditions and social provision among the provinces?

Which system would provide the most reliable safeguards for the

human rights of individuals and minority groups within the new provinces?

Which system is more likely to preserve the coherence of the United Kingdom, supposing that the majority of the UK population wish to preserve it?

Which system will be the most simple to administer, avoiding the proliferation of bureaucracy which is feared if a further tier of legislative and executive authority is introduced?

4 The Case for Federalism

This book is written in the belief that a federal system in the UK could have important advantages: over the existing constitution, over any type of devolution, and over the break-up of the UK into separate nations. A federal solution to current political and constitutional problems is worthy of serious consideration. This Chapter outlines the basis of this conclusion by examining some of the leading objectives that any constitutional system must secure, and assessing the merits of federalism as compared with the alternative systems in achieving them. We are under no illusions that federalism is preferable to the alternatives on every count. However, if there is movement in the direction of decentralisation, that is, if the existing situation should prove untenable, federalism could well provide a more stable and desirable system than the partial and grudging measures of devolution proposed in 1977/8. We do not claim that a federal constitution should be introduced forthwith, but that there is a strong case for it to be studied explicitly and thoroughly as a possible solution.

COHERENCE AND STABILITY

For all except the tiny minority who are anarchically opposed to the continuance of orderly government, the coherence and durability of whatever system is chosen to replace the existing unitary state is a criterion of the utmost importance. Constitutional change is a complex, costly and risky enterprise, and should not be indulged in lightly or frequently. The aim in debating constitutional change in the UK must therefore be to bring about a smooth transition to a new structure, or a confirmation of the virtues of the existing one, that will then be accepted as reasonably permanent and stable by the population as a whole.

This need for constitutional coherence gives rise to a dilemma in the presence of political forces in the provinces that are demanding

changes unacceptable to the majority of the national electorate. Is the stability of the new system enhanced by giving as much as possible to those who are clamouring for change, so that their acceptance may be whole-hearted and they may desist from further demands? Or does this approach merely whet the appetite by showing the effectiveness of political pressure and the unwillingness of the central power to stand firm, and thus provoke further demands leading to complete separation? Fear that this second outcome may be the more likely creates opposition to any change, or a reluctant agreement to make the minimal change necessary to buy off a majority of the provincial electorate. But critics of this approach fear that 'little and late' could create precisely the opposite result from that intended. The proponents of separatism would use the limited powers they had been granted simply as a means to maintain their political pressure. They would receive support not only from extremists but from more numerous moderates who felt that the original grant of powers had been inadequate. The history of devolution experiments provides examples of the unsatisfactory nature of a reluctant grant of limited powers, especially where the central government retains the ultimate constitutional right to end devolution whenever it finds it convenient to do so.[1]

A strong case for federalism, rather than devolution, derives from this awkward problem of ensuring stability. A federal system need not distribute more powers to the provinces than a devolved system. A federal system has the great advantage that authority is shared between the federal government and the provincial governments. Removal of the monopoly of constitutional power from the former national government and parliament in itself would go far to satisfy regional aspirations, and such a system would therefore be more likely to endure, almost regardless of the actual distribution of powers between the centre and the provinces. This argument is supported by the evidence that in several existing federations the distribution of powers has shifted markedly in both directions. Over several decades up to about 1970 some federal governments tended gradually to obtain more powers than were originally given to them, without provoking dissidence in the provinces. This tendency occurred not through any deliberate decision of the provinces to coalesce once more into a unitary system, but derived from practical and administrative imperatives, especially those connected with the equalisation of economic and social benefits. However, recent

developments in Canada and Australia suggest that this shift has gone into reverse.[2] Federal systems thus appear to be flexible enough to cope with enormous shifts in the distribution of powers, without losing their coherence.

Some federations are said to function effectively only because the formal dispersal of power and authority among provinces is mitigated by some unifying or harmonising factor. The clearest example of this 'unifying principle' at work is probably Yugoslavia. There power is distributed not only geographically to provinces and to local authorities (Communes), but also, through a process sometimes described as 'functional federalism', to autonomous industrial enterprises and a producers' Chamber.[3] However, many observers believe that coherence and indeed a large measure of uniformity are maintained by the Communist Party, which provides an all-pervasive network of guidance and reference, and thus overrides the centrifugal tendencies of the system. In Germany a highly professional civil service operating at all levels seems to perform a similar function of providing coherence. The unifying principle may in some cases be less tangible. A basic unity may be maintained by the existence of a national loyalty to the federation which is stronger than the particularism of the provinces, as, for example, in Switzerland. In Canada we may be witnessing the breakdown of this overriding loyalty so far as Quebec is concerned.

Yugoslav allegiance to a (single) nation-wide party is an extreme case. But national political parties also provide a unifying element in other federations. For example, in the German Federal Republic, Bavaria, the province with the strongest historical and traditional particularism, has a localised right-wing party, the CSU, which normally operates in alliance with the national right-of-centre party, the CDU, but occasionally shows signs of independence. But with this exception, all German parties are uniform throughout the federation and thus provide an important focus of nation-wide loyalty. In the US provincial allegiance, and provincial power, is blurred, if not diminished, in another way. American society has so many pluralist elements that the provincial division into states is only one such element among many, and not necessarily the strongest. There are, for example, the important feelings of allegiance to racial, ethnic and religious communities; to the large geographical configurations (the north-east, the south, the mid-west, etc); to interest groups (big business, unions, highly organised professions, consumer groups).

In the case of the UK we are considering the possible dispersal of power from a unitary state to provinces, some of which are ready-made ethnic sub-states, but others, the English regions, largely artificial creations with only a very dim and distant historical authenticity. The balance between unifying and centrifugal forces is therefore likely to be complex. The dispersing forces are clearly visible: Scottish and Welsh nationalism, and a rather vague belief that the Government machine and the UK Parliament are too large, too powerful and too distant. The unifying forces are also of significant strength: both the major political parties are highly centralised and nation-wide; United Kingdom sentiment or patriotism remains strong *vis-à-vis* the outside world. In an unbalanced federation, with the whole of England as a separate unit, however, historical English sentiment might re-assert itself and thus prove a stronger and perhaps even destabilising force. This is one of the reasons why we argue in Chapter 5 that a federal system for the UK should involve the division of England into provinces.

PARTICIPATION

Participation is the central issue as between continuing the existing system of administrative decentralisation, and adopting either devolution or federalism. The basic demand of those who want to change the existing system is to exercise in the provinces control over decisions affecting the provinces. The existing decentralisation of Scottish administration certainly stimulated the popular desire for more participation through elections to a Scottish Assembly. Control or oversight of the provincial administrations was in fact the immediate rationale of the Devolution Acts setting up Assemblies in Scotland and Wales.

The distinction between the role of an Assembly in giving a sense of greater participation under devolution, as compared with the similar role under federalism, appears to be small. The major difference would consist in the constitutional relations between the provincial assembly and the central or federal government and parliament. Under devolution, the exercise of power of the provincial assembly might be inhibited by the constitutional superiority of the central government and parliament, who could in principle change the system whenever the provincial assembly

became too obstreperous. Under federalism, the provincial assembly would have its own constitutionally independent status, and the distribution of powers could only be altered by agreement of the provincial assemblies with the federal parliament. In the US, for example, constitutional amendment is by a qualified majority of the states. However, in political practice this constitutional position may not make any decisive difference. Use of a constitutional right to alter the allocation of responsibilities would be very much a weapon of last resort in a political dispute between the provincial and the central government and parliament. It risks provoking a bigger crisis, and even the break-up of the unitary state. The resumption of direct rule in Northern Ireland in 1972 was obviously of this kind. Thus in practice there seems little to choose between devolution and federalism in respect of which would most effectively increase the sense of participation. Everything would depend on what powers are assigned to the provincial authorities, and on their political ability to exploit them.

HUMAN RIGHTS AND MINORITIES

The pressure for devolution or federalism represents generally speaking the wish of a minority, located in a particular geographical region of a nation state, to manage its own affairs. But the population of regions is rarely so politically homogeneous that there is unanimous agreement on strengthening provincial authority. There are numerous examples of minorities within the minority feeling threatened by political exposure to the provincial majority. The 'loyalists' in the American War of Independence moved to Canada in order to safeguard their own political independence. English-speaking Canadians would live unhappily in an exclusively francophone and independent Quebec. Catholics in a devolved Ulster suffered from Protestant domination. Tolerance of diversity is more easily achieved in larger than in smaller political systems. Since devolution and federalism are designed to give increased powers to smaller units, a devolved or federal system must be designed to provide more protection for individual and minority rights. A system of rights must be so entrenched in the constitution that it cannot be upset by decision of a provincial authority. This requires enforcement by a court having superior jurisdiction over provincial courts.

In a devolution system overriding powers remain with the UK government. However, the use of these powers for preserving individual human rights could be regarded as unjustifiable intrusion into matters where the province should have autonomy. Hence the emphasis in the Kilbrandon Minority Report, and in the Colville proposal, on a universal Bill of Rights, with an Ombudsman endowed with wider powers than the present UK Ombudsman. A federal system could deal with this problem of individual human rights more fundamentally by incorporating a Bill of Rights, and machinery to enforce it, in the original constitution of the federation which would have to be accepted explicitly by all the component parts. The enforcement machinery would consist of a supreme court, accessible to individuals as well as institutions, and perhaps a series of federal courts as in the US.

Safeguarding the rights of minority groups poses more complex problems than protecting individuals from abuses of power. The democratic principle is essentially the acceptance of decision by a majority, arrived at after due consultation, and taking account so far as possible of minority views and interests. Devolution and federalism pose the question: a majority of what? On issues where power is dispersed, a majority in a province can decide irrespective of the view of the majority in the whole federal state. If the parties forming the majority in the state and province are different, this is especially likely to create tension. The majority in a province could even use its powers in ways that were regarded as oppressive to the minority or to a minority group; that is, different standards of democratic behaviour could apply in different provinces, or between provinces and the centre. For the central government or parliament to impose on the provinces minimum standards of democratic behaviour is more difficult than to build into the federal constitution a watertight system of human rights, and adequate powers for Ombudsmen. A relevant example of the problem, and of a means of dealing with it, is the history of colour discrimination in the US. After many years, a more or less uniform practice of non-discrimination (in education for example) has been imposed by the decisions of federal courts. An essential factor, in addition to the function of the Supreme Court in interpreting the Federal Constitution, has been the existence of lower level federal courts operating throughout the individual states (provinces in our terminology). This shows the importance not only of appropriate clauses in the initially agreed constitutional instruments, but also of

adequate means to ensure that they can be applied even against a provincial majority.

However, not all issues can be resolved by judicial interpretation of constitutional principles, and the federal government, representing the majority of the federal state as a whole, may become involved in trying to impose its own interpretation of the democratic principle on the provinces on issues that were not even thought of when the constitution was drafted. Whose interpretation of the democratic principle is 'right' may be questionable. Excessive zeal on the part of the central authority to protect what it regards as minority rights may undermine the distribution of power that a federal system is intended to achieve.

A relevant example in the UK has been the conflict between the Labour Government of 1974–78 and some local authorities over comprehensive schools. The Government invoked the human right of equal educational opportunity for all children throughout the UK. Some local authorities counter-claimed on the human right to parental choice. Since the UK is a unitary state, the central Government can eventually impose its will on all local authorities. But if decision-making in education were assigned to the provinces of a federal UK, such political differences would be much more difficult to resolve. If a federation is to work, it must do so on the basis of continuous interaction and adjustment between the various levels. A federal system should therefore only be adopted if the people are mature enough not to push the inevitable conflicts to extremes.

There are, however, more alarming risks than those exemplified in the comprehensive schools dispute. A province could conceivably slide into a system of internal management which seemed to the others to be opposed to fundamental democratic principles. For example, there has already been some discussion in the European Community on the question whether a Member country whose political system became authoritarian could be expelled. No firm conclusion has been reached, but there is widespread feeling that cooperation on a Community basis would become difficult and perhaps impossible. If a province of a UK federation fell under Fascist or Stalinist rule, what should the rest of the federation do? In the 1930s the rule of Governor Huey Long in Mississipi became increasingly authoritarian and the US Government eventually solved the problem by political pressure and publicity. There are in fact several ways in which to approach such a contingency. Opinion

may be mobilised both inside and outside the province to halt the undesirable trend and restore democracy, with the help of recourse to federal courts and the human rights apparatus. Economic and financial relations between the province and the centre may be cut, which is likely to be effective if the province is poor, but not if it is rich. As a last resort there is a choice between military action by the rest of the federation to restore democracy, or expulsion of the offending province from the federation.

The entrenchment of provincial authority in the constitution obviously makes it harder for a federal government to intervene to protect minorities, than for the central government in a devolved system or in a unitary state. Assignment of powers to the individual provinces clearly implies that those decisions may sometimes be unacceptable to other provinces or to the majority of the population in the state as a whole. The example of Northern Ireland may be cited in support of devolution, as compared with federalism, on this criterion of protection of minorities. In 1972 the UK Government was able to take back the powers it had given to Stormont more smoothly and speedily than would have been possible if Northern Ireland had been a province of a federal UK. However, this incident cannot be judged in isolation. If the debates in the latter part of the nineteenth and the early years of the twentieth century had resulted in the adoption of a federal constitution for the whole UK, the rights of minorities and especially the inadmissibility of discrimination on grounds of religion would surely have been written into the constitution. This would not have solved all the problems of the minority community in Northern Ireland, but it could have gone some way to prevent the build-up of the discontent that has fuelled civil strife in the province over the past nine years. What the example shows, rather, is how a half-hearted devolution, responding to short-term political pressures, may create new problems for future generations to solve, that could have been avoided if a properly designed federal constitution had been adopted.

It is also arguable that the existing Republic of Ireland could have found adequate religious, cultural, political and economic autonomy within a federal UK if federalism had been adopted before separatist feelings became so powerful, and its secession from the UK could thus have been avoided.[4]

SIMPLICITY

Subsidiary to the criteria of meeting the objectives of increased participation while safeguarding the rights of individuals and of minorities within a coherent and stable system, is the question of achieving all this without an excessive growth of bureaucracy and greatly increased costs of representation and administration. While there is a demand in some regions at least for more direct participation in government, there is also a widespread dislike of the growth in the size and the cost of government. One of the major fears about both devolution and federalism is that they would require in addition to the creation of new assemblies between the existing national Parliament and the local authorities, the proliferation of new administrative agencies, not only at the level of the new provincial governments, but at the upper and lower levels also, in order to deal with subjects where powers and interests overlap.

It may be that a certain increase in the number of elected representatives is a price worth paying for a greater sense of participation in decision-making. The costs of the new assemblies would be small relative to the total costs of government and administration. An increase in the number of officials at all levels of administration taken together may be less acceptable. Certainly more departments of government would have to be created, though it would be wrong to drop into the common assumption that the sum total number of bureaucrats at all levels must inevitably increase. It would be possible to dispense with some departments whose functions would be taken over by new ones at other levels, and particularly by the new departments established for the provinces. Opportunities could also be found for economising on the numbers of officials. The new provincial administrations, being nearer to the people, should be more efficient; and they could exercise their newly acquired freedom to avoid wasteful provision of unwanted services in the provinces. Thus there could be overall savings in manpower and expense. Above all it would be essential to clarify and clearly demarcate the responsibilities of departments at the different levels in order to avoid overlapping and the consequent proliferation of coordinating committees. Detailed examination of individual areas of provision such as health, education, etc., beyond the scope of this paper, would be required in order to spell out precisely how administrative economies could be achived.

Devolution may appear to be preferable to federalism in respect

of this criterion, since it can be regarded as granting provincial representation and administration only in respect of those powers that are absolutely essential, and only to those provinces where there is a keen demand to have them. Federalism, in the UK context at least, appears to mean a more comprehensive granting of powers to all regions. But, as argued elsewhere, much depends on the precise structures; and the essential differences between devolution and federalism do not consist in how many functions of government are assigned to the provinces, but in the constitutional basis of the assignment of powers.

A further consideration relevant to achieving administrative simplicity and economy is whether a new federal constitution should be regarded as rigid or flexible. There are arguments on both sides. It is tempting to assume that constitutional and administrative upheaval, if it cannot be avoided altogether, should be once-and-for-all; that is, that a new constitution should be regarded as settling constitutional issues at least for several decades. However, it can also be argued that it is most unlikely that we shall get it right first time, and it is undesirable to take too long in detailed and frustrating argument in search of greater perfection in the initial constitution. It would be better to take fairly rapid and arbitrary decisions, coupled with full realisation by all concerned that changes will be required, and therefore that a workable procedure for amendment is at least as important as the original settlement.

There are also arguments in favour of following an evolution similar to that of many other federations, that is, to start with a comparatively radical dispersal of powers, but envisage that after a time a tendency may set in towards a greater accumulation of power at the centre, for reasons of equalisation, macroeconomic stabilisation policy, or simply of greater administrative efficiency. How far this would be a case for flexibility in a new federal constitution, and how far an argument against tampering with an inevitable centralisation of government, is a matter of judgement. It could be that a deliberate excess of decentralisation is the appropriate response to a perceived and unwelcome centralisation of government, but the decision will depend on the real strength of political objection to the existing constitutional structure.

EQUALITY

A degree of inequality is inseparable from the idea of federalism. In contrast to the situation in a unitary state, a federation exists in large measure because the provinces wish to gain (in the case of a unitary state becoming a federal state) or to retain (in the case of independent states forming a federation) powers of independent decision-making in certain areas of public life. If they wanted to have uniformity throughout the system there would be little point in choosing federation. The problem of assigning powers between the centre and the provinces arises largely from the conflict between this desire for independent choice and the desire not to be noticeably worse off than other provinces, that is, the desire for a measure of equality throughout the whole national population. This dilemma probably shows itself most clearly, and has certainly been most studied, in relation to fiscal and welfare arrangements. Should taxes and benefits be structured so as to bring about near equality in net incomes per head throughout the federation? This aspect of the subject is dealt with at greater length in the discussion of fiscal federalism in Chapter 6.

There are other more general aspects. First, it should be borne in mind that the inhabitants of a unitary state, however centralised its administration may be, do not enjoy complete equality. Rural and urban life, for example, are conspicuously different in the provision of public transport, leisure facilities, natural beauty, pollution, social opportunities and so on; and there is a degree of choice between them. Climatic conditions are by no means uniform, and hence there are variations in the costs of heating and clothing. Different parts of a country notoriously differ in job opportunities and unemployment percentages.

Some of these 'natural' differences may be accentuated by division of a unitary state into provinces, each one of which will cover a smaller geographical area. But there are other more important choices which will be available, depending on which powers are attributed to provincial level. Education and health care are examples.

Other fruitful sources of argument would be found in a wide range of environmental questions which are also normally thought of as particularly suitable for decision at lower levels than a central government. Some provinces, for example, would almost certainly wish not to have nuclear power stations located in their area, or to

impose stricter controls on industrial effluents. They would have different policies on housing density, on motorways, on national parks, on the conservation of old buildings, and many other topics. If provincial powers on these subjects were extensive, significant inequalities could result, not only in the way of life, but also, for example, in industrial and housing costs.

In existing federations the protection of what a province may see as its special interests, due to geography, natural resources—or the lack of them—industrial development or decay, etc., is a matter for negotiation partly within the periodical distribution of tax receipts and development funds, partly through a more political bargaining process in the upper chamber. When the federal government requires the consent of this chamber for legislation the representatives of a province can offer consent in return for a local economic advantage. This familiar phenomenon is termed 'log-rolling', or 'pork barrel politics'. But in forming a new federation the existence of strong provincial interests in specific areas of decision-making or administration will be a powerful and potentially troublesome element in the negotiation of the initial distribution of powers between the centre and the provinces. The case of 'Scottish oil' has been mentioned *ad nauseam* in the context of devolution and would obviously play a vital part in the negotiation of a federal constitution, both with respect to the distribution of the proceeds and the location of decision-making on future licences, taxation arrangements and international marketing arrangements. Fisheries policy may be equally controversial. Any Scottish negotiator will want to insist on a large measure of freedom to decide on fishing limits and conservation policy. Attributing this power to the provincial level would add enormously to the already formidable complication of reaching an EEC fisheries policy. The profound differences between agricultural conditions in Scotland, Wales and southern England may also give risé to pressure to remit to provincial level at least a significant share in making a UK agricultural policy which will then have to be fed into the Brussels debate on the CAP. Similarly some provinces of a balanced UK federation would have coal mines and some would not; some would have surplus water resources, and some water deficiencies, which has already become contentious as reservoirs are built in Wales to supply the English Midlands.

This listing of provincial peculiarities is not intended to throw doubt on the possibility of agreeing on the distribution of powers in

the formation of a UK federation. The issues already arise among the regions of the unitary state. Our purpose is to bring to notice the complexity and importance of the issues that will be made more explicit in a federal system, and to suggest that it may not be possible to perform the task simply by putting down broad categories of powers or lists of government departments to be dispersed or not. The general purpose will be clear: to reach a settlement which will leave the federation viable as a whole, while giving the inhabitants of each province the advantage of feeling that they are better able to look after their essential interests within the federal framework than they are now in the centralised unitary state.

5 A Federal System for the United Kingdom

If devolution for Sctoland and for Wales, had taken place as proposed in the Scotland and Wales Acts this might have brought about considerable transformations in UK political life, and given rise to pressures for other kinds of constitutional change within the UK. Among the many possible issues some of the most notable would have been: reform of the composition and powers of the House of Lords, reform of the electoral system to introduce some form of proportional representation in place of the single member first-past-the-post system, and fixed terms for the various parliaments in order to avoid the confusion of variable dates for holding elections. These further possible changes will not be examined or argued in detail in this paper, since they are not essential to the question of federalism and devolution. However, they are typical of the constitutional issues that surface when a major change is undertaken, and must enter into the discussion of whether, and how, to move towards a federal system.

The devolution debate led to public demands for devolution to at least some regions of England. For example, opinion in The North of England was worried that Scottish devolution might give the Scots an even greater advantage in respect of public investment, etc., than they are believed to have derived already from the existence of the Scottish Office with its own Ministers in the Government.[1] Regional competition for handouts from the central government obviously tends to generalise demands for devolution. Pressure for devolution in England also derived from consideration of the problems of fair representation in the Westminster Parliament of a Scotland and Wales with their own assemblies, and an England without a separate assembly. This issue has already surfaced in the so-called 'West Lothian' problem. For various reasons Scotland and Wales already have a more than proportionate representation in the Westminster Parliament.[2]

Granting Scotland and Wales their own assemblies would call their level of representation at Westminster into question. But it is not easy to discover any formula that would do justice to England without leaving the Scots and Welsh feeling that what had been granted in the new assemblies had been taken away again by reducing their representation at Westminster. The obvious solution therefore would be an English assembly, so that representation in the central parliament could at least be decided as between provinces that had the same kind of assembly to represent them *vis-à-vis* the central parliament and government. And, of course, the Westminster Parliament would avoid the embarrassment of having to double as English assembly as well as UK parliament. Since creation of an English assembly would be such an enormous and difficult step, of much deeper constitutional significance than the Scottish and Welsh assemblies, it is in fact unlikely to come about except in the context of an explicit decision by the Westminster Parliament to create a full federal system in the UK. We therefore continue this discussion on the assumption that this decision will have been taken at some point, and concentrate on assessing the possible structure of a UK federal system, and the method of transition from the existing unitary system.

FROM DEVOLUTION TO FEDERALISM

Opponents of devolution frequently object that it could be exploited by one or more of the devolved provinces to seize greater and greater powers, leading eventually to complete separation. Certainly devolution is regarded by separatists as merely a tactical phase in their struggle for independence. Equally, it is regarded by some supporters of the *status quo* as a tactical move to undermine the political support of the separatists, and they trust that it will have little practical effect on the representation and government of the people of the UK. There is, however, a middle way in which devolution could be of more real effect in helping to resolve the present political difficulties than either of these extreme views would allow. Devolution could be a preliminary step towards a federal system that, by meeting more adequately the needs of moderates who desire a decentralisation of decision-making in a still United Kingdom, would head off the demands for complete separation on the part of a minority of separatists in some provinces.

Indeed, a first stage of devolution is an appropriate, and almost essential, way of moving towards a federal system.

One of the prime characteristics of a federal system is that it should be established by an entrenched agreement among the component provinces. Earlier federations were created out of previously separate colonies which already enjoyed their own assemblies and executives. But if such provinces do not already exist, who are to be the parties to the negotiation of a federal constitution? The conventional response to this question in the UK would be that decisions on the creation and structure of a federation should be taken by the UK Parliament as at present constituted, possibly confirmed in a referendum. However, this procedure would have obvious deficiencies. There would be inadequate representation of the views of the various provinces in deciding the structure and powers of the different parliaments and executives. Demands would inevitably arise for the votes in a referendum to be counted by provinces, and awkward problems would arise in the likely event that a majority of the voters in one or more provinces rejected the decision of the UK Parliament for a variety of reasons. Even in the unlikely event that a referendum produced a majority in favour, well distributed over all the provinces, the problem would not be entirely solved. It would still be possible for opponents of the geographical boundaries, the assignment of powers, or some other features of the new federal system to argue that a fundamental principle of federalism had been breached in the very creation of the system, and that the particular arrangement they objected to therefore had no constitutional validity. This type of *ex post facto* objection could only be met if each province were represented in a constitutional convention by its own properly elected representatives.

Separate assemblies and executives in Scotland, Wales and possibly Northern Ireland would provide ready-made interlocutors in a constitutional convention to design and prepare the adoption of the federal system. However, in the absence of an English assembly, the UK Parliament could not properly speak for England, or for the English provinces. An English constituent assembly, or English provincial constituent assemblies, depending whether the federation was to be unbalanced or balanced, (see pp. 32–6) would have to be created at an appropriate stage in the process in order to be party or parties to the negotiations and to the final constitutional settlement. Although this English assembly, or these assemblies,

would not be exercising the current powers already devolved on the Scottish and Welsh assemblies, they would have to be endowed with the same status in the negotiations. When a constitutional act had been endorsed by the UK Parliament and by all the provincial assemblies, and possibly also by referendum, the provincial assemblies would transform themselves into the parliaments of the federal units. The executives in Sctoland and Wales would become the provincial government there, and new government(s) would be created for the English province(s) by their parliament(s).

The process of forming a federal system in the UK would clearly be exceedingly complex, and it would be necessary to arrive at a substantial measure of general political consensus about the structure of the federation before the process described above could be initiated.

A BALANCED OR UNBALANCED FEDERATION?

As for the devolution proposals, there would remain for federalism the choice between applying it only to Sctoland, Wales and Northern Ireland, leaving England as a single province, or creating English provinces also. These alternatives can be described as balanced and unbalanced federalism. The question of balance is even more serious under federalism than under devolution, since under federalism there is an overt attempt to create an effective sharing of powers, whereas under devolution it is assumed that the ultimate authority will remain centralised. The first question is whether England should be divided into smaller provinces or remain a single unit. A second question is how many English provinces should there be? There may also be a further question, whether Scotland and Wales should also be sub-divided.

There are powerful arguments in favour of England remaining undivided as one of the provinces of a UK federation. There is no political or popular support for the division of England, and indeed there would be strong opposition to it from both the major political parties and from popular opinion. England has for centuries been regarded as a unit, and is a more powerful focus of loyalty than the UK. Its destruction would be a fatal blow to social and political coherence. Secondly, the inhabitants of England, even more than of Scotland, Wales and Northern Ireland, have long been accustomed to a substantial degree of equalisation of economic and social

conditions. They would not accept a system which produced significant variations between one part of England and another, particularly as the boundaries between these parts would be artificially defined and have little historical connotation. If the system avoided this problem by including entrenched provisions for the existing level of equalisation, it would hardly be worth calling it a federation. Thirdly, division would create yet another tier of government and bureaucracy, at a time when local government reorganisation has hardly yet been absorbed. In some cases the regions would be so near in size to the larger local authorities that additional confusion and duplication would be caused.

An unbalanced federation would, however, suffer the immense disadvantage of creating a system in which one province, England, was overwhelmingly preponderant in area, population and resources. England would dominate the federal parliament and make the theoretical autonomy of the other provinces unreal. The alleged advantage of the federal system over devolution, namely, that it would permit balanced bargaining between units of equal sovereignty and roughly comparable weight, would in such circumstances be a mockery. There is no historical model of a successful federation with as few units as four, or with one of the units as preponderant as England would be. There are examples with some provinces disproportionately small, such as Prince Edward Island in Canada and Bremen in Germany, but this does not seem to be destabilising.

An 'unbalanced' UK federation would have a federal parliament and four provincial parliaments: for England, Scotland, Wales and Northern Ireland. It is obvious that the English Parliament would have to be very much larger than any of the other three provincial parliaments. This of itself is bound to mean that differences arising between the federal parliament and the English parliament would take a special form, and would tend to be more acute than the corresponding differences between the federal parliament and the other provincial parliaments. The inevitability of rivalry between the federal and the English parliaments would have to be faced at the formative stage. It seems to have been assumed up to now that the federal parliament would have two chambers and the provincial parliaments only one each. But would a single chamber parliament be acceptable in England? The House of Commons and the House of Lords are, in origin, English institutions. They came into existence centuries before the union of the English and Scottish

Crowns, and continued as purely English institutions for a century after that. There may well be a strong feeling in England that they should continue as such in a British federation. There are good precedents for inconsistency in this respect between the component parts of a federation. In Canada, for example, although all the Provinces now have unicameral legislatures, Prince Edward Island until 1893 and Quebec until 1968 had two chambers; while in Australia, Queensland at present has one chamber and the other States each have two. If, therefore, it was clearly shown to be the wish of the people of England to keep the House of Commons and the House of Lords as their own, there appears to be no constitutional or historical reason why they should not have their way. Such an arrangement would have the advantage of removing the prickly problem of reform of the House of Lords from the debate on federalism, and leave it to be solved by the English alone.

However this question is decided, it seems most unlikely that the members of an English parliament, representing much the greater part of the inhabitants of the federation, would not continually wish to discuss matters which are intended to be reserved to the federal level, and consider themselves as well qualified to do so as the members of the federal parliament. No English government could avoid reflecting this view. The location of both parliaments in London, which is surely inevitable since neither would accept the down-grading involved in being sited anywhere else, would ensure that their rivalries attracted the maximum publicity.

A 'balanced' federation, that is, one composed of a number of English provinces and Scotland, Wales and Northern Ireland, would avoid some of the difficulties since there would be no single English parliament. Though there would still remain large variations in area, population and resources among the provinces, no one province would predominate. Supposing England were divided into nine provinces, there would be a federal parliament and twelve provincial parliaments. The federal parliament would presumably be bicameral. The provinces could choose whether to have one or two chambers each. The former seems much the more likely. In this 'balanced' system no provincial parliament would represent an area approaching the size of the federation as a whole, so the risks of rivalry and duplication between the federal and provincial parliaments would be reduced. The complexity of inter-parliamentary relations would be increased, but one of the main functions of the second chamber of the federal parliament would be to reconcile

federal and provincial interests. If this mechanism worked satisfactorily the need for direct contact between parliaments at different levels would be small. This is certainly the crucial argument in favour of a balanced federation, and it is so powerful that if it cannot be accepted by the English electorate, it would probably be wise to abandon any attempt to create a federal system.

There is little doubt in any quarter about the current weakness of regional loyalties in England, and the creation of English provinces would clearly have little historical validity or apparent current relevance to their inhabitants. Loyalties are probably invested in much smaller units, such as the town, or even the local football team, rather than in regions such as the North-West, or Wessex. Nevertheless, it would be wrong to assume that this state of affairs is immutable. There is a considerable body of evidence to show that provincial loyalties can to some extent be deliberately engineered, even if they do not develop of their own accord. The question may therefore be, not whether provincial loyalties do exist in England, but whether they can and should be created. As already mentioned, the approach of devolution in Scotland has stirred up provincial feeling in the North of England, if only because it appeared that a devolved Scotland might gain more political leverage on regional grants and other central government funds. The development of provincial loyalties in Germany is probably a relevant example. There was, admittedly, a long history of provincialism in Germany, and one of the German *Länder* had existed as a sovereign state until the mid-nineteenth century. Nevertheless, the actual provinces set up by the Allied authorities after the Second World War were in several cases based on rather artificial boundaries related more to the zones of Allied occupation than to historical considerations. In spite of the artificiality of several of these *Länder* it appears that provincial feeling has grown up in them and there is certainly a high degree of participation in elections to the *Länder* parliaments. A similar evolution could take place in England once provinces had been created with adequate powers. Their more extensive powers in comparison with those of the present local authorities should certainly arouse sufficient interest to ensure a more satisfactory turnout for elections to the provincial assemblies than is at present the case for elections for local councils.

There is therefore good reason to believe that provincial feeling *could* be stimulated in the UK so as to form the basis of a viable federation. The question whether it *should* be stimulated is more

difficult to answer since it depends on a variety of social and cultural judgements of a highly personal kind. There are those who complain that English provincial life is drained by the centralisation of many political, economic, social and cultural activities in the metropolis. There are others who judge the unity of England to be its strength and virtue, and who fear the creation of provinces as divisive and disruptive. These feelings are strongly held on both sides, and it is the political balance between them which will eventually decide whether the UK will move to a federal system. Without attempting to conceal what we believe that this decision should be, our main purpose is to clarify the issues in order to make its consequences better understood.

HOW MANY PROVINCES?

Subsidiary to the question whether England should be divided into provinces is the question how many provinces there should be. In discussions over the last few years the choices have usually been assumed to be between five, eight (or nine), and twelve provinces. The major problem is the size of the South-East of England, and the dominating position of London within that region. A decision on five provinces would have the advantage that other provinces were nearer in size to an undivided South-East. A decision on eight would match the existing planning regions, which have established a certain administrative validity. Nine provinces would imply amending the existing planning regions by separating Greater London from the South-East region. Twelve provinces would enable more sub-division in other parts of the country. It is not the intention in this paper to enter into detailed examination of the many considerations and arguments. From the point of view of creating a federation that will be stable and viable, what matters is not the creation of nearly equal units, in terms of the size of population, geographical area, industry, or any other criterion. Provided no province is dominant, as England would be in the 'unbalanced' federation, it does not matter if one province is substantially larger than all the rest, as the South-East would be in the eight-province model. In the Federal Republic of Germany, Nord-Rhein-Westfalen is much larger than the other *Länder*, and there are similar discrepancies in the size of provinces in other federations.

Rather different considerations apply in deciding whether Scotland and Wales should be subdivided in a UK federation. The main argument is that provinces corresponding with ethnic boundaries are likely to be intolerant of minorities within their borders, particularly those who do not share their cultural affinities, such as the English speakers in Wales. They may also be uneasy partners in a federal system which demands a high degree of cooperation and consultation. The significant cultural, historical and economic differences between the Highlands and the Lowlands of Scotland and between North and South Wales might also be held to support the suggestion of division. However, the provinces resulting from division would be extremely small, exaggerating the inevitable disproportion between large and small provinces in the federation as a whole. This in itself would not be an insuperable obstacle to division, but both the Highlands of Scotland (assuming no oil revenues) and North Wales would be not only small but very poor compared to the other provinces. On balance, sub-division of Scotland and Wales does not appear to have advantages sufficient to override the political furore which would accompany any attempt to bring it about.

There is however the case of Shetland which has already obtained special treatment in the Scotland Act, and might well demand separate status in a federation. Shetland would be absurdly small to form a province of a federation, and it would probably be better to regard it, if the wish for separation were maintained, as falling within a special category of islands and enclaves, such as the Isle of Man and the Channel Islands, in relation to the UK.

THE INSTITUTIONAL STRUCTURE OF A UK FEDERATION

The German Federal Republic is the only example of a federation created out of a unitary state, although the latter was itself a much more recent creation than the UK. Germany is also remarkably similar to the UK in area, population and economic structure. A federation in the UK could therefore be expected to have many features in common with the German federation. There could be argument whether the UK should follow the German model of 1969, which incorporated adaptations to deal with difficulties experienced in operating the 1949 Constitution.[3] Naturally, there

would be no need to follow, and no advantage in following, closely every feature of the German model. Other federal experiences would undoubtedly provide useful indicators, and innovations adapted to peculiarly British needs would be at a premium. In several other federations there has been the same tendency as time goes on to concentrate more power at the centre, largely in order to provide more equalised application of welfare and development resources.

Contradictory arguments will be used in the UK debate. On the one hand, one of the reasons for making a UK federation would be to satisfy the urge of some Scottish and Welsh opinion for more autonomy, and to diminish the remoteness of government by bringing significant areas of policy-making nearer to the public by decentralisation. For these reasons it would appear necessary to provide for a degree of dispersal of power that would be real and visible, and greater than would have been provided for Scotland and Wales by the Devolution Acts. The *raison d'être* of the federal alternative is precisely to provide an option, between devolution and independence, which may satisfy many people who find the former too little and the latter too much. On the other hand, it is persuasively argued that the people of the UK as a whole will not take kindly to a federal system in which, owing to provincial decision-making, levels of social provision are noticeably different from one province to another. On this argument great caution would be needed in the allocation of extensive powers to provinces lest this produce unacceptable differences of standards, especially among the English provinces.

It is not sensible to press this discussion beyond these few remarks, since so many issues are involved. Some are raised later in this paper, especially in the discussion of the economic arrangements in Chapter 6. The present chapter therefore continues with an examination of the various practical questions concerning the major institutions of a federation.

There is no reason why the position of the monarch as constitutional Head of State should be significantly changed. Since Scotland and Wales do not have monarchs of their own there is no need to adopt the Malaysian method of a rotating head of state. The question would have to be resolved, whether the Head of State should be represented in each province, as in Australia and Canada. Germany appears to find such an arrangement unnecessary, and it may be argued that the geographical extent of the UK, like that of

Germany, is so small as to obviate the need for representatives of the Head of State in each province, which is found in federations of continental size. On the other hand, Lords-Lieutenant have represented the monarch in the British counties, and it could therefore be both agreeable and useful to appoint representatives at the provincial level.

The status of the UK Parliament under most forms of federalism would remain much more important than was envisaged in Sir John Colville's devolution proposal. The Westminster Parliament would become a federal parliament. The central legislature of a British federation would in all probability consist of two houses. The lower house would be elected by popular vote throughout the federation. The specific federal function of the upper house would probably be to represent the provinces. The basis could be equal numbers of members from each province, elected within each province separately, or, more probably, a combination of representation proportional to population with a minimum number of representatives from each province, to ensure adequate representation for the smallest provinces. Much legislation, perhaps all, would have to be approved by both houses: the directly elected UK lower house, and the upper house representing the provinces. Except perhaps in a limited range of legislation relating to national emergencies, both chambers would have equal power.

The passage of federal legislation through the upper house could be made dependent on qualified majorities, for example two-thirds, on matters particularly affecting the powers of the provinces, in order to enable it to fulfil its role as the expression of the distribution of power among the provinces. Whatever the detailed arrangements, the participation of both chambers in most legislation will underline the need for extensive consultation between central and provincial authorities at an early stage of the legislative process, or even before it begins. This would be facilitated if, as appears to have occurred in Canada, the behaviour and voting habits of the federal chamber come to derive more from the party allegiance of its members than from their function as provincial representatives.

In addition to this role as the chamber of the provinces, the upper house could continue to fill various roles, including those it enjoys at present, and others that have been suggested for it. It would be most appropriate that it should continue the existing role of reviewing in detail legislation emanating from the lower house. It could possibly provide a parliamentary base in the UK for the British members of

the European Parliament. It could also represent interest groups, such as employers, trade unions and consumers, if it were decided to bring them formally inside the parliamentary processes of decision-making. Constitutional innovations to give the federal upper house such functions could require the creation of separate categories of membership, alongside the elected representatives of the provinces. Such other members, not representing the provinces, would naturally have to be excluded from voting and even from discussion on issues vital to provincial authority. Giving the upper house these additional roles, and the additional membership needed to carry them out, is by no means an essential feature of geographical federalism, and they are not mentioned here in order to recommend adoption of all or any of them. However, one of the advantages of adopting a federal system would be that in writing the constitution it would be both possible and necessary to make changes in the role of the upper house to meet other current preoccupations. Whatever decisions might be made, this would at least be better than continuing the perennial and sterile ideological debate about abolishing the House of Lords.

Both chambers would have to accept that a supreme court might override parliament in the interpretation of the constitution and determining the compatibility of new legislation with it, in resolving disputes between the directly elected lower house and the provincially elected upper house of the federal parliament, and with regard to many aspects of the relationship of the provinces with the centre. This, or some similar, form of restriction on any attempt by the lower house to extend its powers at the expense of the provincial assemblies and executives is the essential difference between a federal system and any of the devolution systems described above in Chapter 3. There would certainly be a written constitution, including a strong bill of rights. Considerable use would be made of ombudsmen, at both federal and provincial levels. But the chief guardian and interpreter of the constitution would be the supreme court with extensive powers to resolve disputes between the different levels of government, as well as to deal with complaints by individuals against any level of administration.

A procedure for amendment of the constitution would also be necessary. This could take the form of requiring the agreement of the provincial assemblies. To require unanimous agreement would give a veto to any province on all constitutional change, so a more acceptable provision would be for some kind of qualified majority of

the provinces. An alternative method would be to require the direct approval of the electorate for constitutional change. This could be based on a majority in a national referendum, or on majorities in the provinces. A partial precedent for this latter method already exists in the provision for referenda before the entry into force of the Scotland Act and the Wales Act setting up assemblies in those provinces. There could be contradictions between the results of provincial assemblies voting on amendments to the constitution, and the results of referenda on the same amendments. It would therefore be important, whatever system is chosen, to avoid any excessively complicated provisions that would increase the possibility of stalemate and constitutional crisis.

However wide, or however narrow, the effective power given to the provinces in relation to that assigned to the federal government, an essential element of provincial sovereignty, to be used in the last resort, would be the right to secede. Secession or attempted secession has usually been a painful process, as dreadful wars in the United States, and more recently in Nigeria and Pakistan, have shown. It is also not very encouraging that the one federal constitution which includes the formal right to secede is that of the Soviet Union! However, it is unthinkable that England would ever go to war to keep in the UK Scotland or any other part of the kingdom the majority of whose inhabitants clearly demanded independence. It would therefore be realistic, though perhaps rather pessimistic and provocative, to include a secession clause in a federal constitution. This would provide that if any province was finally unwilling to accept constitutional decisions of the federal parliament, or judgements of the supreme court, it would have the right to withdraw from the federation. The deterrent to secession thus would not lie in any power of enforcement in the hands of the federal government or of the supreme court, but in the social and economic benefits and greater collective security and influence conferred on the provinces by the federation.

Once the federation had been established, legislation is the area of inter-parliamentary relations in which disputes would most clearly be expected, but also that in which they would be most easily contained within formal bounds. Presumably the basic constitutional enactment would lay down which matters were reserved for federal and which for provincial legislation, probably adding a list of concurrent matters. The matters assigned to the provinces would presumably be the same for each province, which is not, of

course, the case in the 1978 Devolution Acts for Scotland and Wales. The settlement of the disputes which would inevitably arise from time to time as to whether either the federation or a province is proposing, or has purported to pass, legislation outside its competence, would have to be entrusted to a court of law. This could be the Judicial Committee of the Privy Council, as was proposed for Scottish Assembly bills in the Scotland Act; but the federal supreme court already proposed would be preferable.

In discussion not founded upon legislation, for example, debate on a substantive motion or a motion for the adjournment, and in parliamentary questions, it will be less easy to define the boundaries of order, still less to get them observed. Control of matters affecting the whole federation, such as defence and foreign relations, will no doubt be reserved for the federal government. It will nevertheless be very difficult to prevent questions on these issues being raised in the provincial parliaments; nor would it necessarily be desirable to seek to do so.

Formal relations between the parliaments should not be difficult to organise. There is no reason why joint meetings of two or more parliaments should not in theory be held; but a more practical arrangement would be joint meetings either of specially appointed delegations, or of already existing committees, drawn from two or more parliaments. Conventions might be established, similar to those which have long been maintained between the two Houses at Westminster, for the exchange of messages, and for the appearance of members of one parliament as witnesses before the committees of another. Again, regular periodical conferences might be held of presiding officers (as in India), or of clerks (as in India and Canada). Finally, day-to-day working relations at the official level should provide no difficulty, since the officers of both Houses at Westminster have had a long and varied experience of such relations with the officers of Commonwealth and foreign parliaments and of international assemblies.

The federal government would probably be formed from and primarily responsible to, the lower house of the federal parliament, following the pattern which applies widely throughout the majority of both unitary and federal states. There would certainly be neither desire nor need to emulate the division between the legislature and the executive which exists in the United States. The provincial executives would probably be formed from and responsible to a unicameral provincial assembly. In the unlikely event that the

option for an upper house of the provincial parliaments was adopted, the provincial executive would, like the federal government, be formed from and responsible to the lower house.

The division of powers between the federal and the provincial level would be the most difficult and the most important part of the settlement. Apart from the allocation of specific powers, it would also have to be decided whether the federal government or the provinces would be the residuary recipient of powers not enumerated. Typical and probably non-controversial arrangements would be that foreign affairs and defence would be handled at the centre, though the discussion in Chapter 7 shows that even here there are numerous shaded areas. Education, police and personal welfare services are candidates for provincial authority, though the precise assignment of functions is not always straightforward. The most crucial and difficult question is how to assign the vast range of economic and financial powers wielded by modern governments. This issue is discussed in some detail in Chapter 6. Two comments, however, are relevant at this point. First, the debates on devolution have already indicated something of the range and complexity of the issues that would have to be faced. Secondly, unless the outcome of such debates, in the context of the proposed creation of a federal constitution, were to be that a substantial proportion of them should be assigned to the provincial level, there would be no point in pursuing the project for constitutional change.

Another issue would be whether, and how far, to adopt the German practice that the provinces play a large part in the administration and execution of federal policies. The alternative is to rely more on federal agencies, as in the United States. Implementation of federal policies could be an important role for provincial executives, though it would in itself be no substitute for the direct exercise of powers as a justification of the creation of a federal system.

While the central feature of the new provinces would be their legislative powers, the implications of federalism for existing structures of local government and local administration would also have to be clarified. Powerful arguments were advanced in the Minority Report of the Kilbrandon Commission[4] for the view that the introduction of provincial executives and assemblies would not be creating a new tier of administration but would be a good method of hacking some order out of the jungle of existing regional functions carried out by central government departments or by

regional boards and authorities set up under them. Certainly a wide range of administration is at present being conducted at levels intermediate between the local authorities and the central government. Regional health authorities, regional economic planning boards, hospital boards and the numerous other 'quangos', have been criticised since there is no direct democratic control over their actions. To go further than this and argue that with the establishment of provincial authorities in a federal system some existing local authorities could be abolished, and their functions transferred to the provincial level, may be regarded as unduly disturbing of the new local authority structure so painfully created in the reorganisation of 1972. Lord Hailsham has nevertheless suggested that a desirable way of dealing with this question would be to abolish some or all of the larger local authorities set up by the 1972 Act.[5]

The establishment of a full provincial government and a provincial assembly in Scotland would certainly create a strong argument in favour of abolishing or modifying the recently created upper tier of Scottish local authorities. This would appear necessary in order to avoid conflict of jurisdiction, as well as the proliferation of bureaucracy. Participation is a vital element in this case for replacing upper tier local authorities by provincial authorities. One of the main reasons for devolution or federalism is that people wish to have accessible administrative authorities and elected representatives, carrying out functions that are of real importance to them. The apparent wish to participate in local government is remarkably small, if judged by the turn-out at local elections. The case for devolution or federalism is that provincial authorities would be endowed with more powers than any existing local authorities, and that this would increase their significance to electors, and give rise to an increased interest in elections below the national level. The desire to improve democratic participation in government is therefore an argument for giving greater powers to new provincial authorities and assemblies at the expense of both national governments and upper-tier, if not lower-tier, local authorities. It will therefore be a high priority for the provincial assemblies to review relations with the local authorities and consider whether streamlining could be brought about. There would be no need to insist on uniform handling of this matter in every province.

6 Economic Issues in Constitutional Change

THE ECONOMICS OF SEPARATISM AND FEDERALISM

Although the protagonists of constitutional change couch their arguments mainly in political language, economic issues have an immense underlying importance in determining the choice among different consitutional structures. For example, the suggestion that Scotland might be more prosperous as an independent state, or as a federal province, has recurred ever since the Act of Union.[1] Even if studies showed that in terms of current economic performance Scotland was poorer than England, it was favourable to economic development. It is no accident that the huge increase in support for the Scottish Nationalist Party has occured since the prospect of North Sea oil revenues transformed the immediate economic prospects of an independent Scotland.[2]

At least four separate economic issues should be distinguished: first, the economic performance and prospects of a province after separation or federalism; secondly, the budgetary links between the province and the unitary state or federation (what contributions must be made towards common services, what taxes are assigned to the province, what assistance will be forthcoming from the centre towards the province?); thirdly, the broader economic relations between the province and the central or federal government (what regime is established for trade, labour and capital movements, monetary management, payments, etc?) and fourthly, the ownership and control of public and private industry.

The significance of these economic issues varies with the constitutional structure (devolution, federalism, independence) that is adopted, but they all enter into the assessment of the economics of whatever constitutional system is finally agreed. Complete independence would mean cutting off the province from budgetary contributions to, and receipts from, a central or federal

government; this in turn would make the economic prospects of the province, and the economic relations that can be negotiated, especially important. Federalism would imply a less complete separation from the centre and therefore has less significance for economic prospects than independence, since some degree of equalisation of revenue could be expected. Economic relations would also become less critical, since the autonomy of economic policies would be less. However, even under devolution, as compared with the unitary situation without devolution, there would be a higher degree of self-reliance in economic matters and greater independence of policy, and these would influence the level and type of transfer between the centre and the province. Even if the demand for separate status is entirely political in motivation, it has to have some effects on economic interaction for the constitutional change to have lasting effect.

The problem of achieving viability can be crucial for a province considering separation from a unitary state. However, it is also well known from historical experience that considerable economic sacrifices may be accepted by provinces that have a strong political will for independence. Only where the desire for independence is weak is the balance of economic costs and benefits likely to be decisive. However, in the absence of an appreciation of the economic consequences of independence, it is difficult to assess the strength of the political will to achieve it. Examination of the economics of independence may therefore serve a purpose, however remote the possibility, if it helps electors to understand what they really want.

Dependent or interdependent economic status can also limit the actual independence of policies even where complete constitutional independence is secured. This fact must also figure in the calculations of the benefits to be derived from separation. For example, Ireland has been constitutionally independent of the UK since 1923. It has therefore been cut off from the transfers that have kept the level of income per head close to the UK national average in Scotland and Wales, and to a lesser extent in Northern Ireland. Partly for this reason, Ireland has remained a relatively poor country. At the same time, its continuing dependence on the UK for markets, jobs and capital have prevented it from exercising monetary and economic policies as independently as it would have wished.[3] Similar considerations would apply to a constitutionally independent Scotland, Wales, etc., even though they would have

advantages over Ireland in terms of the level of industrial development and of resources.

Where formal economic links are retained between the province and the centre, under federal or devolution models, a trade-off emerges between the increased capacity to make policy independently and the enjoyment of assistance from the centre. A dilemma is created both for the province seeking a federal or devolved status and for the central government. Any type of provincial authority or assembly is likely to have two objectives: first, an adequate degree of economic independence; and secondly, a standard of living not too much out-of-line with other provinces in the system, and particularly its closest neighbours. In many circumstances these objectives must be mutually incompatible.

On political grounds central governments rarely if ever welcome the separation of one of their provinces. There are few recorded historical examples of separation 'by consent' and many of bloody wars that have been fought to preserve political unity, including that of federations. A central government may be more easily reconciled if the concomitant of separation is reduction in transfers from the centre to the province, especially if it can continue to draw on manpower resources and to exploit the markets of the province. Constitutional structures determine, at least in part, the outcome of haggling about the division of economic costs and benefits. Generalisation about provincial attitudes to the economics of separation is difficult.

Developments in the economies of different provinces can alter at any time the balance of economic costs and benefits in either unitary or federal systems. The argument about Scottish devolution has been influenced towards separatism by the change in the economic balance brought about by North Sea oil. It could be reversed by the oil reserves running out. Thus the outcome of political debate about separation may be influenced by how long a time-horizon the protagonists are assuming. Over ten, twenty or even thirty years independence may seem to offer considerable benefits to Scotland. Over fifty or more years, a more muted form of separation (a low level of devolution, or federalism with a strong federal government, implying a settlement on oil revenues which is generous to the rest of the UK) may be considered preferable. A Scotland that drove a hard bargain in 1980 in order to leave the UK might have to accept a hard bargain to re-enter the UK in 2020 or 2030.

Since the essential difference between devolution and federalism

lies in the reservation to the central government of ultimate power to change the constitution versus its diffusion among the federal and provincial authorities, appraisal of the relative merits of devolution and federalism in terms of their economic impact is not a simple matter. The discussion of different types of devolution and of the variability of the relative powers of federal and provincial governments, shows that there is a large area of overlap in the possible centralisation or diffusion of economic powers in the two systems. Devolution probably implies less freedom in economic policy-making, and less authority in arguing with the central government about taxes and grants. It also probably implies greater reliance on the central government for assistance in equalising economic conditions and therefore less risk of economic sacrifice in the interests of independence. However, federal systems can have a wide spectrum of economic arrangements, from very strong to very weak federal governments. The strong federal government may have economic and budgetary powers as great, relative to the provinces, as the central government in a devolution system.

FISCAL FEDERALISM

The measurement of the degree of centralisation or diffusion of economic powers is extremely difficult, which adds to the problems involved in distinguishing different types of system from the economic point of view. Many economic powers find expression through public budgets and the structure of 'fiscal federalism' can be a useful indicator, even if it cannot provide a categorical definition. Many works have been published which analyse the public finance of federations.[4] One of the most recent was the Report of a Study Group of the European Commission[5] which analysed the budgets of three unitary states: the UK, France and Italy; and of five federations: the US, Canada, Australia, Germany and Switzerland. In all but one of these countries, (Australia) the proportion of public expenditure to gross national product passing through public budgets at all levels was between 37 and 42 per cent. The shares of the central or federal government in the total public expenditures ranged from around 20 per cent of GNP in the federations to around 35 per cent in the unitary states.

In traditional public finance, the effects of public budgets on the

economy are studied under three headings: (1) effects on the distribution of income; (2) effects on the allocation of resources as between different kinds of economic activities; (3) effects on the overall stability of the economy in terms of inflation, unemployment and growth. In countries with more than one level of government exercising the powers of taxation and public expenditure, the effects on the economy will depend on which services each level of government is responsible for providing and how these services are financed. The possibilities for different combinations of services and taxing are considerable; there are no simple rules or formulae.

Governments directly alter the distribution of income via the incidence of the taxes used to finance two principal kinds of expenditure: cash benefits (unemployment benefit, supplementary benefit, etc.) and free or subsidised public services (health care, education, etc.). Where there are regional differences in average incomes, the effectiveness of these redistributive activities will depend in part on the extent to which tax revenues from relatively prosperous areas are transferred to the less prosperous. These transfers are affected in two ways: (1) by paying cash benefits to the poor, no matter where they live, (interpersonal redistribution,); or (2) by paying a higher proportion of the costs of public services used by people in regions where incomes are on average low. In federal countries these inter-regional transfers take on particular significance when they involve the formal transfer of tax revenues from the budget of the central government to that of the provincial governments responsible for providing the services. The interpersonal redistribution of income can be an important instrument for reducing inter-regional income disparities, but, lacking the political dimension of inter-governmental transfers, they have received less attention in the discussion of fiscal federalism.

Fiscal relationships between central and provincial budgets can be classified into four basic types:

(1) Provincial governments responsible for both providing services and financing them from local taxable resources;
(2) Provincial governments responsible for providing services and raising taxes but the central government supplements the taxable resources of relatively poor provinces;
(3) Provincial governments provide services but they are wholly financed by central tax receipts paid out as grants to the provincial governments;

(4) Central governments provide both the services and the finance from national taxation.

It is difficult to think of a country where only one type of budgetary relationship is used. In most countries one type of central-provincial relationship is applied to some services and another to other services. In the last few decades there has been a tendency for the centre to assume responsibility for providing cash benefits (4), that is, to take over the inter-personal redistribution of income. There has also been a tendency for the centre to equalise the taxable resources of provincial governments: (2) and (3). These inter-provincial transfers of national tax revenues are relatively small if they are designed simply to make up the difference between a province's taxable resources and the national average (2); or they are relatively large if they completely replace local taxes (3). The same degree of redistribution is consistent with very different scales of inter-governmental transfers.

The federal role in the allocation of resources will depend on which public services are reserved to the centre and on the extent to which the centre is given powers to intervene in the market economy. Experience of recent years suggests the centre would want considerable powers to influence industrial development and plant location. The structure of taxation can have an important effect on the allocation of resources within the private sector and division of responsibility for levying taxes may be made with this consideration in mind.

If the role and instruments of the different levels of government cannot be assigned according to some simple formula, it is also easy to understand how in practice the share of the federal, relatively to the provincial, governments in the total of public finance can vary widely. This apportionment of actual fiscal flows depends, of course, on economic and social structures, as well as on the constitutional structures, which vary considerably, and on the size and methods of transfers of funds between different levels of government. Unitary states have large and often highly automatic flows of revenues between public budgets at the different levels. Federal states tend to have smaller transfers. However, the outcome in terms of the actual extent of redistribution is not so widely different as the budget statistics suggest. For example, a similar redistributive effect can be achieved in a federation with a small federal budget as is achieved in the unitary states by large central budgets, if federal expenditures

are concentrated on 'high-powered' transfers, (that is, transfers with a marked redistributive effect,) and not disbursed on a wide range of expensive programmes having little redistributive effect.

The MacDougall Report[5] found that the average degree of redistribution among the provinces in the federations was not decisively different from that in the unitary states; (35 per cent versus 45 per cent). As the Table in Appendix 2 shows, Australia reduced the income differences among its provinces virtually to the same extent as France, and Canada not much less than the UK. Only Switzerland, among the federations, had a markedly lower degree of redistribution than the unitary states. This evidence suggests that wide differences in constitutional systems are consistent with fairly similar levels of redistribution among provinces. Some of the federations have only slowly built up their inter-provincial transfers over recent decades, by a gradual accretion of fiscal power to the federal level and its use in ways that redistribute income among the provinces. Equally, it has been only in recent times that the unitary states have developed some of their national standards of welfare provision, their regional policies, etc. We may conclude that similar social, political and economic pressures give rise to similar patterns of redistribution, even in the presence of substantially different constitutional systems. In the case of a federation formed by the provinces of a previously unitary state, these pressures would certainly persist and there would be a strong desire to maintain an existing high degree of equalisation.

Nevertheless, complete equalisation is certainly ruled out and there would be political pressure in a new federation to introduce some diversity into public provision and public financing as between one provice and another. The federal structure would otherwise be meaningless. Creation of a federation in the UK, with its highly developed national systems of provision of social security, health, education, etc., would therefore introduce considerable tension between the desire to maintain and possibly increase equalisation throughout the country and the demand for autonomy and diversity of the provinces. The high degree of unionisation in public services would severely limit the variation in services in the UK, unless the trade union structures were also de-centralised. The demand for equality of access to education, shown in the imposition of a comprehensive structure of schooling on often reluctant local authorities, would run strongly counter to the demand for provincial powers. Similarly, the desire to maintain minimum

standards of health care through the National Health Service, would come into conflict with any attempt to give provincial governments freedom to exercise choice as to the level of service they would provide. The minimal degree of equalisation would be determined by how much is necessary to prevent the federation from breaking up. On the evidence of other federations the maximum may go almost as near to complete equalisation of provincial incomes net of taxes and benefits as it does in unitary states; that is, there may turn out to be little real alteration in existing arrangements.

Federal governments often attempt to control and coordinate the operation of the provincial budgets so as to make them more consistent with the fulfilment of federal objectives. The most common means of securing this fiscal leverage is to attach conditions to transfers and grants. Or they may use their constitutional powers to control and coordinate the operations of the provincial budgets so as to ensure that they are consistent with the fulfilment of federal objectives. There is in existing federations a wide range of methods of joint participation by federal and provincial governments in financing expenditure taking place in the provinces. These range from general vertical (federal–provincial) or even horizontal (province to province) 'equalisation' grants, which leave the province entirely free as to how it spends the extra revenue provided, through 'block' grants for a loosely specified set of activities, to grants-in-aid and matching grants which are narrowly specified as to their uses and indeed, often require prior approval of specific projects of expenditure. General equalisation transfers redistribute income, but give the federal government little leverage to oblige provincial governments to fulfil its desired objectives. Grants-in-aid give maximum leverage, but they reduce the political autonomy of the provincial government, and increase the problems of over-lapping administration. At times when federal governments are keen to have certain things done in the provinces, these specific grants tend to proliferate. At a certain stage the administrative complexity can become so great that pressure builds up to consolidate specific grants into block grants. The problem of 'additionality' (ensuring that provinces do not merely replace intended provincial financing by the federal grants, without any increase of total expenditure) is a major obstacle to federal governments achieving their objectives by this means. But well-designed grants, such as matching grants, can stimulate provincial

government action and minimise such substitution, though again often at the cost of administrative complexity.

If the objective is redistribution with reference to a specified problem, such as unemployment, open-ended grants are preferable to the allocation of specific percentage quotas to each province in advance of the objective determination of the needs which a fund is intended to alleviate. However, political pressures and inter-provincial rivalries may well impose quotas. Some 'regions' are better equipped than others to develop their own programmes and to lay claim to federal revenues to which they have a general entitlement. This can often work in a regressive direction, since the richer regions are usually best equipped to exploit the possibilities.

One of the main differences between the devolved system and the federal system is in respect of the decision-making process on fiscal arrangements. Under devolution, the amount of grants might well be subject to discussion between the central government and the province, but the central government would retain the power of decision in the last resort. Under federalism there would be negotiations between entities of more nearly equal authority and the final outcome could not be imposed by simple administrative decisions of the central authorities. The federal system may thus prove a more acceptable compromise than devolution between the unitary state and full independence. The province in a federal system would have somewhat less assurance than in a devolved system that it will receive adequate assistance to ensure an acceptable standard of living. But it will have the advantage, both real and psychological, of greater autonomy in making use of its own resources, and the satisfaction of being able to conduct negotiations about assistance from a more equal constitutional position. Individual provinces would see advantage in emphasing particular benefits or development plans more strongly than others, and a federal system could better respond to individual provincial preferences by greater diversity of treatment.

Stabilisation of the level of economic activity, the avoidance of inflation and unemployment caused by cyclical fluctuations, is an essential objective of all governments. The effects of different constitutional systems on the capacity of governments to manage their economies effectively is therefore a most important criterion for the choice of system. The purpose of devolution or federalism is to hand over power to provincial authorities to determine for themselves a wider range of matters, including many fiscal and

economic policies. If provincial authorities exercise this power to meet local conditions and needs, they cannot avoid influencing the overall level of aggregate demand throughout the state, given the high economic interdependence among the provinces which exists in all federations and unitary states. The more the central or federal government is obliged either by the constitution, or by subsequent negotiation with provincial governments, to allocate fixed amounts of resources to the provinces, or to allow them to raise their own resources, the weaker becomes its own leverage for economic stabilisation. The evidence on this matter does not support the view that provincial budgets are always de-stabilising. However, if they should be, stabilisation policy then depends on the federal government being able to influence the provincial governments to manage their own finances in ways that will reinforce, rather than obstruct, the operations of the central or federal government. Such an influence is not impossible to achieve, but it imposes new political and administrative obstacles to the devolution of fiscal policy.

In existing federations the emphasis in monetary policy, for sound technical reasons, is strongly on the supremacy of the federal level. Indeed, as the Gold Standard, the Sterling Area, Bretton Woods and recent EEC initiatives have shown, the appropriate level for the exercise of monetary discipline may be higher than even the larger federations. The substantial links between monetary and fiscal policy, especially via the borrowing policies of central and provincial governments, make impossible a complete separation of these instruments and therefore their complete assignment separately to one level of government or another. A good example of this difficulty of clear assignment was the necessity in Germany of the 1967 Stabilisation Law, which, among other changes designed to strengthen the power of the federal government to deal with cyclical fluctuations, required the *Länder* governments to plan their budgets forward over several years in coordination with the Federal Government's policy and imposed controls over the borrowing powers of the *Länder*. This happened in a federal system that already gave such strong powers to the federal level that it was often described as a de-centralised state, rather than a truly federal one.[6] Also, the scope for any independent stabilisation policy for the single province is insignificant, given normal levels of economic interdependence. Nevertheless, the impact of cyclical fluctuations varies from one province to another, depending on the sensitivity of the indusrial and economic structures, and political preferences also

differ from one state to another. Therefore it is desirable both on technical and on political grounds to leave room for manoeuvre in the hands of provincial governments, which may mean leaving some tax systems and tax rates unharmonised.

Federal fiscal arrangements are also constrained by the risks of administrative and political confusion. Recently in the US there has been a revulsion from the proliferation of federal programmes involving revenue transfers between the federal and the state governments, on the ground that these had become so numerous and so complex that there was no understanding of what they were expected to accomplish, and great difficulty in administration. Similar observations have been made about the proliferation of methods of bringing aid to regions in unitary states, such as the UK and Italy. A major argument against federalism or devolution, now being considered in some EEC states, is the increase in bureaucracy that would be involved, though some increase may be a price that electors would be willing to pay for the sake of an increase in participation.

INDUSTRIAL ORGANISATION

The more important industrial and financial enterprises, both national and multinational and, not least, the trade unions, impose a high degree of uniformity and homogeneity throughout the UK industrial structure. In the debate on constitutional change and the early stages of a move towards federalism the unions are likely to resist geographical de-centralisation of power because it will seem to threaten their own national and centralised structure. They have presumably not felt it necessary to challenge the recent devolution proposals, incorporated in the Scotland and Wales Acts, but the creation of English regions could appear to contain a more serious threat to the unified trade union structure. For, if powers are dispersed, so must be those parts of the bureaucracy and industrial civil service relating to the exercise of the dispersed powers. Hence a number of public sector employees will no longer be employed by the central government but by the provinces. NALGO successfully represents its members employed by local government as well as the central government, and it appears to favour negotiation at local level in certain circumstances. However, the powers of the provinces under a federal system will be greater than those of local

authorities, including power to legislate in certain areas which may well be sensitive as regards the position and views of their employees, such as certain aspects of welfare and, probably, education. More important in this context, they will have more power than local authorities to vary the size and nature of public expenditure programmes, thus directly affecting the numbers of public servants whom they employ. Trade unions in public utilities are likely to wish to retain the power which a unified structure now gives them, thus following a different road from that of NALGO. It is a matter for speculation at present whether this will lead them to oppose the idea of federalism altogether, or whether they will remain confident that whatever else happens the public utilities will remain unified and thus leave their power unimpaired. The provinces, while theoretically free to exercise their authority in the areas in which powers are allocated to them, are likely to be reluctant to do so in such a way as to antagonise a powerful union. At the same time, the unions may themselves find it useful to devolve some of their authority to provincial centres.

The existence of common public utilities, at least so far as gas and electricity are concerned, may be an important element of coherence in a UK federal system, imposing some limitation on the real freedom of choice to be exercised by the provinces. The organisation under a federal system of the public sector corporations, such as gas and electricity, both as regards managerial responsibility and trade union structure, would give rise to many problems. Since the national grids play so vital a part in distribution, it is highly probable that these undertakings will continue to be organised on a nationwide basis. On the other hand, decentralisation of decision-taking in a federal system might avoid the present situation where a small number of employees in key positions in a few power stations can bring the whole country to a halt. But in order to achieve this result, radical changes would have to be made in the direction not only of decentralised production, but also of pay bargaining at a provincial rather than a national level. So long as gas comes mainly from the North Sea, the chances of separate local production of household gas are particularly remote. It seems inevitable, therefore, that provincial interests in this field would have to be met in some other and less thorough-going way: for example, by provincial representation on a board which determined future energy investment and production programmes.

One may speculate more generally on the relationship of

functional and geographical federalism in economic affairs. Functional federalism recognises the growth of power centres outside the government and largely outside politics, and poses the question whether some place should be found for them in the constitutional decision-making framework. Concertation in the Continental sense is one answer to this question. It provides for virtually obligatory consultation between the government and the 'social partners' (employers and trade unions,) over a wide range of economic and industrial decisions. The nearest British equivalent is the National Economic Development Office. More extreme solutions institutionalise such consultations through a Chamber of Labour as in fascist Italy, or the Producers' Chamber in Yugoslavia. Attempts to bring extra-governmental centres of power and influence within a constitutional system tend to increase their power and influence. Thus recognition is being given to the nation-wide entities at the same time as the nation itself is showing signs of greater geographical dispersal of power, through devolution or federalism. The question whether these tendencies are consistent and compatible is interesting, but one can only speculate about the answer. The corporate entities, whether they are the General Electric Company, the Transport and General Workers Union or the Central Electricity Generating Board, may resist geographical dispersal, because it threatens their new-found strength. They may, by insisting on retaining their nation-wide operation, considerably limit the amount of power dispersed to provinces; or they may in some cases conclude that they too must devolve or federalise, to match the new centres of political power provided by the provincial legislatures.

7 Implications of Federalism for External Relations[1]

Control over foreign affairs and defence is the most obvious candidate for assignment to the centre and this pattern is followed by existing federations. Nevertheless, the application of this principle is not now so easy as it once appeared to be. When external affairs consisted of the higher reaches of diplomacy, the balance of power and alliances, there was not much question that these were functions of the central government. But Foreign Offices today are increasingly involved in the negotiation of technical, often economic, agreements, many of which fall within the scope of the powers allocated to provinces in a federal system.

Several questions immediately arise.

> How is a federal state, a polity with a constitutional division of powers along central-regional lines, to participate in international treaties involving matters which fall within the constitutionally reserved powers of the constituent units?[2]

If a federal state succeeds in negotiating an international agreement of this kind, how does it secure implementation by all its provinces? Can a province act by itself in the external field, for example, by making a border arrangement with a neighbouring state, or with a province of a neighbouring federal state? Can it make an agreement with a foreign state on a matter wholly within the province's responsibility, for example, on education? In order to mitigate these difficulties can a province be represented at international negotiations which may affect it? In the particular case of intra-EEC relations how is it to be arranged that Community decisions apply within provinces and should forms of plural representation or provincial scrutiny be envisaged?

To show that these are not purely theoretical problems some practical examples may be cited. In 1937, Canadian federal

legislation to fulfil International Labour Office conventions was declared *ultra vires* because it infringed provincial rights. For this reason Canada by 1964 had ratified only 20 out of 120 labour conventions; others were ratified later after agreement with the provinces. Canada was unable to ratify the UN Convention on Human Rights for similar reasons. Quebec claims to have a limited international personality of its own. It has concluded cultural conventions with France and has been separately represented at a meeting of francophone states in Africa. Difficulties created for the federation seem to have been settled temporarily by an arrangement that federal endorsement is necessary in order to make provincial agreements with an external state effective. The USA has a more comprehensive view of the federal government's power in external affairs and it has been generally accepted that international treaties override state laws unless they are held to be contrary to the constitution. Nevertheless, the US has refused in several cases to enter into agreements which would have to be implemented by state laws. It did not accept, for example, the 1922 Convention on the suppression of traffic in women and children, and refused in 1953 to ratify the Convention on Human Rights. In Germany, many of the areas of application of technical international agreements are within the area of concurrent powers in which *Bund* law overrides *Land* law, but in a notable case where this was not so the Federal Government found itself unable to implement provisions of a Concordat with the Vatican on denominational schools. In Switzerland, treaties generally override local law. But the federal government has hesitated to make agreements on taxation and labour matters for fear that their implementation would lead to difficulties with the cantonal authorities. The UK, even with its present very limited quasi-federal relationship with the Isle of Man and the Channel Islands, is having trouble with the former on the issue of corporal punishment by judicial decision, which is held to be contrary to the European Convention of Human Rights. A similar problem could arise concerning corporal punishment in Scottish schools.

Three lines of action have been followed to overcome some of these problems. One is a 'federal states clause' inserted in international agreements, to the effect that the treaty will be applied by federal states so far as their law allows and that 'best endeavours will be made to persuade the provinces of the federation to do what is necessary to enable the treaty to be generally applied. Another

method is to have provinces associated with the negotiations by some form of plural representation, in the hope of securing from the beginning their acceptance of the treaty and thus eliminating the need for a 'federal states clause'. Thirdly, there is the obvious method, which must in any case be used in conjunction with the other two, of internal cooperation between the centre and the provinces. This can extend to financial compensation to provinces for damages or costs expected to be suffered by them as a result of an international agreement. A similar need for cooperation arises in the reverse case of a province making an external agreement which requires sanction from the centre in order to be internationally effective.

In addition to these general implications for external relations there are special considerations relating to the membership of a federation in the European Community. Decisions in the Community are taken by representatives of the member states, but have to be applied automatically throughout the territories of the federation, which would in some cases require the active participation of the provincial authorities. This question is discussed more fully in the next Chapter.

A UK federation would not start with a clean slate. There are countless existing international obligations entered into by the UK which have technical and administrative implications. These arise not only from membership of the European Community but also from signature of multilateral conventions such as those on Human Rights, GATT, ILO, etc. It would cause international chaos if these had to be renegotiated to ensure continued application by the new provinces of a federal UK. As in the normal case of successor states, it would be necessary to accept all existing international obligations as part of a new federal constitution. In general, there should not be many practical or political difficulties about this, but some EEC obligations, notably some of the provisions of the common agricultural policy, may give rise to strong provincial pressure for amendment.

The decision whether or not to proceed to devolution or federalism in the UK is unlikely to turn on the implications for the conduct of external relations. The problems posed by this aspect should not be used as an argument against a federal system if this seems in other respects desirable. On the contrary, in this field as in others, the increased necessity of taking into account provincial feelings and interests which is inherent in a federal system could be

valuable in making the decisions of governments more acceptable. From the federal government's point of view the complications of consultative procedures in the course of negotiation or of plural representation, in contrast to the present reliance on prerogative and *post hoc* scrutiny, may be an acceptable price to pay. From the province's point of view the united voice of a federal state, if it can be achieved, may be seen as a more effective vehicle for provincial interests than the isolated efforts of an independent mini-state.

A universal rule in federations seems to be that defence is a federal, or centrally decided, matter. The reasons are obvious. Provinces are unlikely to be able or willing to devote the necessary resources to defending themselves individually. Decisions often have to be taken quickly, which precludes consultation between different levels of government. The extreme example of this is, of course, the decision to use nuclear weapons, which is generally held to reside with a single individual, the head of government, and may have to be taken in a time measured in minutes.

The most important aspects of UK defence are handled largely in the framework of the Atlantic Alliance. Continuing membership of NATO would be one of the commitments which a federal UK would have to undertake as part of the act of succession referred to above. It would not make sense for one or more provinces of the federation to say that they wished to opt out of this commitment, or to have a different world alignment. To do this would be tantamount to withdrawing from the federation. However, the level of defence expenditure would be a factor in the overall financial arrangement between the federal government and the provinces, since it is one of the elements which have to be met from central revenues, and thus imposes a certain constraint on the amount available for redistribution. There could therefore be argument between the federal government and the provinces on the level of expenditure, and this has actually occurred between Quebec and the Canadian Federal Government.

The legislative and executive action which governments find it necessary to introduce in time of national emergency would also have to be dealt with in the establishment of a federation. This can have far-reaching effects on all aspects of life, including some which would normally fall in the sphere of provincial powers. There must presumably be some overriding provision in the constitution to allow the federal parliament to take such action without having to obtain provincial concurrence on every occasion.

8 A Federal United Kingdom in the European Community

So far in this paper the discussion has centred mainly on the internal government of the UK. However, it is necessary to consider explicitly a parallel major development affecting the constitution of the UK: membership of the European Community (EC). Assuming that the EC continues to exist and to develop, and that the UK remains a member, it is essential to consider how the development of devolution or federalism within the UK would be reconciled with membership of the wider political grouping. To do so, it is necessary first to clarify the nature of the EC and its implications for the constitution of the UK. Then we consider how other member states, especially those with an explicitly federal constitution, such as the German Federal Republic, have been affected by membership. Thirdly, we shall examine in more detail the impact on national parliaments and governments of EC legislation. Turning to the regional/provincial dimension itself, we shall examine the question of regional representation in Brussels, how this might develop; and the relations of existing 'autonomous' islands and provinces with the Community. Finally, it will be possible to discuss the overall balance of powers between the three levels—European Community, nation states, and provinces—implicit in an assessment of the EC as an embryo federal state.[1]

THE SUPREMACY OF EUROPEAN COMMUNITY LAW

It has frequently been remarked that, while the actual scope of the EC is limited to a fairly narrow range of actions on external trade, organisation of the internal market and the common agricultural policy, its legal status is one of a power unparalleled by any other

international organisation. One authority has suggested that this has been a consequence of the caution of the founding states in not writing into the Treaty of Rome the normal protection of provincial rights included in federal constitutions:

> The Community is not a federal state in the classical sense and never will become one. Neither is it a confederation, although its position is similar to that of the confederation of the Thirteen States in the decade before 1789. It will develop into a new political form for which the word 'Community' is quite adequate and indeed accurate. Nevertheless . . . the Community even now has greater legislative powers than any federation existing in the world today . . . The legislative powers of the Community within the areas covered by the Treaties . . . are unlimited and it remains in the hands of the courts to determine whether and to what extent the member states have retained powers over human rights, national sovereignty, even national territory, not to mention such classic areas of federal conflict as the tax power and foreign relations.[2]

This is, of course, a statement of the legal position, and should be moderated by consideration of the political opposition to the extension of EC powers which makes progress even on sensible and urgent common policies painfully slow. However, the political reluctance to grant new powers to the Community institutions, and the insistence on protecting national sovereignty, are themselves provoked by the legal superiority of the community over the member states. Interpreting a Treaty which is vague on many issues, in the absence of specific protection of the member states powers, the European Court of Justice has been able to build up a substantial case law:

> We have . . . seen the inexorable development of the Court of Justice into a pure common law court, creating law where none previously existed, drawing general principles out of the air common to all the ten legal systems, proceeding from case to case and indeed being led sometimes to enunciate principles in a form which it might have preferred to avoid merely because of the accident of litigation . . . It has shown an amazing skill in developing the law and ensuring its respect by very proud administrations. And it has now built up a body of tradition and

> style and practice which is likely to endure even through periods of legislative super-activity. Community law is and will continue to be what the Court says it is.[3]

Even if some of the impact of these conclusions is softened by the consideration that the national governments exercise tight political control by insisting on unanimity for virtually all new Community legislation, there is clearly in existence a situation that has to be taken into account in considering the future constitution of a federal UK. Whatever constitutional structure is devised for this country must be fitted into the framework of existing EC law, and must also be capable of adapting to future developments of EC law. Specifically, nothing could be inserted into the constitution of the UK which could be interpreted as giving priority to provincial over national decision-making in any area where the UK had already given up its powers to the European Community. Moreover, it would have to be made clear that any future development of EC legislation which the UK would be obliged under its Treaty of Accession to apply throughout the UK would have immediate effect in all provinces, and no rights granted to the provinces under a federal constitution could be interpreted as giving them the right to avoid implementing EC legislation. In this manner the EC could be already, and could become even more in the future, a constraint on the constitution of a federal UK. Regulations of the EC, which have direct effect in the member states, would have to continue to be given immediate effect in all provinces of a federal UK without exception. Directives of the EC, which do not take direct effect but carry an obligation on member governments to implement them in their own legislation within a short time, normally two years, would have to be implemented by laws having effect throughout all provinces, whether these were federal or provincial. Some room for manoeuvre might be left in the case of Directives, since there is scope for some discretion as to the precise method of implementation in each national state. However, it would be necessary to implement throughout the national territory all the essential conditions of any Directive, and failure to do so on account of opposition in one of the provinces could result in an action before the Court of Justice for failure to implement the Directive.

IMPLICATIONS FOR A FEDERAL UNITED KINGDOM

The legal superiority of the EC appears to mean that two things would be necessary in the constitution of a federal UK. First, the initial assignment of powers, especially in the areas of agricultural policy, internal and external trade and taxation, where the EC has developed its own policies, would have to be consistent with the obligations already entered into by the UK government. Secondly, there would have to be a method of ensuring that any new EC policies, properly accepted by the UK federal government in accordance with the new constitution and the Treaty obligations to the EC, were implemented throughout all the provinces. This could be done by a general 'EEC Clause' which would provide that the federal (national) government could override the provincial governments on any issue where such an override was necessary in order to comply with Community law. Any such 'EEC Clause', however, would need to be balanced by a 'provincial rights Clause' to protect the provinces from the federal government agreeing to EC legislation with the intention of asserting its own authority over the provinces. Such a 'provincial rights Clause' would have to consist in the right to be consulted and to have a voice in the ratification of EC legislation at national level. This might be a separate clause in the federal constitution, or it might form part of a wider clause protecting the provinces from other manifestations of the extension of federal power. An alternative method, which would avoid a federal override on EC matters, would be for the provinces to agree in the constitution that they would themselves in all cases implement EC Regulations and enact EC Directives on matters assigned to the provinces in the UK constitution. Failure to fulfil this clause in the UK constitution could then lead to a case being brought before the UK Supreme Court.

This question of two-way safeguards with respect to the development of EC powers in relation to a federal UK raises wider issues of the scrutiny of EC legislation at national and at provincial level. Before examining further the protection of provincial rights *vis-à-vis* the EC, it may be helpful to make some comments on the existing complex and not very satisfactory position regarding scrutiny of EC legislation at national level. New legislative instruments are proposed by the Commission, after consultation of interest groups in the various member states. They are communicated to the Council of Ministers, and each member government submits them to its own

parliament. In the UK there are scrutiny committees in both the House of Commons and the House of Lords. However, these committees have neither the manpower, the resources, nor the time to cope with the immense mass of detail which descends on them. Scrutiny is made more difficult in that the legislative process is so lengthy, and complicated by the necessity of translation into all the official languages of the Community. Draft Directives, especially, may be changed many times over a period of several, and sometimes many, years, as the Commission responds to comments coming not from one but from nine different legislatures, plus the European Parliament and the Economic and Social Committee. National parliaments have notorious difficulty in coping with the mass of detailed national economic legislation that is now put before them; it is even more difficult for them to deal adequately with EC legislation.

Turning to the specific problems of regions and provinces in relation to EC legislation, we should note, first, that there are obviously no insuperable obstacles to reconciling a federal constitutional structure with membership of the EC, since one of the existing members, Germany, has a federal constitution. It is therefore sensible to consider whether the German example constitutes a satisfactory model for the future organisation of relations between a federal UK and the EC. The reconciliation of *Länder* rights with EC membership is achieved in three ways. First, the *Bundesrat*, the upper house of the German Parliament, is entirely a chamber for representing the interests of the *Länder*. Thus the views of the *Länder* are taken into account directly at federal level and indeed no federal legislation can succeed without the consent of the *Bundesrat*. Since there are other powerful arguments for making the upper house of the Westminster parliament into a chamber representing the provinces, this would be the most satisfactory method of solving the dual constitutional problem created by integration upwards simultaneously with devolution or federalism downwards. In addition to this central constitutional feature, there is in Germany intensive consultation of the *Länder* governments on EC legislative proposals. Such consultation, which in unitary states also is highly developed, not only with the regions, but also with pressure groups, professional bodies, etc., is clearly essential, though it confers no rights. Thirdly, there is in the German constitution a wide definition of concurrent powers, in which *Bund* law overrides *Land* Law. If such an override were inserted into a federal UK

constitution, and included the areas of legislation where the EC already has, or is likely soon to have, competence, the problem could be resolved.

PROVINCIAL REPRESENTATION IN THE EUROPEAN COMMUNITY

Moving outside the national constitutional structure, there are two further ways in which provincial interests could be safeguarded *vis-à-vis* the EC. First the provinces could be represented directly in Brussels. The German *Länder* already have a representative in Brussels, to keep in touch with EC legislation which may affect them. This provincial representation could be developed and strengthened, to provide more adequate influence of the provinces at an early stage in the EC legislative process. This method would, however, further increase the already excessive complexity of that process, and would not confer any actual rights on the provinces to assert their preferences, or their vetoes, on the Commission's legislative proposals.

If a UK federation is established one of the reasons will be that Scotland, and to some extent Wales, want greater powers of decision-making in matters that appear to concern them directly. Some aspects of Community policy, particularly in agriculture and fishing, will seem to fall in this category. It may therefore be unwise to assume that in this respect the provinces of a UK federation will be willing to apply the German model. They might feel that the federal override in particular represented too great a sacrifice of independence. If so, more emphasis would have to be placed on prior consultation and on allowing provinces particularly concerned to be represented in the UK negotiating team. This is not going to make Community decision-making any easier. Alternatively, Scotland might try to secure amendment of some aspects of Community policy as a condition for accepting constitutional arrangements which would allow the federation to operate effectively as a Community member. It is clear that in any case UK membership of the Community will be a significant factor in the debate about both the allocation of powers in a federal system and the methods of resolving differences between the centre and the provinces. Moreover, some member states have been very hostile to any official recognition being given to representatives in Brussels of

the 'unrepresented nations', fearing that this would stimulate demands for regional autonomy.

Secondly, we may speculate whether the directly elected European Parliament after June 1979 may develop as the representative assembly of the provinces. So far all the evidence has been that Members of the European Parliament (MEPs) associate with their 'ideological' friends from similar parties in other member states, and their attention to the regions or provinces in their own countries is a secondary matter. However, they have not so far been elected from territorial constituencies, except in respect of their membership of their national parliaments where the constituencies are probably too small to allow members to identify with major regions. Also the selection of MEPs from within the national parliaments has been too erratic, in geographical terms, to give them any sense of urgency in representing the problems of their provinces. In the directly elected European Parliament there should be a greater identification with regions so far as the UK MEPs are concerned, given the much larger constituencies, though not so great as it would have been if the system of regional lists had been adhered to. Since in France the MEPs will be elected on national lists, a decision made deliberately to avoid enhancing the influence of the provinces in Strasbourg, in that country the MEPs will not play the same role. However, it would probably be sufficient that a significant proportion of the directly elected MEPs should regard themselves as representing their regions or provinces for this role to develop, and for pressure to be brought to bear on other member states to increase the element of regional representation. The electoral system has to be uniform for the second direct election, due in 1984, and this could be the occasion for a decisive development of the role of the European Parliament as a platform for the 'regional voice' in the EC. However, such a development would still have the significance only of an increase in consultation. The constitutional powers of the European Parliament will not be affected by the direct election. It will be asked its opinion, but, except for its powers in relation to the Community Budget, it will have no power to alter or even to delay, let alone to veto, or to initiate, the EC legislation. While development of the regional or provincial aspect of the European Parliament may therefore be significant for the longer term, it would be wrong to rely too heavily on its possible role in considering what would be satisfactory constitutional arrangements for a federal

UK. For the foreseeable future, it would be wise to assume that provincial rights must be safeguarded in a federal constitution for the UK which is made consistent with obligations already entered into with respect to the existing constitution of the European Community.

In considering all aspects of the relations between the provinces of a UK federation and the EC we should also draw attention to a scenario that has been suggested for many years of '*l'Europe des Régions*': provinces which are directly related in a federal constitution with a Community Government.[4] Such a development has been proposed by those who are 'maximalist' on both the regional devolution and the European integration issues, and contrasts with the 'minimalist' position taken by centralising nationalists who are opposed to both regional devolution and the European Community, and only slightly less so with that of the 'confederalists' who accept a minimal role for the EC. Certainly such a constitutional structure for western Europe would simplify the problems of the tri-lateral relationships of EC, nation states, and provinces, under discussion. It would create in western Europe a federation of some 72 provinces, similar to that of the United States with its 50 provinces. It would solve many problems, but at the expense of creating many new issues. While accepting that this scenario is possible, we regard it as so remote from the current realities of both existing constitutional structures and existing public opinion, as to be not worth exploring further.

INDEPENDENCE AND THE EUROPEAN COMMUNITY

Finally, in order to complete this review of problems of relationship to the EC, we should explore briefly the consequences of adoption by one or more provinces of the UK of the extreme solution to internal constitutional differences: independence. An overt objective of the Scottish Nationalist Party is that they would take Scotland out of the UK, and become an independent sovereign state. In such an eventuality, relations with the EC would have to be considered from an entirely different standpoint. A related proposal is that some province or provinces, while remaining part of the UK, would seek an autonomous status in which they would be entitled, among other benefits, to seek a special status within the EC.

The Treaty of Rome, Article 227(4), states that, in the absence of

any special agreements, the Treaty applies fully to any European territory for whose external relations a Member of the Community is responsible. Special arrangements exist, and affect the application of EC rules and policies, in a surprisingly large number of European territories, including: Heligoland, (Federal Republic of Germany), Andorra, Zone Franche and St Gingolphe, Monaco (France), Campione, San Marino (Italy), and the Faroes, Greenland (Denmark), the Channel Islands, the Isle of Man (United Kingdom). The special terms for territories of the original Six in Europe recognised long-standing special treatment already accorded by their parent states to tiny enclaves and border territories of little political or economic significance. As such, they do not appear relevant to the search for guide-lines as to what status and terms provinces of a federal UK might be able to obtain. The special protocols to the Treaties of Accession negotiated by the UK for the Channel Islands and the Isle of Man (and by Denmark for Greenland and the Faroes) are somewhat more relevant. There is no precedent for negotiating new terms of membership or association for part of the territory of an existing Member state, since no territory of a Community Member state has, after its parent state joined the Community, sought to obtain special arrangements.

The account given in Appendix 3 of the treatment within the EC of the Channel Islands and the Isle of Man, which are subject to the Crown but constitutionally separate from the United Kingdom, provides a number of pointers to the possibilities of special treatment. It would, however, be entirely unrealistic to expect that large provinces within a UK federation could be granted the kinds of basic exemptions permitted for these small and traditionally independent islands. Provinces under a newly adopted UK constitution would be claiming a new status within the Community, and the reaction by the rest of the Community would be much less amenable to the grant of special status. In particular, the Community would have in mind that granting special status to UK provinces would open the door to similar claims from a number of provinces of other member states, which have been seeking some form of autonomy. Brittany, Corsica, Catalonia, Vizcaya and numerous other provinces could seek to follow any precedent set by the treatment accorded to UK provinces. The opposition to special terms within the EC would derive in fact not only from the desire on the part of other member states to avoid the erosion of their own advantages of membership, but also from the wish to avoid any

developments which would give encouragement to the demands of their own provinces for any form of autonomy within the national states. The strong opposition to special treatment would also have a firm foundation in the precedent which already exists for the membership of a federal state; the Treaty applies in full in all the *Länder* of the German Federal Republic. It is, therefore, only in the circumstances of complete constitutional independence from the UK that the question of different terms of membership of the EC would arise.[5] Since we have earlier set up this as one of the options open to UK provinces in the event that they are finally dissatisfied with the gains to be derived from devolution or federalism, a few comments on the implications for relations with the European Community would be in order.

If Scotland were independent of the UK, with ownership of the oil resources in its waters, but wished to continue a member of the EC, it would have to apply for membership and the effects would again depend on negotiations, whose outcome is unpredictable. While some special arrangements could no doubt be agreed by the EC, they need not be very favourable to Scotland. The increase in income per head on account of the oil revenues could preclude consideration for grants from the ERDF, and might affect the application of FEOGA grants also. Oil revenues leading to high levels of imports of manufactures and agricultural products from third countries would raise the incidence of CET duties and CAP levies paid into the EEC Budget. Contributions related, via the VAT *tranche*, to consumer final expenditure would be much higher than the existing notional Scottish contribution to the EC Budget. The common fisheries policy would probably have to be accepted, implying free access to Scottish waters by vessels of other Member states, subject only to any exclusive zones that could be negotiated, and to any agreements restricting catches and allocating them to the various Members. Given the traditional reliance of some parts of Scotland on fisheries, they would probably be better placed than the UK as a whole to press for some exclusive zone, and favourable allocations, though the final outcome must be uncertain. Given the importance the EEC attaches to secure energy supplies, Scottish oil could be an important bargaining counter in obtaining concessions in other policy areas. A guarantee to supply EC Member countries exclusively, or to give them priority over other customers, could be traded off against fisheries and other policy issues. Much would depend on the political and psychological reaction of the EC

Members, including the UK, to independence. It cannot be assumed that the favourable treatment of wealthy Jersey (see Appendix 3) forms the appropriate precedent, since they only sought to retain a previous status, not to make new demands.

An independent Scotland would not necessarily seek membership of the EC, or find the terms acceptable, since membership could become less attractive and, like Norway, it might prefer to negotiate some form of association agreement. In Norway the problems of fishing, and of high cost agriculture, were decisive in the referendum vote against membership in 1972. Since then, oil wealth appears, for the majority, to have endorsed this decision. The case of Scotland is not dissimilar in terms of population, industrial structure, etc. Scotland could therefore attempt to negotiate a free trade agreement similar to that of Norway's in order to secure industrial trade outlets in the Community, and especially in England. The terms of the Norwegian agreement were fairly onerous so far as 'sensitive' products were concerned, notably aluminium and paper, of which exports to the Community were restricted for a lengthy transitional period by tariffs and quotas. Scotland, within a comparable agreement, would suffer some disadvantages in similar industries. In return, it would not have to apply the common agricultural policy, nor make contributions to the Budget, and it would be able to declare its own 200 mile economic zone.

Finally, Scotland could consider remaining entirely outside, and unassociated with the EC. As an independent nation outside the EC, Scotland would enjoy full freedom to determine its own economic policies: currency, tariffs, etc. This freedom would be worth little, if oil is left out of account, since Scotland would be too small and poor to maintain a separate currency, and would suffer far more from EC tariffs on its exports than it would gain from imposing its own tariffs on imports from the EC. It would also lose access to the FEOGA, the ERDF, and the EIB. If ownership of the oil in Scottish waters passed to an independent Scotland, the position would alter significantly. Independent Scotland would be able to sell the oil to EC countries, or elsewhere, at the world price. A conservative depletion policy could, if technically possible, maintain a substantial income per head from oil for many decades while the alternative policy of investing oil revenues abroad could build up a substantial investment income which could continue indefinitely after the oil is exhausted. Independence would also be

beneficial to the fisheries, since Scotland would be able to declare its own 200 mile exclusive zone, up to the median lines with the UK, Norway and the Faroes. Within this zone fishing vessels of other nations could be excluded, at the costs of reciprocal exclusion from others' zones. However, an association agreement would also safeguard the right to an independent fisheries policy, while preserving access to industrial markets.

Appendix 1 Federal Models

THE UNITED STATES

The United States of America was the first modern federation and is still usually regarded as the typical example. The constitution provides for a characteristic vertical division of powers between the Federal Government and the States, with a particularly important role for the Supreme Court as the arbiter of constitutional disputes. The legislature is bi-cameral, the House of Representatives being elected by the people as a whole, and the Senate specifically representing the States, with two Senators each, however different their size and number of inhabitants. State populations vary from 18 or 19 million for New York and California, 10 or 11 for Ohio, Pennsylvania and Texas, down to 600,000 each for the Dakotas and 300,000 for Wyoming. The State legislatures are also bi-cameral, except in Nebraska.

The history of the US is a text-book of debate between the concepts of 'strong' and 'weak' federation, or between federation and confederacy. The debate began with the philosophical arguments of Jefferson and Hamilton, but it required the Civil War to prove that the right to secede was not included in the rights of individual states, whatever other powers they may have. However, the resulting supremacy of the Federal Government was slow to develop, because of the American antipathy to government of any kind. In the economic *laissez-faire* of the nineteenth century, 'divide and rule' was stood on its head; the division of powers between centre and periphery helped the citizen to avoid being ruled. But economic disaster in the 1930s caused the interventionism of the New Deal to be accepted with little question, though the growth of federal power imposed severe strains on the constitutional structure.

The federal structure is only one of the checks and balances inherent in the US constitution, and perhaps not the most important. The rigid division of executive, legislative and judicial powers has a more pervasive and decisive effect on the formation

and execution of policy in many fields, and in itself safeguards the federal structure against excessive centralisation. The Senate limits the power of the central executive both in its general function as part of the legislature, in which capacity it has, for example, specific powers in the field of foreign affairs, and as the guardian of states' rights. Its federal aspect is sometimes most apparent in the pursuit by Senators of material advantage for their home states through the allocation of federal economic assistance.

Another element in the US political structure which restrains the power of the federal government is the highly de-centralised party system, coupled with the frequency of Congressional elections. But although de-centralised, the parties remain of the highest significance in Presidential elections. Party control of a state is considerably more important for the delivery of the state's votes to a candidate in the Presidential election than for control of the state legislature. It matters a great deal more to the average voter to get his man into the White House than into the Governor's mansion. No doubt this is in part a reflection of the greatly increased share of power and patronage obtained by the Federal Government since the New Deal, and the infinitely greater role played by the US in world affairs now than in 1789.

Nevertheless, states still regulate large areas of economic life and have significant powers to raise taxes. The other characteristic state prerogative, education, has of late suffered some diminution as a result of the Supreme Court's judgements against educational discrimination or separation on grounds of colour.

CANADA

The Canadian constitution, drawn up in 1867, described Canada as a Confederation despite containing elements of a more centralising and authoritarian character than the constitution of the US. This was partly a reaction to the belief that the recently ended American Civil War had been caused by the weakness of the US federal government. Contrary to most other federal systems, the British North America Act enumerated the powers allocated to the provinces and left the rest to the centre. The Governor-General was given the right to disallow provincial laws; the Senate was appointed by the Governor-General and the Lieutenant-Governors of provinces were paid by the central parliament, not by the

provincial legislature. The choice of the name 'confederation' in these circumstances demonstrates only the unreality both of this term and of the alleged distinction between it and federalism.

The evolution of the system has been exceedingly uneven, and in many respects contrary to the intentions of its originators. In a number of decisions in the nineteenth and early twentieth centuries, the Judicial Committee of the UK Privy Council reversed the centralising intentions of the constitution by giving more powers to the provinces and limiting those of the centre by enumeration. The Privy Council's powers were transferred in 1949 to a Canadian Supreme Court whose general attitude has not been significantly different. The war and economic difficulties created pressures in the opposite direction, allowing the centre to increase its fiscal powers in the 1940s. But the growing strength of Quebec separatism since the 1950s reversed this tendency and now dominates the constitutional scene.

Canada now consists of ten provinces with a wide divergence of provincial populations from some eight million in Ontario to about half a million in Newfoundland, and only 100,000 in Prince Edward Island. The central government and the provincial governments are based on the British Cabinet and Parliamentary model, not on the US Presidential system. There are two central chambers. The House of Commons is elected by popular vote. The Senate is still appointed, with fixed but not equal numbers of members from each province, and one each from the centrally administered territories of Yukon and the North West Territories.

The provincial legislatures are uni-cameral, and each province has a supreme court. The provinces were originally given powers to raise direct taxation, to borrow funds, to administer justice and to manage education. The central government obtained in 1941, by agreement with the provinces, exclusive rights to raise income-tax and corporation tax. After 1945 tax-sharing agreements were made with all provinces except Quebec, including complex equalisation arrangements for the poorer provinces. In the case of Quebec the central government was obliged eventually to agree to an abatement of central income tax in order to allow the separate raising of provincial tax.

The system as now operated depends on much detailed negotiation and bargaining between the centre and provinces, and still fails to satisfy Quebec's more extreme aspirations, which have gone so far as to challenge the central government's right to manage even

defence spending. The view has been expressed that if further concessions have to be made in order to persuade Quebec to stay within the federal system, the central government will have lost its paramount position and will in fact become merely an equal partner of the provinces.

AUSTRALIA

The federation established in 1901 comprised six former colonies: New South Wales, Victoria, Queensland, South Australia, West Australia and Tasmania. The Northern Territory became a state in 1977. The capital area of Canberra is directly administered by the central government. Populations of the states vary from about five million in New South Wales to 400,000 in Tasmania.

The general theory underlying the Australian Federal Constitution was to return to the greater emphasis on states' rights in the US constitution in contrast to the more centralising tendency of the British North America Act which incorporated the constitution of Canada. There was therefore a very clear vertical division of powers, except for some overlap on welfare. The federal legislature is bi-cameral. The Senate contains ten members from each state plus two each from Canberra and the Northern Territory. In spite of equal representation of all the states, the Senate is judged not to have functioned primarily as a Chamber of States, but rather as a general review body influenced predominantly by party considerations. The House of Representatives is elected by popular vote. The two houses have equal powers, and disagreement between them is resolved either by a joint session of both houses, or by a dissolution and new elections.

The state legislatures are bi-cameral, except for Queensland. A High Court hears cases in which there is conflict between the central government and the states. Amendment of the constitution can only be brought about if there is a majority both of the voters and of the states in favour of it.

Initially income tax could be raised only by the states, and the central government was financed by customs revenue. Later, under pressure of the Second World War, uniform federal taxation was instituted in 1942 followed by equalisation grants to the states. This led inevitably to some degree of central control over spending by the states, a tendency which was further increased by the proliferation

of grants tied to specific spending requirements. The growth of financial inter-relations between the central government and the states led to the establishment of two further institutions. A Grants Commission was set up in 1933 to make recommendations about the size and terms of the grants from the central government to the states. A separate Loan Council determines the size and nature of loans to be raised by both the central government and the states. The central government has two votes plus a casting vote on this Council and each of the states has two votes.

The formal division of powers follows normal lines. Defence, foreign affairs, immigration, citizenship, currency, insurance and pensions are allotted to the central government; education, health and welfare primarily to the states. In practice, however, the states can only exercise these functions if they receive a large allocation of central funds. There is therefore a disequilibrium between resources and responsibilities, which could theoretically be resolved either by transferring more functional powers to the centre or by handing more revenue-raising powers to the states.

Some attempts have been made to change the constitution in a centralist direction but these have failed to obtain sufficient popular support. Equally the central government has been reluctant to give up to the states the revenue-raising powers which it has acquired in the past 30–40 years. However, in 1977, The Financial Assistance Grant (a block grant and the main source of federal support of state budgets) was replaced by allocating to the states a share in federal income tax proceeds. This global sum is divided among the states by a formula based on population, number of children, etc. Each state can then supplement these revenues by levying a surcharge (positive or negative) on the income tax paid by their residents. There will effectively be two income taxes, state and federal, with the federal government collecting both.

SWITZERLAND

The official title of Switzerland is *Confédération Helvétique*. The earlier form of the association of the cantons was very much a confederal system, but since the constitutional changes of 1874, the system has had most of the attributes of a federation.

There are 22 cantons, varying in population from 1.1 million down to 13,000. There are two chambers; the *Nationalrat* which is

elected by popular vote and the *Ständerat* which has two members from each canton. The central government consists of the *Bundesrat*, or Federal Council, with seven Ministers elected by the two chambers in joint session and with a rotating chairmanship. In each canton, there is an elected local assembly, the *Kantonsrat*. A federal Tribunal rules on constitutional disputes. A particular feature of the Swiss federal system is the very frequent use of the referendum, both nationally and in the cantons. Amendments to the constitution also have to be approved by referendum. In some cantons decisions can in fact be taken by an actual popular assembly of the inhabitants.

The division of powers allocates to the federal government the right to declare war, make treaties, manage the money supply and public works and to operate two universities. The remaining powers (including education apart from the two federal universities) are in the hands of the cantons. There appear to be no formal unions of the cantons which speak a common language but the existence of three clearly defined linguistic groups in the country no doubt helps to symbolise the federal nature of the constitutional structure and to accustom people to think in terms of a union of diverse elements.

THE FEDERAL REPUBLIC OF GERMANY

There are ten *Länder* varying greatly in size and population from North Rhine Westphalia with 17 million inhabitants to Bremen with 800,000. The *Länder* have governments and parliaments (mostly uni-cameral) and are collectively represented in the second federal chamber, the *Bundesrat*. The *Bundestag* is directly elected.

The making of federal law is itself in many areas of government subject to the consent of the *Bundesrat*, representing the *Länder*. However, there are also areas in which the *Bund* has overriding powers. The general tendency in recent years has been to increase central powers. There are two main divisions of function between the central government (*Bund*) and the provincial governments of the *Länder*. One is that the latter may legislate independently on certain limited subjects: mainly education, police and local government. On other matters the *Länder* are mainly responsible for the administration of federal law.

The greater part of the revenues of both the *Bund* and the *Länder* is raised by centrally legislated taxation, the proceeds of which are divided between the *Bund*, the *Länder* and the local authorities,

rather than by providing separate sources of revenue at the different levels. Decisions on the amount to be raised and the proportions to be alloted to each level of government are taken as a result of argument and consultation, in which the Finance Planning Commission, presided over by the Federal Finance Minister, plays a considerable part.

Much consultation takes place among the *Länder* governments and between them and the Federal government, and this is so indispensable that the system is sometimes known as 'co-operative federalism'. A negative result of this process is that the power of the provincial assemblies is reduced and the quality of their membership suffers accordingly.

In addition to the federal distribution of powers and responsibilities, Germany also shows a strong tendency to administrative decentralisation through the numerous official agencies, attached to government departments but having a high degree of independence from Ministerial control.

The whole system is tied together by three elements: a highly developed network of administrative law and constitutional courts; a homogeneous public service operating at all levels of administration; and the national party organisations which permeate all levels of representation.

BELGIUM

Belgium does not yet call itself a federation, but has moved a long way in that direction. The country was founded in 1830 as a result of a revolt against a combined Kingdom of the Netherlands in which the Belgian provinces had been incorporated in the post-Napoleonic settlement. The movement was francophone, in opposition to a Dutch King and Government, and French was for long the sole official language of Belgium. However, the inhabitants of the northern part of the country continued to speak Flemish, which is almost indistinguishable from Dutch. As their numbers and relative economic importance grew, they began to demand equal recognition for their language. The subsequent constitutional history of Belgium has consisted of a succession of changes leading to the ever greater separation of areas, based on differences of language, but going beyond language itself to include the greater part of cultural life. The situation is complicated by two further

factors. Brussels is a largely French-speaking enclave within the Flemish linguistic area. This has been dealt with by giving both languages equal status within the capital, though with considerable difficulties in obtaining agreement on the boundaries of this bilingual area. Secondly, there is a small German-speaking area near the German frontier, parts of which were incorporated in Germany up to the end of the second world war.

After many political crises, a very complex system of dispersal of powers was agreed in principle in 1971, but has not yet been fully implemented. The system recognises: four linguistic areas – Flanders, Wallonia (French-speaking), Brussels (bilingual) and the small German-speaking area; three cultural communities – French, Flemish and German, with no territorial definition; three socio-economic regions–Flanders, Wallonia and Brussels (nearly, but not exactly, co-terminous with the linguistic areas, other than the German-speaking one). The linguistic areas determine the language to be used for official purposes. The members of the bi-cameral national parliament are divided into two groups (French and Flemish) which form the Cultural Councils for their respective Communities and can take decisions on cultural and educational matters. A Cultural Council for the German Community has also been set up. The language groups in the Parliament have certain limited powers to delay legislation relating to Community interests. The socio-economic regions are intended to be more like provinces, with a moderate degree of devolved powers, largely in the field of planning and regional economic development. They have elected regional assemblies. The only regional participation in the central government is that a small number of the members of the Senate are elected on a specifically regional basis, and there is a Ministerial Committee for Regional Affairs. Finance for the linguistic communities is provided by overall decision of the central government and parliament and is divided on the basis of 'objective criteria' or, failing agreement on these, on an equal basis. Funds for the regions are also provided globally by decision of the central government and are divided in accordance with a formula taking account of area, population, and the tax revenue of each region. Taxes may not be levied by the regions or Communities, but there is provision for local taxes being levied by smaller administrative units.

The system thus amounts to a high degree of cultural separation together with some regional devolution, but in neither case having strictly federal characteristics, since the area of separation is, though

very important to the communities concerned, a rather limited slice of governmental responsibility. The regions are beneficiaries of, rather than participants in, central decision-making on such vital matters as the level and distribution of government expenditure. The system is, however, incomplete and further legislation is required, but political and constitutional difficulties have delayed further progress in creating a true federation.

Appendix 2

Regional income differences in relation to national or community averages

	Personal Income* (1)	*Mini-Max Ratio* (2)	*Gini Co-eff* (3)	*Percentages Reduction through Public Finance* (4)
FEDERATIONS				
Australia	87– 105	1.2	0.03	53
Canada	54– 117	2.2	0.09	32
United States: (5)				
51 States	60– 175	2.9	0.09	28
9 Regions	77– 111	1.4	0.06	
Switzerland	72––43	2.0	0.07	22
Germany	81– 133	1.6	0.05	29
UNITARY STATES				
France	80– 139	1.7	0.09	54
Italy	60– 134	2.2	0.14	47
United Kingdom	69– 119	1.7	0.06	36
EUROPEAN COMMUNITY: (6)				
72 Regions	41– 161	4.0	0.13	
9 States	57– 123	2.2	0.09	

* Average of all regions = 100.

SOURCE MacDougall Report, vol I, p. 27 and p. 30.

(1) The sum of wages, salaries and property income, before taxes, social security contributions and benefits. Regional indices (range).

(2) The ratio of the highest regional index to the lowest regional index.

(3) Weighted average of per capita income differences between regions: 0.0 means exact equality; 1.0 means all income concentrated in one region.

(4) Average of individual regions' reduction in per capita personal income differences (regions unweighted by population) through federal or central government taxes, transfers and public expenditures.

(5) Nine Census regions, excluding Washington DC.

(6) At purchasing power parity exchange rates, but with no adjustment for purchasing power differentials within countries.

For further details of the years to which the statistics relate (1970–5) and other statistical notes, see the source quoted.

Appendix 3

SPECIAL STATUS IN THE EUROPEAN COMMUNITY

The UK joined the EC together with three dependencies of the Crown, the Bailiwick of Jersey (population 74,000), the Bailiwick of Guernsey (population 52,000), and the Isle of Man (population 62,000). The two Bailiwicks are commonly described together as the Channel Islands, though they are legally distinct entities. None of the islands has separate sovereignties. The provisions for the relations of the Channel Islands and the Isle of Man to the EC were set out in Protocol No. 3 to the UK Treaty of Accession. The requirements regarding free trade in respect of agricultural products were set down in greater detail in a later EC regulation, no. 706/73.

The impact on the Islands in mainly in respect of two areas – free trade, and non-discrimination in the free movement of persons and businesses. A Law to make provision for the implementation of the arrangements was adopted in the Channel Islands in 1973. Apart from additional administrative burdens, there has been little effect. The Islands have progressed to full customs union with the EC and in this respect must have regard to all regulations and directives concerning the free trade provisions of the Treaty. In the field of customs administration there has also been a necessary change in documentation and procedures.

In agriculture, again the impact has been mainly on the administration which has to keep abreast of regulations and directives affecting trade in products which the Islands have traditionally exported.

With regard to immigration controls, the previous thorough individual examination of all EC foreign nationals seeking admission to the Islands has been relaxed because the latter are free to take up employment or set up businesses without immigration restriction other than under the terms of the Treaty of Rome. However, the Islands are not precluded from applying immigration

controls on a non-discriminatory basis (that is, provided they give no preference to British nationals) and the continued application of housing controls, and restrictions on establishing new businesses have been accepted. Article 2 of the Protocol states that

> the rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services.

At first sight this would appear to impose onerous restrictions on free movement. However, it is understood that in so far as the Islanders enjoy UK nationality, they are entitled to as free movement under Community rules as are UK nationals, and the exclusions resulting from Art. 2 are thought to be minor.

The Islands' domestic autonomy, and in particular their fiscal independence, has not been affected. The application of the common external tariff on imports from non- EC sources is intended only to prevent trade deflection. The revenues which arise accrue to the Islands' budgets, and are not paid over to Brussels as in the case of the UK itself. Similarly, the common agricultural policy (CAP) is applied, but the revenue from levies raised on imports in accordance with EC regulations accrues to the Islands' budgets. The Value-Added Tax (VAT) is not applied since the Islands have complete fiscal autonomy from the EC, as they have always had from the UK. Since they are excluded from contributing to the Community budget the Islands cannot benefit from its expenditures. They do not benefit from spending under the CAP Guidance Fund, nor from export subsidies under the CAP Guarantee Fund. Similarly, they receive no direct benefits from monetary compensatory amounts (MCAs) applied to intra-Community agricultural trade to offset the effects of fluctuating exchange rates. However, they may receive indirect economic benefits, to the extent that Community policies lower the prices of certain products bought within the Community. They are excluded from grants from the European Regional Development Fund and the Social Fund. An aspect of the proposal which is open to misinterpretation is the 'safeguard clause', which states that if difficulties appear on either side in relations between the Community and the Islands, the Commission shall without delay propose to the Council such safeguard measures as it believes necessary. It was made clear at the time of the agreement that this

'safeguard clause' only applies to those parts of the treaty which are necessary to maintain the free trade regime and the 'safeguard clause' does not mean that the Community will be able to impose on the Islands provisions of the treaty which they do not want. There is, therefore, no question of the Islands' fiscal autonomy being undermined through the use of this clause.

All matters regarding the EC are dealt with through the Channel Islands and Isle of Man desk at the Home Office. The Islands have no direct contact with Brussels and are only involved in discussions with EC officials if the UK Government, which is responsible for the Islands' international affairs, consider this to be of value.

Notes

CHAPTER 1

1. For an excellent and balanced examination of various constitutional alternatives for Northern Ireland, see John Oliver, *Ulster Today and Tomorrow* (PEP: London, March 1978 (Broadsheet no. 574).
2. See for example, Maurice Vile, 'Federalism in the United States, Canada and Australia', Commission on the Constitution, Research Papers no. 2 (HMSO: London, 1973). This tendency has accompanied the growth of government intervention in the economy and in the provision of welfare services in the twentieth century. Applied to the present position of the UK, this point would imply that it would be exceedingly difficult to move away from a unitary state in practice, whatever the formal constitutional structure adopted.
3. See, for example, Roderick MacFarquhar MP, 'The Community, the Nation State and the Regions', in Bernard Burrows, Geoffrey Denton and Geoffrey Edwards (eds), *Federal Solutions to European Issues*, (Macmillan/The Federal Trust: London, 1978).

CHAPTER 2

1. This Chapter is taken from Dr James G. Kellas, 'The Application of Federalism to the United Kingdom, with Special Reference to North Sea Oil Production and Revenues,' a paper written for the Conference of the European Consortium for Political Research (Louvain: April, 1976). We are grateful to the author for permission to use his material in this paper.
2. W. Ferguson, *Scotland 1689 to the Present* (Oliver and Boyd: Edinburgh and London, 1968) p. 47.
3. Sir Reginald Coupland, *Welsh and Scottish Nationalism* (Collins: London, 1954) p. 109 note.
4. Ferguson, op. cit., pp. 47–53.
5. See for example, T. B. Smith, 'The Union as Fundamental Law', *Public Law* XCIV 1957, and *Scotland* (Stevens: London, 1962) p. 52.
6. Letter to *The Times*, 8 May 1886, quoted in J. Morley, *Life of Gladstone*, Edward Lloyd (ed.), vol. II, pp. 427–8.
7. Letter to *The Times*, 16 April 1918, quoted in Coupland, op. cit., p. 414.
8. Coupland, op. cit., p. 325.

9. John P. Mackintosh, *The Devolution of Power* (Penguin Books: London, 1968) pp. 206–7.
10. Opinion Research Centre Survey, *The Scotsman*, 16 December 1975.

CHAPTER 3

1. Royal Commission on the Constitution, vol. II, Memorandum of Dissent, Cmnd. 5460-I (HMSO: London, 1973).
2. By the summer of 1978 the Conservative Party, which had opposed the Government's Devolution Bills but remained uncertain as to what, if any, constitutional changes it wanted, was proposing an all-party conference to examine, among other alternatives, a 'quasi-federal' system which apparently meant a highly devolved system similar to that proposed in the Kilbrandon Minority Report. See Francis Pym MP and Leon Brittan MP, 'The Conservative Party and Devolution: The Realistic Option – A Preliminary Draft of a Submission to an All-Party Conference' (Conservative Research Department: London, September 1978).
3. Sir John Colville, 'Devolution can Offer Britain a New Design for Democracy', *The Times*, 7 June 1977.
4. See Tony Carty and Alexander McCall Smith (eds.) *Power and Maneouvrability* (Q Press: Edinburgh, 1978).
5. See Chapter 8 below for a further discussion of the implications of Scottish independence for membership of the European Community. See also D. I. MacKay (ed.) *Scotland 1980*, (Q Press: Edinburgh, 1977) for a thorough account of the economics of Scottish independence.

CHAPTER 4

1. It has already been suggested that willingness to consider a full federal structure for the UK could have solved the problems of Ireland, keeping Eire within the UK and avoiding the half century of devolution that satisfied nobody in Northern Ireland. Many commentators have suggested in the recent debates about devolution to Scotland and to Wales that the new assemblies will do little to satisfy, and much to provoke, nationalist aspirations in those provinces, while being nevertheless highly unpopular with unionists.
2. See Maurice Vile, *op. cit.*, and D. J. Collins, *The Australian Personal Income Tax Reforms 1975/76*, Institute for Fiscal Studies, Lecture Series no. 8 (London, 1977).
3. See, among a large literature, Jan Vanek, *The Economics of Workers' Management: a Yugoslav Case Study* (Allen & Unwin: London, 1972).
4. See Lord Hailsham, *The Dilemma of Democracy* (Collins: London, 1978) pp. 163, 167.

CHAPTER 5

1. The opposition of MPs representing constituencies in the North of England was a key factor in the defeat of the Government's first attempt to pass devolution legislation in the Scotland and Wales Bill in the Session 1976/77.
2. See A. H. Birch, *Political Integration and Disintegration in the British Isles* (Allen & Unwin: London, 1977) for an excellent history of relations between these provinces and the United Kingdom. Professor Birch explains how they obtained this favourable parliamentary representation. The number of Westminster MPs in Scotland is currently 71, but on a proportional basis would be only 57. In Wales, the over-representation is 36, against 31. In 1918 Ireland had 105 seats, against 63 on a proportional basis. The position of Northern Ireland has been different in that, having their own Assembly at Stormont, their representation at Westminster was reduced to 12. However, the present Government are introducing legislation to increase the number of members for Northern Ireland to 17, which would restore a representation proportional to population.
3. See N. Johnson, 'Federalism and Decentralisation in the Federal Republic of Germany,' Royal Commission on the Constitution, Research Papers no. 1 (HMSO: London, 1973).
4. Royal Commission on the Constitution, op. cit.
5. Lord Hailsham, op. cit.

CHAPTER 6

1. See A. H. Birch, op. cit., ch. 6.
2. See D. I. Mackay (ed.), op. cit.
3. These remarks apply especially to the period between 1922 and about 1958. In the 1960s and 1970s Irish Governments have carried out a successful industrial and economic policy, which has decreased their dependence on the UK. Finally, from the beginning of 1979, the fact that Ireland became a member of the European Monetary System, while the United Kingdom did not, has resulted in breaking the link between the Irish pound and the British pound.
4. The literature has been surveyed by Wallace E. Oates, *Fiscal Federalism*, Harcourt Brace Jovanovich, New York, 1972. See also the more recent collection of papers edited by Professor Oates, *The Political Economy of Fiscal Federalism* (Heath: Lexington, 1977).
5. Commission of the European Communities, Report of the Study Group on *The Role of Public Finance European Integration* (Brussels, April 1977, also referred to as The MacDougall Report.)
6. See N. Johnson, op. cit.

CHAPTER 7

1. Much of the discussion in the first part of this Chapter is derived from Ivan Bernier, *International Legal Aspects of Federalism* (Longman: London, 1973). *University Law Review*, 34 (1959) (quoted by Bernier).
2. R. B. Looper, 'Limitations on the Treaty Power in Federal States' *New York University Law Review*, 34 (1959) (quoted by Bernier).

CHAPTER 8

1. For a set of papers which review a number of political and institutional developments within western Europe in the perspective of the European Community as an incipient federation, see Bernard Burrows, Geoffrey Denton and Geoffrey Edwards (eds), *Federal Solutions to European Issues* (Macmillan/ Federal Trust: London, 1978).
2. Neville March Hunnings, 'The Future of Community Law, in *Federal Solutions to European Issues*, p. 52.
3. Neville March Hunnings, op. cit., p. 61.
4. See for example, Roderick MacFarquhar, 'The Community, the Nation State and the Regions,' in Bernard Burrows, Geoffrey Denton and Geoffrey Edwards (eds.), op. cit.
5. There is one slight exception to this remark, in that the Faroes, while constitutionally a part of the Kingdom of Denmark, are formally not a member of the Community. However, this is yet another of the rather anomalous positions which are acceptable for 'islands and enclaves', but cannot realistically be expected to apply to major provinces of existing member states.

Glossary

Unitary State This term is used to distinguish a centralised sovereign state both from a sovereign state organised in a federal system, and from a state which is a province (see below) within a federal system. It is therefore a state in which a single central parliament and executive exercise sovereignty. Central legislative provisions may endow regional and local authorities with limited powers to make and administer local bye-laws and regulations, to collect local taxes and to administer block grants. There may also be administrative decentralisation. However, these authorities have no constitutionally independent rights.

Region A part of a state which is distinguished by special problems, and therefore given special treatment, short of any kind of separation in economic and social policies of central governments. 'Regionalisation' implies a recognition of the special problems of a part or parts of a unitary state by according special treatment. This may extend to establishing regional councils and planning departments, but does not include the grant of any autonomous legislative or executive powers.

Separatism The ideology which calls for complete separation and independence of part of a state.

Devolution A constitutional arrangement in which certain limited legislative and executive powers are granted to a province by the central government of a unitary state. The provincial authority thus established has no constitutionally separate sovereignty, and in theory at least its powers can be altered or revoked at any time by the central government that grants them. In practice, however, political pressures may make this constitutional right not easy to enforce.

Federalism A system of government organised on the principle of sharing of powers by independent constituent provinces and

central government. The more common usage refers to the formation, normally in a constitutional convention, of a federation of provinces by a group of previously independent states; a less common, but more relevant meaning for our purposes, is the reorganisation of a previously unitary state into provinces of a federal state.

Federal State An independent sovereign state in which powers are divided among constituent provinces and a federal legislature and executive. Some elements of policy and administration are assigned to the federal government, others to the provinces and some may be shared.

Province A part of a state enjoying powers acquired through devolution or federalism. Provinces may, but need not, be identical with the regions in a previously unitary state.

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