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Proposals for  
Scottish Devolution:  
An assessment of  
the options

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## 1. Introduction

May 1<sup>st</sup> 1997 saw the election of a Labour government committed to legislating for a Scottish Assembly or Parliament on the basis of the proposals put forward by the Scottish Constitutional Convention (SCC). However, these proposals describe broad commitments rather than legislative details (Lynch, 1996) and since it will be Downing Street and Whitehall that will actually provide the substance of the soon-to-be published devolution White Paper, not the Constitutional Convention, there is the potential for a set of proposals to emerge whose character is very different from those of the Convention (Lynch, 1996). For this reason, there is a need to survey the main sets of proposals currently on offer with the aim of comparing how effective they would be (were they to find their way into Labour's legislation), in meeting the criteria that all, to varying degrees seek to respond to, namely, the need to make Scottish government more accessible and more representative of the wishes of Scottish people. The analysis can therefore offer a set of benchmarks by which to assess the legislation itself, if and when it emerges following the government's proposed devolution referendum among Scottish voters this autumn.

The variety of devolution proposals that have been advanced over the past twenty years, besides being connected to grievances specific to Scotland, also, as David Marquand (1989) implies, form part of a broader shift of mood which seeks to challenge the profound 'ideology of centralism' in British politics. This, in an era of big government, is widely seen as having led to a growing feeling of powerlessness among ordinary citizens and is regarded, in many quarters, as having been 'too slow to appreciate that the people who live in different parts of the country may legitimately have



different priorities' (1989: 401). There is a felt need, then, for forms of government which, by overcoming the remoteness of existing forms will thereby alleviate their insensitivity: for forms of government which, by allowing decisions to be taken at the lowest possible level, will maximise the opportunities for participation in decision making. In this way, the goals of making government more accessible and more representative can be seen to be two sides of the same coin.

The remainder of this paper is divided into six sections. In section two we summarise the historical trends that have brought devolution onto the agenda of British politics and the arguments of those who advocate it. Section three lists the most influential of the sets of proposals that have sought to respond to these arguments and suggests that their success in so responding will be a function of the provisions they make in three areas: the powers, finances and internal and electoral arrangements for the Scottish Assembly or Parliament.<sup>1</sup> Sections four, five and six compare and contrast the provisions made by the proposals in each of these areas respectively; while section seven seeks to draw some conclusions about what, in the light of the forgoing analysis, an ideal devolution Bill might realistically be expected to contain from the point of view of maximising the accessibility and representativeness of Scottish government.

## **2. The rationale for devolution**

The historical patterns and sequences that have brought devolution onto the agenda of British politics may be summarised, briefly, as follows. Prior to the

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<sup>1</sup> The terms 'Assembly' and 'Parliament' will be used interchangeably here.

start of the Scottish National Party's (SNP's) fitful growth in the 1960s, the established parties had been able to ignore the issue arguing that the demand for self-government could only be acted upon if it were reflected in the election of MPs pledged to support it. The SNP had been founded with the express purpose of securing the election of such MPs after attempts to secure the support of other parties' MPs had seemed to yield little. Unfortunately, insofar as nationalist candidates did badly at the polls, they 'exposed the inability of the home-rule cause to mobilise the electorate and thus allowed the major parties to take even less notice of it' (Webb, 1978: 75-6). And as long as this was the case, the pressure-group approach of groups like the Scottish Convention could not work either for the lack of electoral support for the cause deprived it of bargaining power. Serious consideration of the self-government issue therefore had to await the growth of the SNP. This came about from the mid-sixties onwards. Even then, the issue might not have been taken seriously had the SNP's growth been insignificant or had it been such - for example, by taking votes from all parties in equal measure - as to leave the overall party balance at Westminster unaffected. Neither of these conditions held, however.

From 2.4 per cent of the Scottish vote in 1964, the SNP advanced to reach an all-time high of 30.4 per cent at the election held a decade later in October 1974. The Labour government's response to this was to attempt to secure the passage of a Bill offering devolution through the establishment of a Scottish Assembly; and although the failure of this endeavour - through the failure of the referendum that was supposed to sanction it - signalled a subsequent decline for the SNP, since 1987 the party's electoral fortunes have again been on a rising trend. Moreover, this growth appeared to have



potentially profound significance for the overall party balance at Westminster owing to the geographical distribution of the main parties' voting support. On the one hand, the SNP appeared to be more threatening to the Labour Party than to any of the other main parties - in the sense that it was Labour-party support that appeared to be most vulnerable to the threat of any SNP electoral advance. Evidence for this is available at both the aggregate and individual levels.<sup>2</sup> On the other hand, this was *especially* threatening to the Labour Party given the degree to which its electoral support was concentrated in Scotland and thus the degree to which its national-level prospects appeared dependent on the level of its Scottish support. In 1978, Jack Brand had written:

Only in the elections of 1945 and 1966 was the Labour Party able to command a majority of seats in England and Wales alone. In other words, Labour won the elections of 1950, 1964 and the two elections of 1974 by depending on Scottish seats. If the SNP replaced Labour as the majority party in Scotland, the probability of Labour forming a British government would be seriously diminished (Brand, 1978: 4)

If growth of the SNP was one factor which forced Labour politicians to take the self-government issue seriously, a second was the outcome of party competition during the 1980s. Quite simply, this revealed that the two major

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<sup>2</sup> An analysis of the results of the 1992 election in Scotland, correlating the 1987-92 changes in SNP vote in the 72 constituencies with the changes in vote for the other parties, showed a correlation of -0.38 between the changes in Labour's and the SNP's levels of support - as compared to -0.06 that was obtained for SNP and Conservative support (Newell, 1994a). An opinion poll carried out by MORI in May 1987 asked Scottish voters, 'If you were not to vote for the (party mentioned at questions 1 and 2) which party would you vote for instead?' 31 per cent of intending Labour voters mentioned the SNP, as compared to 13 per cent of intending Conservative voters and 19 per cent of those intending to vote for one of the Alliance parties.

parties no longer had equal chances of winning power, and it resulted in the repeated election of Conservative governments whose radical policies had distinctly anti-Scottish overtones. Not only was the hated poll tax introduced in Scotland a year before coming into force in England; but in abolishing or staffing with government supporters a raft of intermediate bodies such as health boards and education committees associated with the Scottish Office, Margaret Thatcher thereby caused the latter to cease to be perceived as a defender of Scotland's interests and to be perceived, instead, as an arm of semi-colonial government from London (Paterson, Brown and McCrone, 1992). Moreover, all this took place at a time when the Conservatives seemed to be an ever-diminishing minority in Scotland (in 1983 their share of the vote declined from 31.4 to 28.4 per cent and in 1987 it went down to 24.0 per cent). Thus two of the conditions underpinning the existing constitutional relationship between Scotland and the rest of the UK - namely, that the party-system should transcend the border so that the party winning power at UK-level also enjoys support in Scotland, and secondly, that both parties should have an equal chance of winning power (Constitution Unit, 1996) - patently no longer held. In the absence of these conditions, it was not surprising that Labour politicians in Scotland should have begun to argue that the Conservatives had no mandate to govern Scotland and thus to accept - willingly or otherwise - what was the logical corollary of this view, namely, that Scotland had to have some form of self-government in order to end a situation which allowed Conservative writ to run in Scotland despite its manifest rejection at the polls. The other side of the same coin was that self-government would offer Labour a possible way out of the cul-de-sac of



having strong support for its policies but no means of implementing them (Deacon, 1990; Geekie & Levie, 1989).

Yet only two months after Labour's May election victory, there are already signs of division within the government's ranks over the content of the devolution legislation to be proposed, with some prominent English Cabinet Ministers apparently at odds with the Scottish Secretary over the policy areas within which the Assembly should be given powers to legislate. Meanwhile, there has been some press speculation that among Labour backbenchers, 'there is by no means unanimity ... that devolution should go ahead'.<sup>3</sup> Whether the government can therefore be expected to deliver convincing self-government proposals might therefore be regarded as subject to legitimate doubt. If nothing else, in the wake of Labour's victory and the unprecedented majority that has come with it, some diminution in enthusiasm for the reform might be expected; for the sheer size of the party's victory appears to have nullified at least two of the factors spurring its support for devolution in the first place, namely, an inability to win power at Westminster and a high level of dependence of the party's national-level prospects on the level of its Scottish support. Yet, having let the genie out of the bottle, the Labour Party is likely to find it almost impossible to get it to go back in in the sense that the issues it raised in connection with the self-government theme in the years prior to the election seem likely to continue to exercise the minds of opinion leaders now that the election has been held. For example, the argument that a governing party with minority status in Scotland has no

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<sup>3</sup> See the report in the *Glasgow Herald* on 9<sup>th</sup> July (reproduced on World Wide Web page <http://www.wp.com/Alba/labno.html>), by Catherine MacLeod: 'Tory says Labour MPs back 'No' vote'

mandate there finds an echo largely because of the deeply rooted feelings of national identity of Scots, and opinion leaders might, in a situation of government unpopularity, turn Labour's argument against it. In other words, with no party having won as much as 50 per cent of the Scottish vote, Labour too might be accused of being a Westminster-based party imposing policies which a majority of Scots have not voted for. Since, then, the case for self-government that can be made from a general, political-theory, point of view is unlikely to lose any of its validity (or otherwise) whatever the course of events in the coming period, it will be appropriate to consider, if briefly, what this case is.

Underlying the writings of influential supporters of Scottish self-government of whatever kind are a number of common themes one of which is simple recognition of the previously mentioned sense of national identity: a perception of oneself as Scottish which, for approximately two-thirds of Scots, is more salient than any British identity when it doesn't displace the latter altogether (Moreno, 1988; Brand et al., 1992; Newell, 1994b; McCormick & Alexander, 1996). That this should be held to underpin the case for self-government is presumably rooted in basic democratic theory. Democracy, whatever else it is, is a set of arrangements allowing a group of people to exercise 'self government'; while 'government', as commonly understood, is a set of arrangements which allows for regulation of the behaviour of persons inhabiting a given territory. Since national identity is a feeling of identification with a group which inhabits a common territory, it would seem to follow that if governments are genuinely to provide self-government, the boundaries of their jurisdiction must avoid cutting across the territorial boundaries of the groups with which people identify. In short, the



democratic principle requires that, wherever it is desired, nation and State should coincide, in other words, that there should be realisation of the principle of self-determination.

National identity, it is then often observed, is itself rooted in a pre-Union sense of nationhood as well as in that post-Union complex of institutions - the universities, media, church, legal and party systems - which together make up the distinct Scottish political system (Kellas, 1989).<sup>4</sup> It is the sense of a distinctive Scottish political system, transcending the Act of Union, that provides the core of the argument for self-government. On the one hand, it sustains that interpretation of the 1707 Act which would view it as having the status of fundamental law (Kellas, 1968: 105; McCreadie, 1991: 49). Here it is argued that as the Act of Union came into force as a result of having been passed simultaneously by the Scottish and English parliaments, it differs in essence from ordinary parliamentary enactments, being in the nature of a contract between Scotland and England. Therefore, the argument continues, the sovereignty of Westminster is not unlimited and Scots, having made the Union, have retained a constitutional right to amend or to repeal it as they see fit.<sup>5</sup> On the other hand, the existence of distinctive institutions, in

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<sup>4</sup> For the case against the view that it is appropriate to regard the items safeguarded by the Act of Union as the components of a distinct political system, see Midwinter, Keating and Mitchell, 1991, ch. 9.

<sup>5</sup> An original, though unsuccessful, attempt to win general legal recognition of the status of the Act of Union as fundamental law was made in 1953 in *MacCormick v. Lord Advocate*. In this case, Dr John MacCormick, Rector of Glasgow University, argued that use of the numeral 'II' in Queen Elizabeth's title constituted an 'indirect but nonetheless real breach' of the Act of Union which had specifically laid down that the new kingdom created by the Union

particular Scots law and the legal system, bear witness to the existence, at the heart of Scottish government, of a democratic deficit. This is created by the absence of a legislature to oversee the operation of the system and elected by the people to whom the system is to apply. Despite being one of Europe's oldest nations, Scotland finds itself in the anomalous position of having to share control of its legal system with members of other nations; for despite the fact that it applies only to them, Scottish law is made at Westminster which Scottish voters can influence but not control.

Finally, central government in London, it is suggested, 'has become over-extended and therefore overloaded' (Marquand 1989: 402). Parliament cannot properly control or scrutinise the executive while ministers cannot properly control their departments. The in-trays of ministers and civil servants are cluttered with detailed local questions while backbench MPs now receive as much constituency mail in a day as, in the immediate post-war years, they generally received in a week (Cowley, 1996: 12). Because it takes too many decisions, central government often takes bad decisions, ones which overlook those of Scotland's interests that are different from those of the rest of the UK. Thus it was, claims the SNP, that during the late 1980s, 'Scottish industry [was] crippled by deflationary policies and high interest rates intended to dampen down overheating in the South of England property

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of England and Scotland was to be known as 'great Britain'. MacCormick argued that since use of the numeral 'II' implied, contrary to fact, that a previous Elizabeth had been queen of Great Britain, if the queen chose to use this title then: either it had no legal effect, or one would be forced to the conclusion that the Act of Union had been repealed - in which case the United Kingdom of England and Scotland had ceased to be a United Kingdom and was separated into two parts.



market ... when the Scottish economy was still operating at far below capacity' (SNP, 1992: 11). So remote government is seen as being incapable, precisely because it *is* remote, of exercising the flexibility needed to protect Scotland's specific needs and wishes; and in this way we come back to the suggestion made in our second paragraph: that in many quarters the inaccessibility and unrepresentative character of government are seen as being two sides of the same coin. What are the devolution proposals that have sought to address this problem?

### **3. The proposals and the criteria for their assessment**

Of the sets of devolution proposals that have been advanced over the past twenty years, the most influential appear to be the following: the 1976 Scotland and Wales Bill; the 1977 Scotland Bill (which subsequently became the 1978 Scotland Act); Donald Dewar's devolution Bill, 1987; the Scottish Constitutional Convention's proposals contained in *Towards Scotland's Parliament* (1990), *Scotland's Parliament. Scotland's Right* (1995) and related documents; the proposals contained in the Institute for Public Policy Research's (IPPR's) document, *The Constitution of the United Kingdom* (1991); Menzies Campbell's Home Rule (Scotland) Bill (1995); and finally, the Constitution Unit's *Scotland's Parliament: Fundamentals for a New Scotland Act* (1996). This gives us four proposed pieces of legislation and three sets of proposals from 'think tanks'. It is these seven that we shall analyse in the remainder of this paper.

The rationale for choosing these proposals - a choice which ignores both the SNP's proposals for independence in Europe and (broadly speaking) the proposals that have been made in some quarters for a straightforward

federal solution to the problems of Scottish government<sup>6</sup> - is simply stated. First they reflect a judgement about the scale of change which is likely to be implemented in the foreseeable future. Independence and federalism, though intellectually perfectly respectable, do not appear, as yet, to be on the political agenda. Second, they are the proposals which appear to be most likely to inform the thinking of those who will actually have responsibility for drafting whatever devolution Bill emerges should the supporters of a 'Yes' vote, as seems likely, emerge victorious in the government's proposed autumn referendum. It is unlikely, for both practical and political reasons, that the drafters will be able to ignore previous legislative proposals, while the think-tanks responsible for producing the three remaining sets of proposals all have influential voices in the corridors of power of the Labour Party. Labour was a significant player in the SCC; the IPPR was set up by left-of-centre academics and trade unionists with the specific remit of providing an alternative to the free-market think tanks; while there is considerable overlap in membership of the Advisory Group and working parties responsible for producing the IPPR's proposals and the Advisory Committee of the Constitution Unit.

The degree to which the establishment of a Scottish Assembly will increase the representativeness and accessibility of Scottish government seems likely, as explained in more detail in sections four, five and six, to be a function of three crucial variables, namely, the legislative powers with which the Assembly is invested; second, the financial arrangements that are made

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<sup>6</sup> As we shall see, some of the proposals to be examined have federal implications.

for the Assembly; and third, the Assembly's standing orders and the electoral arrangements that are made for it. In fact, the bearing of these variables on representativeness and accessibility is in each case straightforward and obvious. An Assembly with few powers would be one which left the remainder in the hands of Westminster - whose shortcomings in terms of the accessible and representative exercise of such powers from the point of view of Scots has already been discussed. Financial arrangements are significant because, by influencing the degree of control of the Assembly over the volume of resources available to it, they will influence the degree of latitude which the Assembly has *de facto* in exercising the powers granted to it *de jure*. Finally, the Assembly's standing orders and the electoral system will each have a part to play by virtue of their central role in ensuring the accountability, to the Scottish electorate, of the Members of the Assembly itself.

#### **4. Powers of the Scottish Assembly**

The extent of the Assembly's legislative powers will be a function, broadly speaking, of three things: first, the degree to which the existence and powers of the Assembly itself are entrenched against the possibility of unilateral amendment or repeal by Westminster; second, the number and nature of the areas in which the Assembly is given authority to legislate; third, the conditions under which, and the mechanisms by means of which, given items of proposed Assembly legislation may be challenged or blocked by Westminster and/or other outside parties. We will consider each of these issues in turn.



ENTRENCHMENT. Of the seven sets of proposals, only those of the SCC and Menzies Campbell's Bill raise the possibility of giving the Assembly anything other than concurrent powers. The remaining sets of proposals attempt to do no more than give the Scottish Assembly shared, rather than sole responsibility for legislating in certain areas and it is difficult to see how they could do otherwise given current constitutional arrangements. These dictate that Westminster would retain power to legislate for Scotland even on matters falling within areas of the Assembly's legislative competence. This fact was explicitly recognised by the 1976 Scotland and Wales Bill and the 1977 Scotland Bill when they stated that nothing contained in them affected the power of Parliament to legislate for all or part of the UK (even though from a legal point of view the statement was made redundant by virtue of the doctrine of the supremacy of Parliament).<sup>7</sup>

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<sup>7</sup> When powers are concurrent or shared, there has to be some means of resolving conflicts of legislation where they arise. The two Bills of the 1970s and the 1987 Bill dealt with this by empowering the Scottish Assembly to make laws which could amend or repeal Acts of Parliament within the areas of its legislative competence. This, combined with the doctrine of 'implied repeal' would in effect have directed the courts to uphold whichever piece of legislation - that of the Assembly or of Westminster - came later. In the event of persistent conflict, the undiminished power of Parliament to amend or repeal the legislation constitutive of the Assembly itself would in the final analysis have allowed Westminster legislation to trump Assembly legislation. Of the remaining sets of proposals, only those of the IPPR imply adopting the alternative approach to potential conflicts of legislation, namely, to include in the devolution Bill a clause which prohibits the Assembly from passing any Act which has the effect of amending or repealing any post-devolution Westminster legislation. The IPPR proposals in effect advocate this approach in virtue of providing for Assembly Acts inconsistent with Westminster Acts to be declared void, (though the provision only really has any meaning in the

The SCC proposals describe the powers which it advocates for the Scottish Parliament as encompassing both sole and shared responsibilities as does Menzies Campbell's Home Rule (Scotland) Bill. In effect, therefore, both envisage a federal form of government.<sup>8</sup> This places the issue of entrenchment (or of how to protect the Assembly and its powers against the threat of abolition or amendment by ordinary Westminster legislation) in particularly sharp relief; for, though a relevant consideration in any event, the problem of entrenchment becomes particularly acute when the ambition is to establish sole responsibilities, since these, to be effective, would require constitutionally guaranteed procedures making it possible to challenge the validity of Westminster legislation in cases where the latter was suspected of encroaching on areas of the Assembly's sole responsibility. Menzies Campbell's Bill attempts to provide for this by setting out, in schedule 1, a 'Constitution of Scotland' establishing competences exclusive to Scotland, and then stipulating, in section 4, that, 'Any enactment passed or to be passed which extends to Scotland shall have effect subject to the Constitution of Scotland'. Any doubt about the constitutionality of such an enactment would be determined by the Appellate Committee of the House of Lords sitting as a Constitutional Court. The Bill ultimately fails in its ambition since, in view of the overriding force of the doctrine of the supremacy of Parliament, there is

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overall framework of the proposals within which it is embedded and which provide for a written constitution for the UK as a whole).

<sup>8</sup> Even though, for the SCC, 'Federalism is not as yet on the political agenda' (SCC, 1990: 7)

nothing about it which could legally prevent a future Parliament from amending or repealing the legislation as it saw fit.

Yet though legal entrenchment may not be possible, some degree of 'moral' or 'political' entrenchment might be. Only the SCC's and the Constitution Unit's proposals deal explicitly or at any length with this issue.<sup>9</sup> Both the SCC and the Constitution Unit recognise that any degree of legal entrenchment is impossible since Parliamentary supremacy means that Parliament has legal authority to make or unmake any law it wishes. Therefore, what needs to be aimed for is entrenchment of a political kind whereby the Assembly would enjoy such authority that unilateral attempts to curb its powers, though legitimate in a strictly legal sense, would be unlikely to be accepted by the public as legitimate. What both sets of proposals do, therefore, is to suggest mechanisms which in essence are designed to assist the Assembly in achieving the maximum authority possible. For the SCC, the document *Further Steps Towards a Scheme for Scotland's Parliament*, published in October 1994, proposes the inclusion of clauses in the Act setting up the Parliament clearly stating Westminster's intention, first, that the Act should not be amended without the consent of the Scottish Parliament; second, 'that the Act should not be repealed, or amended in such a way as to threaten the existence of the Scottish Parliament, without the consent of the Scottish Parliament and of the Scottish people, directly consulted through general election or referendum'. In the document *Scotland's Parliament, Scotland's Right* which was published a year later, it was proposed that the

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<sup>9</sup> Apart from Menzies Campbell's proposals, the three other Bills simply did not aim to achieve entrenchment at all while in the case of the IPPR



second of these two clauses be embodied in a Declaration of the Parliament of the United Kingdom, rather than in the text of the Act itself. The Constitution Unit favoured this solution on the grounds that the attempt to embody the clause in the legislation might be thought to raise a question of principle which, whatever the legal status of the clause, would make it difficult to get through Parliament without lengthy debate. The Constitution Unit also suggested holding a referendum - either before the legislation or after Royal Assent - as a means of strengthening moral and political entrenchment. In the final analysis, however, the degree of such entrenchment which the Parliament could expect to enjoy would depend on its own activities. Since these, in turn, might be significantly affected by the composition of, and by the internal arrangements made for, the Parliament, added significance is correspondingly given to the issues to be considered in section 6 below.

AREAS OF COMPETENCE. Table 1 shows the areas of competence which each of the seven sets of proposals would allocate to Scotland. Powers in each of the areas listed would not necessarily be of the exclusive variety for the reasons we have discussed; but a cross in a given cell of the table indicates that the relevant set of proposals lists the given area as being one in which the Scottish Parliament would be able to legislate. The absence of a cross indicates that the area is not listed in the relevant set of proposals. Table 1 permits only broad comparisons since the areas listed in any one set of proposals do not correspond exactly with the areas listed in each of the other sets (for example, 'energy', included in the IPPR document and Menzies

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document, entrenchment was inherent in the nature of the overall proposal for a written constitution itself.

Table 1. Areas of competence to be devolved to a Scottish Assembly or Parliament.

	1	2	3	4	5	6	7
Education	X	X	X	X	X	X	
Health	X	X	X	X	X	X	
Social welfare	X	X	X	X	X	X	
Water	X	X	X	X		X	
Local government	X	X	X	X	X	X	
Ancient monuments and historic buildings	X	X	X	X		X	
Registration services	X	X	X	X		X	
Local matters	X	X	X	X			
Local finance	X	X	X	X			
Deer	X	X	X	X			
Dwellings/housing	X	X	X	X	X	X	
Fire services	X	X	X	X		X	
Transport	X	X	X	X	X	X	
Inland waterways	X	X	X	X		X	
Forestry	X	X	X	X		X	
Tourism	X	X	X	X		X	
Pollution	X	X	X	X		X	
Public holidays	X	X	X	X			
Charities	X	X	X	X			
Civil law	X	X	X	X	X	X	
Crime	X	X	X	X	X	X	
Legal profession and legal aid	X	X	X	X	X	X	
Courts	X	X	X	X	X	X	
Tribunals and enquiries	X	X	X	X	X	X	
Land use and development	X	X	X	X		X	
Erosion and flooding	X	X	X	X		X	
Countryside	X	X	X	X		X	
Roads	X	X	X	X		X	
Marine works		X	X	X		X	
Agricultural land	X	X	X	X	X	X	
Fisheries	X	X	X	X	X	X	
Public records		X	X	X		X	

Table 1 (continued). Areas of competence to be devolved to a Scottish Assembly or Parliament.

	1	2	3	4	5	6	7
Electricity			X	X			
Manpower and training		X	X		X		
Police			X	X	X	X	
Administration of social security			X		X		
Industrial development			X		X		
Arts and leisure	X	X	X	X	X	X	
Energy					X	X	
Environment	X				X	X	
Regional policy and development					X	X	
Trade and industry					X	X	
Electoral law				X		X	

Key.

1. 1976 Scotland and Wales Bill; 2. 1977 Scotland Bill; 3. 1987 devolution Bill; 4. Scottish Constitutional Convention proposals; 5. Institute for Public Policy Research proposals; 6. 1995 Home Rule (Scotland Bill); 7. Constitution Unit proposals

Campbell's Bill presumably comprises 'electricity' mentioned in the 1987 Bill and in the SCC proposals) and because any given area was more or less restrictively defined from one set of proposals to another (for example, the 1976 Bill specifically excluded universities from the Assembly's competence in the area of education). Nevertheless, the table suggests the existence of an approximate consensus as to the functions that should be devolved: of the total of 43 categories listed in the table, 14 are listed as being appropriate for devolution in six of the seven sets of proposals, 26 in five of the seven. That said, the SCC's proposals and the 1995 Bill were more generous than the earlier Bills since they also specified that all the functions currently within the



remit of the Scottish Secretary should be brought within the competence of the Assembly.

Column 7 is blank since the Constitution Unit argues against a detailed listing of powers to be devolved (as happened with the 1976 and 1977 Bills) in favour of a short listing of powers to be retained at Westminster. This is argued for on essentially practical grounds the main ones being: first, it is likely to make drafting of the devolution Bill quicker and easier by reversing the burden of proof in Whitehall: each department will be forced to consider which functions it needs to retain rather than simply resisting the inclusion of functions and statutes in a list drawn up by the drafters of the Bill. Second, the principles on which the division of powers is based will be more clearly decipherable thus making it easier to adjudicate disputes about the Assembly's competence. However, in addition to the practical arguments there are a further two, which are mentioned but not emphasised in the Constitution Unit's document, yet which are central to the issue of maximising accessibility and representativeness. They are: first, that a short listing of reserved powers is likely to increase the possibilities of moral and political entrenchment by making it clear to Scots precisely how their system of government will change after devolution; second, listing reserved powers removes the need for the Scottish Assembly to point to a specific power in the devolution Act to establish its competence before it can proceed to legislate. Finally, although the Constitution Unit's document denies it, it is reasonable to assume that, provided the list of reserved powers is kept succinct, the practical result will be a more generous devolution of powers than would take place were the legislation to list the policy areas to be devolved.

CHALLENGES TO ASSEMBLY LEGISLATION. In principle, the conditions under which proposed items of Assembly legislation might be challenged amount to two; that is, a proposal might be challenged either on legal grounds (i.e. because it is considered *ultra vires* or outside the Assembly's competence) or on grounds of merit (i.e. because it is considered undesirable on substantive grounds), or both. Meanwhile, the mechanisms by which an item can be challenged might be such as to allow challenges before or at the moment of enactment, or else allow them at any point thereafter (or both); finally, the faculty of launching challenges might be conferred on Westminster or it might be conferred on private subjects (or both). This gives eight possibilities.<sup>10</sup>

Table 2. Challenges to Assembly legislation

	On <i>vires</i> grounds		On grounds of merit	
	At enactment	After enactment	At enactment	After enactment
By Westminster	1	2	5	6
By private subjects	3	4	7	8

Possibilities 7 and 8 are not made available by any of the sets of proposals being considered here. Given what is generally understood to be

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<sup>10</sup> Formal frameworks of the kind used here and below in section 5 are, as David Heald (1980: 64-5) points out, useful in focusing attention on different possible 'packages', and thus on the important issues to be resolved.

entailed by the notion of representative democracy, the only conceivable way in which they could be made available is if, along the lines of the procedures available in Switzerland and Italy, for example, provision were made for legislation to be made subject to popular referenda if desired by a certain minimum number of electors.

Possibility 6 is inherent in the existing constitutional principle of Westminster supremacy, and would require for its effective exercise merely the passage of legislation having the effect of amending or repealing the offending item of Assembly legislation and/or the Act constitutive of the Assembly itself. As we have seen, Menzies Campbell's Bill sought to place legal limits on the exercise of this possibility while the SCC's and the Constitution Unit's proposals sought to place political obstacles in the way of its unfettered exercise. Articles 55 and 56 of the IPPR's written constitution restrict the power of Parliament to make laws overriding Assembly laws in areas within the latter's competence to cases in which the matter in question cannot be regulated 'adequately' by the Assembly, or where regulation of the matter by the Assembly would prejudice the interests or interfere with the rights of residents of other parts of the UK. None of the three remaining sets of proposals seek to place any limits on the power of Parliament to use its own legislation to challenge Assembly legislation.

Possibility 5 is provided for by the 1976 and by the 1977 Bills. Both conferred a power of veto on the Secretary of State in cases where (s)he considered that an Assembly Bill was incompatible with the international or Community obligations of the United Kingdom; and, in cases where the Secretary of State considered that an Assembly Bill, or any provision thereof, affected, or might affect, directly or indirectly a matter reserved to Parliament,



and (s)he felt that the Assembly Bill was not in the public interest, (s)he was empowered by the Bill to put the question to the House of Commons which could then itself resolve to veto the Assembly Bill. In such cases the Assembly Bill would not be submitted to Her Majesty in Council for approval (i.e. it would not receive the Royal Assent). The 1977 Scotland Bill was even more restrictive, for all of the above provisions remained, and in addition the Secretary of State could, under section 20, also veto Assembly Bills which, in giving effect to international or Community obligations, legislated on matters which, in his/her opinion ought to be provided for in legislation passed by Parliament. The 1987 Bill, on the other hand, contained no veto powers on grounds of merit while the Constitution Unit's proposals argued against them.

Of the four remaining possibilities, 2 and 4 are provided for where there exist mechanisms which allow challenges to the validity of Assembly Acts to take place during the course of other legal proceedings, that is, where it is open to a litigant to seek to establish his case by calling into question the validity of an Assembly Act. The 1977 Bill allowed such a possibility, while the Constitution Unit's proposals appear to go even further in allowing challenges to be mounted by private subjects not merely as a consequence of other proceedings, but also as direct challenges (that is, as 'devolution issues') alone. Donald Dewar's 1987 Bill eliminates both possibilities when it states, in section 2(5), that 'The validity of any Scottish Assembly Act shall not be called in question in any legal proceedings'.

None of the sets of proposals contain any explicit provision for *vires* challenges by private subjects in advance of enactment (possibility 3), but all, in one way or another, appear to envisage such challenges being open to Westminster (possibility 1). The 1976 and 1977 Bills stipulated that the

Secretary of State was to consider every Bill passed by the Scottish Assembly and to refer to the Judicial Committee of the Privy Council all those which (s)he considered to fall outside the legislative competence of the Assembly. Bills which the Judicial Committee decided were not within the competence of the Assembly were not to receive the Royal Assent. The 1987 Bill was more restrictive. While, as the two earlier Bills had stipulated, the Secretary of State was to consider every Bill passed by the Scottish Assembly, (s)he was only to be able to make a reference to the Judicial Committee if, within six weeks of his/her having received the proposed Assembly Act, a resolution to that effect had been approved by both Houses of Parliament (section 4(2)). The SCC's proposals state merely that 'disputes as to the relative powers of the UK and Scottish Parliaments' might be settled by the Appellate Committee of the House of Lords or the Judicial Committee of the Privy Council (SCC, 1995: 19). Menzies Campbell's Bill envisages *vires* questions being settled by the Appellate Committee, but leaves it to the Committee itself to determine the rules of procedure for applications to it. The Constitution Unit's proposals also favour the Appellate Committee. However, they are ambiguous about the rules of procedure for application to it (implying at one stage that they would be available immediately following the passage of an Act through the Scottish Parliament, at another that they would be available after royal assent but before entry into force) and appear to place faith in the idea of disputes being resolved through consultation between the two Governments at an early stage.

To summarise, none of the sets of proposals seems obviously better than any of the others from the point of view of the Assembly's putative powers, and a Bill seeking maximum effectiveness in this area will need to

draw something from each of them depending on whether the issue in question concerns entrenchment, the functions to be allocated to the Assembly, or the possibility of challenges to Assembly legislation.

Some degree of entrenchment should be sought by taking up the SCC's 1994 proposal that the Act constitutive of the Assembly contain a declaratory clause seeking to prevent Westminster from amending or repealing the Act at will. Such a clause might, as the Constitution Unit suggests, encounter objections of principle, but it is precisely in an attempt to establish such a principle that one would want to include the clause in the first place.

With regard to the listing of competences to be allocated to Scotland, the Constitution Unit is surely right to argue for a listing of reserved functions rather than of those devolved. Such a listing is likely to make it easier to perceive the principles on which the division of responsibilities between London and Edinburgh is based and thus make it easier for the Assembly to win popular support (essential if it is to achieve entrenchment in practice).

Finally, Donald Dewar's Bill surely had the most effective approach to the matter of challenges to Assembly legislation. His proposals would give Westminster no power to challenge legislation on grounds of merit and would allow challenges on *vires* grounds only when backed by a resolution passed by both Houses of Parliament. Meanwhile, private subjects would be specifically prevented from launching *vires* challenges. The Constitution Unit argues in favour of allowing such challenges but the case seems weak. Doubtless, as the Constitution Unit suggests, it would occasionally be clear 'to an individual, company or interest group that a specific Act which threatened their interest went beyond the delegated authority vested in the Scottish Parliament' (Constitution Unit, 1996: 46). But to make available



such a power would be to allow challenges of a kind that cannot currently be made in relation to Westminster legislation and might conceivably provide a means for political forces hostile to a Scottish executive (including forces based at Westminster) to prevent it from fulfilling manifesto commitments notwithstanding the 'doctrine of the mandate' which assumes that a party winning an election thereby gains the democratic legitimacy necessary to implement its policies. This surely is the lesson of the most celebrated of *vires* challenges to have been launched in recent years, the London Borough of Bromley's successful challenge of the Greater London Council's cheap fares policy in 1981. Despite the policy's 'flagship' status as a central proposal in the manifesto on which the newly elected Labour council had just won election, the Conservative Bromley Council was successful in getting the policy declared inadmissible on *vires* grounds. If representativeness and accessibility of government are to be the criteria used to decide the case, it is arguably via the electoral process and the normal channels of pressure group activity that challenges to specific items of legislation are most appropriately mounted.

## **5. Financial arrangements**

In principle, if an Assembly were to be truly representative of the wishes of Scots it would arguably have to be free of all financial constraints since only then would it have unfettered power to meet all of the demands emanating from its environment. But this is too strong a requirement since it is impossible to realise in practice: both the making and the meeting of demands necessarily involve making choices among alternatives and therefore involve a consideration of costs (for example, in the short run lower taxes can only be

had at the cost of fewer welfare services). Therefore one would not want to maintain that the Scottish Assembly could only be representative in the absence of any constraints on the volume of resources available to it. Rather, what one would want to argue is that it will be crucial from the point of view of representativeness that the Assembly be free of any arbitrary power of *London* to decide the volume of resources available to it.

Debate about this issue has tended to focus on the possibilities of giving the Assembly its own tax-raising powers. But, while freedom from interference by London could be secured by the provision of tax raising powers, the latter would be neither a necessary nor a sufficient condition of such freedom. It would not be a necessary condition because there are other ways in which such freedom might be secured other than by the provision of revenue raising powers. (For example, it would be equally secured by the provision of a Treasury grant whose size was 'guaranteed' in the sense of being determined according to criteria which it was not open to London to alter at will). It is not a sufficient condition because even with the provision of revenue-raising powers London might still be able to interfere, with much depending on what was stipulated in any accompanying provisions. For example, if part of the Assembly's income came from a Treasury grant and part from its own tax-raising powers, little would be gained by the latter if it were open to London to punish any use of such power of which it disapproved by reducing the amount of grant available. This point is developed further below.

In principle there seem to be three different ways in which the Assembly might be funded (together with five possible combinations of these three): by means of its own revenue-raising powers; by assigning to Scotland

the yield of taxes raised there; by means of central-government grant (see table 3). Assuming that any central-government grant were 'guaranteed' in the above sense, the most favourable position for a future Assembly might be 1 - representing a situation in which, alongside Treasury agreement to underwrite the provision, at some level, of those services transferred upon devolution, the Assembly was also given freedom to decide the nature and/or the rate of some or all taxes to be levied on its citizens. Possibilities 2 and 3 are substantially the same in that in both cases control over the volume of resources available to the Assembly ultimately rests with London. Possibilities 4 and 5 both represent a situation in which all devolved services have to be financed entirely from revenues raised in Scotland with 5 representing the most unfavourable situation in the sense that it requires the Assembly to finance all devolved services from taxes raised in Scotland without giving it any control over the levying of such taxes. None of the sets of proposals advocate 4 or 5, presumably because requiring devolved services to be financed entirely out of Scottish revenues would result in a more or less significant welfare loss in view of the tax base that could reasonably be thought likely to exist at the moment of devolution itself. The practical alternatives, therefore, are confined to 1, 2 and 3.

In 'Scotland's Parliament. Scotland's Right', the SCC proposed that the Scottish Assembly be largely financed by means of central government grant - a proposal which was then also taken up by the Constitution Unit. As implied above, the proposal immediately raises a question about the criteria by which the grant's size would be determined. The SCC's answer was that it would be determined on the basis of 'relative need' together with application of the 'Barnett formula'. As far as relative need is concerned, this is taken -



Table 3. Means of funding a Scottish Assembly

Revenue-raising powers				
	Yes		No	
	Assigned taxes		Assigned taxes	
	Yes	No	Yes	No
Central grant				
Yes	1	X	2	3
No	4	X	5	X

by the proposals and indeed more generally - to mean the sum that would need to be spent in order to provide the same range and levels of service as in the rest of the UK taking into account the socio-demographic profile of Scotland (e.g. the age structure of the population, morbidity in the population and so forth). For this purpose the SCC appeared to be willing to accept the results of a Treasury needs assessment study published in 1979 which concluded that across the range of those services proposed for devolution at that time, per capita expenditure in Scotland needed to be 16 per cent above that in England. The 'Barnett formula' is a ratio devised by Joel Barnett, who was a Chief Secretary to the Treasury in the 1974-79 Labour Government, to be applied to changes in public expenditure in Scotland, England and Wales with the aim of bringing about convergence in relative spending in the three nations. The above mentioned needs assessment study had suggested that per capita spending in Scotland was in excess of 16 per cent above the English level. The formula therefore aimed to close this gap over time by allocating

'increases or decreases in public expenditure to Scotland, Wales and England in the ratio 10:5:85, the rounded share of GB population for the three nations concerned in 1976' (Constitution Unit, 1996: 66). Owing to the relative decline in Scotland's population together with the squeeze on public expenditure throughout the 1980s, convergence (however far it was intended to go) appears not to have been realised (at least not on the basis of the Treasury's 1979 assessment of needs) which presumably explains why the SCC's proposals offer no criticism of the notion.

The Constitution Unit's proposals too argue for a system of financing the Assembly which is largely based on the block-grant idea - but consider the issues in greater detail than the SCC arguing, first, for a new needs assessment, and noting, second, that the Barnett formula was revised in the early nineties to take account of the decline in Scotland's population so that since then changes in the Scottish budget have been proportional to the 1991 population share rather than to the 1976 share. The proposals acknowledge the importance, from the point of view of the Assembly's financial autonomy, of considering who would conduct any new needs assessment, who would determine the needs to be assessed, and who would supply the data on which the assessment would be based. All of these might have a significant impact on the size of the eventual settlement and thus on the degree of control London is able to exercise. The Constitution Unit proposes that the issues be dealt with through the establishment of a Commission, staffed by individuals appointed by both London and Edinburgh, and which would itself have responsibility for the assessment exercise and any related issues.

Donald Dewar's 1987 Bill as well as the Bills of the 1970s all assumed that block-grant financing would be the principal means by which the volume

of resources available to the Assembly would be determined differing little, in their essentials, from the proposals set out above. Arguably, the 1976 and 1977 Bills offered fewer guarantees to Scotland than the above proposals inasmuch as they stipulated (in sections 62(2) and 46(2) respectively) that the House of Commons resolution by means of which moneys for the Assembly would be voted, was to be accompanied by 'a statement of the considerations leading to the determinations to be made by the order'. This, it may be assumed, would have made the size of the Scottish grant the subject of frequent debate whereas the above proposals would set out clear criteria for its determination with the onus on Westminster to justify any departures from it. The 1987 Bill is slightly more favourable to Scotland than the above two in that the House of Commons resolution setting the Scottish budget (section 10(2)) no longer has to be accompanied by a statement seeking to justify it, while section 15(2) specifies that in determining sums payable, the Secretary of State is to 'consider the social and economic needs of Scotland and any changes in demographic or other factors that might be relevant to the expenditure of a Scottish Secretary'. Since the Bill also provides (in section 15(1)) for Edinburgh to have an input into this specification of needs, its provisions are arguably similar to those of the Constitution Unit when they call for a needs assessment carried out by a Commission to be staffed by London and Edinburgh jointly.

Interestingly, the SCC's 1990 document *Towards Scotland's Parliament* offers an approach which is in fact rather different to that of its 1995 document considered above, one that is very similar to what is proposed by Menzies Campbell's Bill. Both differ from the proposals considered hitherto in envisaging a significant role to be played, in financing the activities



of the Scottish Assembly, by assigned tax revenues. While recognising the possible technical difficulties involved in identifying the relevant proceeds, the SCC's document proposes that the Assembly be assigned, as of right, the revenues deriving from all income tax and Value Added Tax paid in Scotland. Menzies Campbell's Bill makes exactly the same proposal. Where the two differ is in terms of how any gap between these revenues and some notion of what an Assembly 'ought' to receive would be made up. The SCC's document refers once more to assessed need and to the 'Barnett formula' - stressing that any balancing payment should bring total income 'into line with assessed need' (SCC, 1990: 10) - whereas Menzies Campbell's Bill proposes (in paragraphs 9 to 13 of schedule II) that the difference be made up by calculating, for the United Kingdom, 'an average per capita expenditure in relation to the functions to be performed by the Scots Parliament and Executive'. This sum would then be multiplied by the population of Scotland to derive the 'expected expenditure' in respect of Scotland and the Parliament would then be paid the difference between this sum and the sum resulting from the assignment of VAT and income tax revenues. This procedure would in effect allocate resources (in respect of devolved services) throughout the UK on a per capita basis, and by taking no account of needs, runs the risk of making available to the Scottish Parliament a far lower volume of resources than any of the other proposals hitherto considered.

Finally, with the exception of the Bills of the 1970s, all of the proposals envisage some role in the financing of the Assembly for independent tax-raising powers. Donald Dewar's Bill proposed merely that the Assembly would 'have power to vary the rates of income tax on individuals resident in

Scotland' if Parliament 'subsequently [determined]' (section 11(1))<sup>11</sup> while the SCC's 1990 document refers to a power to 'regulate' income tax 'within a limited range defined by statute' (SCC, 1990: 11). The 1995 document refers, more specifically, to a power to 'increase or cut the basic rate of income tax for Scottish taxpayers by a maximum of 3p in the pound' (SCC, 1995: 27)<sup>12</sup> while Menzies Campbell's Bill is the most specific of all in referring (in paragraph 29 of schedule I) to a power of the Scottish Parliament to 'set a standard rate of income tax at a maximum of 3 pence in the pound above or below the rate for the time being set by Act of the United Kingdom Parliament'. The Constitution Unit's proposals also back this option.

What then are the merits of the various proposals from the point of view of securing for Scotland an Assembly which is able to maximise representativeness and accessibility in Scottish government? All have holes of greater or lesser magnitude. Let us consider the proposals first, in respect of the provision they make for tax-raising powers. If the sets of proposals here considered are at all representative, there appears to have developed, among policy-makers in general and not just in the Labour Party, a consensus around

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<sup>11</sup> His proposal fits exactly into cell 1 of table 3 since section 11(4) stipulated that, in the event of powers to vary rates of income tax being granted, 'the Secretary of State in determining the sums payable into the Scottish Consolidated Fund in respect of any year... [was to] take account of the amount equivalent, at the rates set in the rest of the United Kingdom, to the sums paid into the Scottish Consolidated Fund in that year in respect of income tax paid by individuals resident in Scotland'.

<sup>12</sup> The proposals do not contain any indication of the benchmark by reference to which the rate-varying power would be exercisable, but it is probably safe to assume that it is intended to be the rate prevailing in the rest of the UK at the time the rate-change is made.

the idea of an income tax rate-varying power of three pence in the pound for the Scottish Parliament. Yet, as the Constitution Unit itself comments, 'This power has raised an astonishing volume of comment given its relative insignificance in the overall financial settlement' (Constitution Unit, 1996: 82). It is important to remember that the power is a *rate-varying* power only; there is no power in any of the proposals over the existence of the tax itself and three of the four Bills here considered expressly prohibit the Scottish Assembly from taking any measure that would 'impose or abolish any tax'.<sup>13</sup> The revenue which use of the power could be expected to yield has been estimated at no more than three per cent of the present Scottish Office budget (Constitution Unit, 1996: 82) and it might not even amount to this. This is because the 'basic rate' - by reference to which the power-to-vary would be exercised - would itself still be controlled by the Chancellor of the Exchequer - as would the power to determine the range of incomes over which the 'basic rate' was to apply. Hence Scotland's tax base would remain at the mercy of a Westminster Chancellor. It is an open question to what degree a Scottish executive would in fact have any freedom to vary the rate upwards in an environment of more frequent elections (created by the existence of the Assembly itself) and cross-party consensus favouring lower taxation. The tax-varying power hardly seems worth having. Indeed, it can be argued that tax-

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<sup>13</sup> The usual argument for this is that it is necessary in order to prevent subordinate bodies from placing obstacles in the way of the measures that central government from time to time needs to take in order to meet its responsibilities in the sphere of macro-economic management. It is an open question how much weight this argument would continue to carry in the event of Britain's acceptance of further moves towards European integration and in particular the single currency.



raising powers in general are always something of a double-edged sword for sub-state legislatures. They allow the easier imposition of state-wide reductions in public expenditure via the insistence that the tax-raising powers should be accompanied by a requirement that a larger proportion of the sub-state legislature's spending be met from tax revenues raised in the area of the legislature's jurisdiction itself. The argument that is usually made in favour of such a requirement is that it restores the link between taxing and spending decisions and enhances democracy by making those responsible for spending decisions more directly accountable to those among whom the money to finance such decisions must be raised. The potential for a generalised reduction in public expenditure which is inherent in proposals such as this lies in the fact that if poorer areas are forced to rely largely or wholly on their own sources of income for the finance of their expenditure, then they will find that their tax bases are simply too small to sustain the levels of spending which they currently enjoy. The proposals have recently been heavily canvassed in Italy by right-wing politicians such as Giulio Tremonti (one-time finance minister in the 1994 Berlusconi government) who have sought to turn the rise of the *Lega Nord* to their own advantage by arguing for what they call *federalismo fiscale* ('fiscal federalism').<sup>14</sup> It seems naive to think that similar stratagems might not be deployed by a hostile party at Westminster to force reductions in the government-grant portion of the Scottish financial settlement

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<sup>14</sup> See: Giulio Tremonti and Giuseppe Vitaletti, *Il federalismo fiscale: Autonomia municipale e solidarietà sociale* (Roma and Bari: Laterza, 1994).

with the Scottish Parliament itself having to bear the political costs by raising taxation to maintain levels of expenditure.<sup>15</sup>

Crucial, then, will be the provisions made in connection with the block-grant part of the arrangements. What strikes one here is the uncritical acceptance by all the proposals of 'Barnett' and similar formulae whose express purpose is precisely that of bringing an over-time reduction in the volume of resources currently going to Scotland. The Constitution Unit's proposals qualify such acceptance to a degree in calling for a new needs assessment to be carried out by an independent Commission, but they accept the basic principle of relative decline in the resources going to Scotland and, moreover, are silent on the issue of how far this decline is supposed to go. This seems to be a dangerous omission. Moreover, in the Constitution Unit's view of things, the Commission whose task it would be to carry out the needs assessment would have no powers to ensure that its findings were accepted. 'Its role would be purely advisory. It would remain the responsibility of the

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<sup>15</sup> Heald and Geaughan (1996: 170) argue that 'the threat to withdraw all equalisation is entirely illegitimate... and perhaps not in the longer-term interests of those claiming to be Unionists'. This is undoubtedly correct. However, a squeeze on equalisation that is less than total might be possible, as is suggested by Kenneth Clarke's widely quoted remark of 1995 that 'If a devolved Assembly were set up in Edinburgh many English taxpayers would undoubtedly expect more of this higher public spending in England to be raised in Scotland'. Moreover, the *political viability* of such a manoeuvre would appear to be increased by arguments in favour of the 'three-pence option' which rest on the notion of 'fiscal responsibility'. This notion is essentially normative. From a normative point of view there does not appear to be any particularly compelling argument in favour of taking it as an ideal to be aimed at *unless* one is willing to consider it in the context of *the wider structure of economic and social inequality* within which any proposed mechanisms for Scottish finance will inevitably be located.

UK government, subject to the approval of Parliament, to take all necessary decisions' (Constitution Unit, 1996: 76). A final flaw in the block-grant proposals is that they do not have an effective answer to the question of how differing policy priorities of Scottish and UK Parliaments could be accommodated within the grant. That is, even if some agreement can be found on what Scotland's relative needs are (assuming that this continues to be a criterion for the setting of grant levels) what if the services that Westminster decides to supply outside Scotland differ radically from those that the Scottish Parliament wishes to supply? This could be a problem precisely because, as we have seen, 'relative need' tends currently to be defined as the sum required, in the light of Scotland's socio-demographic profile, to provide the same range and levels of service as in the rest of the UK. Hence, if it were decided, say, to abolish in the rest of the UK a service that a Scottish parliament wished to continue to provide, a continued calculation of grant levels on the basis of relative need would mean that the money available to Scotland would automatically be reduced (Heald, 1980: 104-5). The Scottish Parliament's powers to spend would still be at the mercy of Westminster. The proposals fail, then, to meet the criteria that would have to be fulfilled if the provisions associated with the block grant were to guarantee freedom from London's interference, namely, that the size of the grant be determined according to clear criteria which cannot be altered by London at will. At the very least it will be necessary to resist pressures to accept any automatic presumption that needs assessment exercises must be driven by practice outside Scotland itself.



Ultimately, the least unsatisfactory solution from the point of view of the Scottish Parliament's autonomy might lie in the direction of assigned taxes as proposed by 'Towards Scotland's Parliament' and Menzies Campbell's Bill. These might then be combined with the provision of 'top-up funding' along the lines proposed by the SCC in its 1990 document. Assigned taxes would, of course, still leave the volume of resources available to the Scottish Parliament at the mercy of the UK Exchequer (which would still be free to modify the taxes whose yields were to be assigned) but would result in an allocation of funds on the basis of clearly defined criteria; and if we assume that tax regimes are difficult to modify radically in the short term we might conclude that in practice the room available to Westminster to restrict Scottish autonomy by means of financial manipulation would be correspondingly limited. Certainly the number of points at which restrictions could be applied would seem to be fewer than those made available by the process of carrying out needs assessments and calculating spending formulae - a process whose application would be limited to that part of the financial settlement that was over and above the sum deriving from assigned tax revenues. With regard to that additional part, in order to maximise its autonomy, a Scottish Parliament would obviously have to negotiate the most favourable settlement possible and in particular would have to find ways of resisting pressures to use the results of needs assessments to justify any reduction in the current volume of resources going to Scotland.

## **6. Standing orders and electoral arrangements**

Three features in particular of the Assembly's standing orders and electoral arrangements will affect the degree to which it is able to bring about an

improvement in the representativeness and accessibility of Scottish government: first, the procedures for bringing about a dissolution of the Assembly; second, the procedures for securing the accountability of the executive to the Assembly and its resignation in cases of loss of confidence; third, the nature of the electoral system. That the representativeness of Scottish government will be significantly influenced by these factors is *obvious*, even if the relationship between it and the last of the three especially is not *straightforward*. In principle, the electoral system that is chosen for the Assembly may be expected to influence the outcome of elections to it, and therefore to influence the representativeness of Scottish government, in three ways: first, it will influence the nature of the line-ups among which the elector is expected to choose by encouraging or not, as the case may be, alliances and stand-down arrangements, splits and mergers. Second, it will influence the voter's choice by determining the likely impact of a vote cast one way or another. Finally, once all the votes have been cast, the electoral system will determine the outcome directly by virtue of the formula it embodies for converting votes into seats. We will consider the two earlier factors, and the electoral system proposed for the Assembly, in turn.

PROCEDURES FOR DISSOLUTION AND ACCOUNTABILITY OF THE EXECUTIVE. The 1976, 1977 and 1987 Bills together with the SCC's proposals provided for four-year Parliaments which, however, in the case of the latter two Bills and the SCC's proposals, would stand dissolved if so determined by a resolution of the Assembly supported by no fewer than two-thirds of its members. Each set of proposals also provided for the election, from among the Assembly's members, of a 'Chief Executive', 'First Secretary' or 'Chief Minister' with power to appoint Scottish Secretaries

(under the 1976 and 1977 Bills such appointments were made by the Secretary of State acting 'on the advice of' the First Secretary). Collectively, the First Secretary and his/her appointees would make up the Scottish Executive. Since the proposals also stipulated that the Assembly would agree its own standing orders, one must assume that it was being left up to the Assembly itself to determine the precise mechanisms for securing the accountability of the executive and, especially, the circumstances in which the latter would be required to resign. In all their essentials, the remaining proposals - those of the Constitution Unit, Menzies Campbell's Bill, the IPPR proposals - make the same suggestions (except that the latter two make no provision for premature dissolution of the Assembly). What is not clear, even from the proposals that do make such provision, is what is supposed to happen in the event of an executive losing the confidence of the Assembly in a situation in which, however, the Assembly is unable to muster the two-thirds required for a dissolution or to find a majority to sustain an alternative executive.

**ELECTORAL ARRANGEMENTS.** The 1976 Bill provided for the Assembly to be elected according to the single-member, simple plurality system - as did the 1977 and 1987 Bills. None of the three Bills gave the Assembly control over its own electoral laws. Therefore, to the degree that one is willing to argue that the system is itself likely to produce results that are unrepresentative, one could argue that the Bills meant that Scotland would be locked into an unrepresentative form of government which could only be changed by a successful request to change the legislation itself.

The remaining sets of proposals differ radically from these in either proposing a variation of the Additional Member system for Assembly



elections (the IPPR proposals), or in giving control of the electoral system to the Assembly itself (Menzies Campbell's Bill) or both (the SCC proposals and the Constitution Unit's proposals, each with some reservations).

There are differences between the Additional Member system proposed by the IPPR on the one hand and by the SCC and the Constitution Unit on the other. The IPPR's system would have half the members of the Assembly elected from single member constituencies according to the plurality formula. The remaining half would be chosen from among the defeated candidates by comparing the votes cast for each party with the number of seats already won and then allocating additional seats in such a way as to ensure that each party's seat total was as near as possible proportional to the total votes cast for it. No party winning less than five per cent of the vote would be entitled to a share of the additional seats. The SCC's system (which the Constitution Unit implicitly endorses) would give each elector two votes. One would be for the election of 73 members to be drawn one from each of the existing Westminster constituencies<sup>16</sup> and elected according to the single-member, simple plurality formula. The other would be for the choice of a party list of up to seven candidates presented at the level of the eight European parliamentary constituencies. Taking account of seats already won, these additional 56 seats would be allocated correctively to ensure that each party's seat total within each European constituency corresponded as closely as possible to its total of list votes in that constituency. Clearly, which of these two systems is likely to be associated with the more representative outcome is a matter for judgement. On the one hand, the IPPR proposals, in providing for

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<sup>16</sup> Except that Orkney and Shetland would become two separate constituencies.

a larger proportion of additional member seats (half as compared to about two fifths), and in providing for these to be allocated at national rather than constituency level, seems likely to produce greater proportionality. On the other hand, the SCC proposals arguably give individual voters more control over the precise impact their votes will have since it allows split-ticket voting. Thereby, voters could use their constituency votes to help defeat their least preferred candidate and their list votes to help maximise the number of additional member seats accruing to their most preferred party. And, by having the additional members elected from party lists rather than from among defeated constituency candidates, the system might be thought likely to result in a greater ethnic and gender balance than the IPPR's system.

Finally, the Constitution Unit's proposals point out that the degree to which the Assembly might be given control of its own electoral system is, of course, a variable. For instance, while it might be given control of such relatively technical matters as the rules governing the compilation of the electoral register or the procedures for absent voting, more fundamental issues, such as eligibility to vote or the formulae for seat-distribution might be reserved to Westminster. Menzies-Campbell's Bill in essence gives control over all such matters to the Scottish Parliament, specifying only certain broad principles - for example, that the electoral system must be proportional - and in any case allowing such principles themselves to be overturned (by a referendum and the approval of two-thirds of the Parliament). The SCC and the Constitution Unit are more wary. The SCC talks about the need for a 'mechanism' to be devised 'so that technical and corrective changes in the electoral arrangements for the Parliament, as agreed by the Parliament itself, can be carried through without delay' (SCC, 1995: 22, my emphasis) - while

the Constitution Unit, after some discussion of the issues holds back from making any specific recommendations. The guarantee of a more representative system would not flow automatically from any decision to transfer control over it to Scotland rather than retaining it at Westminster: the histories of Northern Ireland and of the United States are enough to undermine any easy equation between decentralised control and free and fair voting procedures. However, as the Constitution Unit (1996: 56) points out, the conditions which prevailed in the latter two areas are unlikely to be reproduced in the circumstances of twenty-first century Scotland; and if representative and accessible government are to be the deciding criteria then *prima facie* it would seem that the onus lies with those arguing for retention to establish the case that there is some particular feature of the electoral system that ought to be reserved rather than devolved.

## 7. Conclusions

As Bogdanor (1979) implies, for better or worse, the mainspring of the case for devolution has less to do with the wider separatist claims of nationalists than with improving the quality of Scottish government within the framework of the United Kingdom; for though it has been the growth of the SNP and related electoral concerns that have placed home rule on the political agenda, the arguments that are most commonly heard in its favour in fact refer to the need to reinforce an existing relationship that has been weakened: that is, that increases in the scope and degree of centralisation of government have displaced 'the institutions guaranteed by the Union - the legal system, the courts and the Kirk - ... from their positions as guarantors of Scottish identity' (Bogdanor, 1989: 89) and that effective accountability over Scottish matters



has been undermined. The issues of representativeness and accessibility with which we started out, then, lie at the heart of the case for devolution. Yet the success of any devolution settlement in securing these features is likely to depend at least as much on the flexibility and willingness to co-operate of Westminster and Edinburgh politicians as on any formal institutional machinery that is put in place. Also, on the whole, the proposals we have examined do not, beyond relatively technical questions, strike one for their radical distinctiveness, one from another. Taken together, these two observations mean that it is less than straightforward to derive from the foregoing analysis a firm view as to what, from the point of view of representativeness and accessibility, the maximally effective devolution Bill might look like. Bearing that caveat in mind, one might make the following suggestions as to the kind of provisions that the devolution Bill will need to make.

We first examined recent proposals for devolution from the point of view of an Assembly's legislative powers looking particularly at their entrenchment, their scope and the circumstances in which their use might be challenged. In the author's judgement, the first of these should be sought by adopting the SCC's 1994 suggestion that the Act constitutive of the Assembly contain a declaratory clause stating the intention that the Act not be amended or repealed without the consent of the Scottish Parliament itself. However, if this proves impossible, it is unlikely that much will be lost by it; for experience of the operation of devolution to Northern Ireland between 1921 and 1972 suggests that once established, an elected body would automatically enjoy a degree of *de facto* entrenchment against possible attempts by Westminster to curtail its powers or to abolish it. This might seem like a

strange remark to make in the light of Stormont's demise in the extreme circumstances of the early seventies; but the point is that these circumstances *were* extreme and for fifty years prior to them it proved very difficult for Westminster to use its reserve powers under the 1920 Government of Ireland Act in opposition to the wishes of Stormont (Bogdanor, 1979; McCormick & Alexander, 1996: 104). If, then, it is politically difficult to overturn the actions taken by an elected body within the framework of a *given* set of powers, it takes little imagination to appreciate how difficult it would be to curb these powers *themselves* as long as they continued to enjoy the support of a majority of the Scottish people. In such circumstances, any attempt so to curb the Assembly's powers would be the indicator of a profound rift between London and Edinburgh thus demonstrating how in practice the Assembly and its powers would be at risk only in pathological situations. If we then assume the passage of a Bill which maximises the scope of the Assembly's powers, the most significant issue in relation to its freedom to represent the interests of Scots will be the provisions made with regard to *vires* challenges. Such provisions should be as restrictive as possible and of the alternatives here considered those contained in Donald Dewar's Bill would appear to be the most desirable. It will be important to ensure that *vires* challenges by bodies other than Westminster itself are not possible - otherwise, it would appear to be open to a hostile government in London to use outside bodies to undermine particular items of Scottish legislation without having to suffer any political opprobrium for so doing.

Second, we considered the proposals from the point of view of the financial arrangements they make for the Assembly and discovered that there appears to have emerged something of a consensus around the idea of

conceding an income-tax rate-varying power of up to three pence on the basic rate. The significance of this from the point of view of its impact on the volume of resources available to the Assembly will be minimal though its political significance seems to be much greater. It does not appear to be beyond the bounds of possibility that a future government, keen to cut public expenditure, might seek to do so by extending an Assembly's tax-raising powers once the principle had been conceded. It could then seek a partial substitution of taxes levied in Scotland for the equalisation grant, using financial-'responsibility' and 'accountability' arguments to bolster its position, knowing that a Scottish executive would find it difficult to raise taxes to make up for the grant short-fall. This appears a likely scenario if one imagines a cost-cutting United Kingdom Conservative government faced with political opponents in Edinburgh; for such a government would be able to draw sustenance from a submerged but well established Conservative tradition favouring a home-rule settlement involving tax-raising powers. In the 1960s, it had been the Conservatives, of the two largest parties, that had first shown responsiveness to the growth of the SNP and to the argument for devolution, seeing in the latter a means effectively to oppose both the separatist SNP, and the centralising socialists. Hence, Mr Heath's 1968 Perth speech, which had proposed the creation of a Scottish Assembly, had concluded, appropriately enough, with a quotation from Quintin Hogg's *Case for Conservatism*, 'Political liberty is nothing else but the diffusion of power' (Bogdanor, 1979: 109); while Alec Douglas-Home (author of the Conservatives' 1970 plans for an Assembly) campaigned for a 'No' vote in the 1979 referendum precisely on the grounds (among others) that no tax-



raising powers were being proposed for the Assembly.<sup>17</sup> What will be critical, then, will be to ensure that any new devolution Bill contains provisions which ensure that the size of the block-grant - which in any likely scenario will form the most significant source of the Assembly's income - is determined by mutually agreed-upon criteria and is not subject to constant re-negotiation. Only by this means, together with provisions for the assignment of revenues, will it be possible for the Assembly to establish some sort of guarantee for itself against the potential threat, inherent in the conferral of tax-raising powers, to the volume of resources available to it.<sup>18</sup>

Finally, we examined the proposals from the point of view of their provisions with respect to the Assembly's standing orders and electoral system. All envisage an Assembly which would hold to account a Scottish executive. What is most interesting, however, is that none of the proposals envisage conferring on the head of this executive the title of 'Prime Minister' - no doubt so as to leave the Assembly under no illusion that sovereignty has been transferred (Bogdanor, 1979: 164). Efforts should be made to ensure that the devolution Bill does use this title however; for whatever the position from the point of view of constitutional law, it seems plausible to think that its

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<sup>17</sup> It is also the case that in 1978, 'a key foundation of the Conservative attack on the Scotland Bill was the irresponsibility of an exclusively block grant funding mechanism that divorced spending from all responsibility for revenue raising'. (McCormick and Alexander, 1996: 127).

<sup>18</sup> In addition to the Italian case, already cited, one might also mention the United States as a further example of a country where the potential existence - or in this case, the actual existence - of revenue raising powers has been actively exploited by the Right as a means of engineering all-round public expenditure cuts.

symbolic significance would help to shore-up the degree of political entrenchment that might be enjoyed by the Assembly. If this view is correct, then it supports the argument that the freedom of the Assembly to represent Scots' interests will depend on a range of provisions rather than on one above all others. A further such factor is the nature of the electoral system which, in view of Labour's commitment to legislate for home rule on the basis of the SCC proposals, seems most likely to take the form of an Additional Member system. To the extent that this system paves the way for coalition politics and makes new forms of political co-operation the order of the day (Lynch, 1996: 10), it would appear to offer yet a further opportunity for the consolidation of political entrenchment based on the rallying of popular support. Yet while offering significant opportunities, such provisions also involve significant dangers as Bogdanor (1979: 193-4) has implied. He argues that, with its inevitable bargaining between interdependent governing structures, devolution 'raises problems of political accountability which have nowhere been fully solved. To whom will the intergovernmental layer be responsible?' Devolution will 'allow a good deal of room for obfuscation and buck-passing on the part of politicians, and the electorate will not find it easy to pinpoint the responsibility for decisions'. If this argument is valid, then it raises once more the point that the success of devolution in resolving problems of representation and accessibility will ultimately depend on the skills of its practitioners - thus making it reasonable to think that, while offering exciting possibilities, devolution can in reality be no more than the starting point of efforts to redress the democratic deficit currently at the heart of Scottish government.

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