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REPORT OF THE CONSERVATIVE PARTY COMMITTEE ON THE REFERENDUM

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Introduction by the Chairman

The Committee was appointed by the Leader of the Party early in April to consider the future place of the referendum in our constitutional arrangements and to make recommendations. The Committee met for the first time on April 24 and held its final meeting on July 3rd. The issues are complex and it is hardly surprising that some members of the Committee would be prepared to go further than others, and that there is not agreement on all points of detail. However, our principal recommendations are unanimous.

We have been very much aware of the need to carry opinion with us, and have been conscious from the outset that whatever theoretical considerations might apply, or however strong our personal convictions on particular points might be, there could be no purpose in our putting forward proposals unless we could see some prospect of our obtaining widespread support for them both in Parliament and outside.

Several Members of the Committee prepared papers for our consideration and I am particularly grateful to Mr. P. Goodhart for his invaluable introductory essay, and to Prof. D. O'Connell for a constitutional paper that greatly influenced us. We also received valuable written advice from Mr. Nevil Johnson, of Nuffield College, Oxford; Mr. Vernon Bogdanor, of Brasenose College, Oxford; and Mr. Terence Higgins, M.P. We would like to express our gratitude to our secretary, Mr. G.D.M. Block for his assistance.

R. N. EDWARDS

The Political and Constitutional Background

The Committee has carried out its work at a time when there is widespread, though by no means universal, acceptance that the referendum has a place in the procedure for major constitutional change. The referendum has been used following accession to the E.E.C., and, more recently, the Labour Government has with some reluctance adopted it as a device to try to get the Scottish and Welsh Devolution Bills through a divided party and Parliament.

The last Conservative Government held the Northern Ireland Border Poll, and since then political leaders have often found it convenient to point to the result of that poll as an indication of majority sentiment in Northern Ireland. Previously, though not on this occasion on a constitutional matter, a Conservative administration introduced a referendum on a septenial basis to allow the people of Wales to reach a decision about Sunday drinking.

Inside the Conservative Party the pro-referendum tradition has a lengthy history. As long ago as 1911 Arthur Balfour, as leader of the Conservative Opposition, moved the following clause during the Consideration of the Parliament Bill:

> "A Bill which (a) affects the existence of the Crown or the Protestant Succession thereto, or (b) establishes a National Parliament, or Assembly, or a National Council in Ireland, Scotland, England, or Wales, with legislative powers therein; or (c) affects the qualification for the exercise of the Parliamentary franchise or affects the right to vote at any Parliamentary election, or affects the distribution of Parliamentary seats or (d) affects the constitution or powers of either House of Parliament or the relations of the two Houses one to the other, shall not be presented to His Majesty nor receive the Royal Assent under the provisions of this Act and until it has been submitted to a poll of the electors and approved at such a poll in accordance with the Schedule of this Act".

In an impassioned speech supporting his proposal, Arthur Balfour declared: "In the referendum lies our hope of getting the sort of constitutional security which every other country but our own enjoys ..... I am convinced that whatever is done now.....that before long and practically in the lifetime of all of us, we may see this great democratic engine brought into practice".

In 1930 Stanley Baldwin, confronted with the rise of the Empire Free Trade Movement, pledged a referendum prior to the possible introduction of taxes on non-Empire foods; and in 1945 Winston Churchill unsuccessfully sought to persuade Clement Attlee that the wartime parliament should be further extended to the end of the Japanese war on the authority of a referendum.

Advocates of the referendum today point to the erosion of the Parliamentary conventions that previously sustained our constitutional arrangements and to the emergence of an "elective dictatorship", and argue that the referendum can be used as a valuable mechanism to prevent violent and arbitrary constitutional change. They are impressed by the way it has held in check extremism in Switzerland and by the cautious manner in which the Australian electorate has handled constitutional proposals submitted by them for approval. (They have accepted only eight proposals for change out of thirty-six constitutional referendums held there, though a further five received an overall majority but not the necessary backing of

sufficient states). Others point to the value of the referendum on non-constitutional matters, and advocate its use on the grounds that it will more effectively represent the will of the people than can our present political system. We have been very much aware of the demand that has been made while we have been sitting for the Party to commit itself to referendums on issues such as capital punishment and proportional representation.

At the same time we could not fail to be conscious of the antagonism felt by many to the whole concept, and of the real practical difficulties. Referendums or plebicites have been used by authoritarian governments; they can act as a block against desirable social change; they are vulnerable to abuse by the ruling party; they can put the rights of minorities at risk; it can be difficult to pose a fair question and isolate that question from other material questions which cannot easily or appropriately find a place in the referendum; and, as we found, it is extraordinarily difficult to devise a satisfactory triggering mechanism if the referendum is to be used as a defence against arbitrary government or as an expression of popular will. Above all, we have been concerned about the difficulties of reconciling the referendum with the concept of representative parliamentary democracy. We have been led to ask ourselves what Members of Parliament, who are elected to use their own judgement, are to do if that judgement should be in conflict with the outcome of a referendum; and we have had to consider whether people send representatives to Parliament to vote for something they may believe to be wholly wrong and damaging to their country because a particular question, asked in a particular way at a particular time has thrown up a particular answer. We have also noted with concern that if a referendum is provided for by adding an enabling clause to the Bill that deals with the subject of the referendum we can find ourselves in the situation, as with the Scotland and Wales Bills, where Members vote for measures of which they strongly disapprove in order to obtain the referendum they feel to be desirable.

A Constitutional Defence

At a very early stage the Committee reached the unanimous conclusion that it was as a constitutional safeguard that the referendum was most urgently needed and where its use could be most easily reconciled with our existing system of parliamentary democracy. We decided to start our considerations where Balfour left off sixty seven years ago. We were aware of the view held by some that the referendum should take its place as part of an overall package of constitutional reform that might include an elected or partly elected second chamber and possibly a written constitution; and it was suggested that as a referendum required the introduction of rules for its use, it could hardly be added in a satisfactory manner to a constitutional arrangement that has no rigid rules. We were also made very much aware of the difficulty of adequately defining a constitutional issue. As one paper submitted to us put it:-

> "Such questions cannot be satisfactorily defined (quite apart from defining who or what institution would be entitled to initiate a referendum). Second, any likely definition would be far too narrow to encompass some of the issues on which there is some kind of case (grounded in democratic theory or based on the legitimate anxieties of politicians as to the strength of their authority) for the referral to the people."

Our attention was drawn to a great deal of the legislation that has been passed by the present Parliament and which has affected human rights and constitutional relationships, but which none the less would be difficult to bring within a definition of the type originally attempted by Balfour.

We were told that it was an appreciation of these problems of definition that had led the Conservative Review Committee on the House of Lords under the chairmanship of Lord Home of the Hirsel to decide against making a proposal to vest a power in the second chamber to call for a referendum on critical constitutional issues. The Home Committee put their conclusions on the matter in this way:

> "It is hard to define basic constitutional and human rights issues, and it is most unlikely that either the House of Commons or the Government could agree to the Second Chamber having complete discretion to decide when and on what matters a referendum might be held. Obviously too this type of scheme might encourage conflict between the Houses of Parliament. Consequently we consider that the regular use of referendum as an instrument of constitutional protection should be contemplated only within a wider framework than that of reform of the House of Lords and for that reason we do not press the proposal in the present context."

We reached a similar conclusion against the House of Lords having complete discretion if this was to apply to a wide range of constitutional or semi-constitutional issues. However, we consider there is one very narrow but critically important area where the powers of the House of Lords and a scheme for a referendum could be effectively linked, and in the following section we set out our proposals. We emphasise that they are not dependent on House of Lords reform, but stand on their own as a constitutional innovation, and indeed we believe that because of their limited but fundamental nature there is a much more reasonable prospect of their being implemented within the life-span of a single parliament.

Constitutional Proposal

We propose the introduction of a measure to be described as the Constitution (Fundamental Provisions) Bill. We believe that the introduction of a written Constitution is not a realisable objective in the near future, even assuming it to be appropriate, having regard to our traditional constitutional arrangements. It would, however, go some way to meeting criticism and dispel misgiving if we were to introduce an enactment of a fundamental and potentially more enduring character than belongs to the ordinary run of legislation. While it is not possible technically to entrench without a written constitution, a Statute of this description could well achieve a special status in the hearts and minds of citizens which would make any effort at repeal an electoral liability. Any Government which sought to repeal it would be open to the charge of subverting the Constitution, and an appeal to the maintenance of the Constitution has, in our history, proved to be a potent force. Hence the case for a Constitution Act.

This Act would provide for a referendum before any fundamental change in the Constitution occurs. While the sovereignty of Parliament makes it impossible to prevent such an Act being repealed by a bare majority and without a referendum, it would require an exceptional set of circumstances for a government to act so boldly without incurring a serious electoral liability, especially if in time the Act came to acquire a constitutional standing approaching that of the Bill of Rights, 1689.

The primary protection sought by such a Bill would be the existence of the Second Chamber. That would be the principal goal of our Constitution Bill, which would protect the basic institutions of the constitution by requiring a referendum before they are fundamentally altered, while at the same time amending the Parliament Act of 1911, so that the constitutional changes could not be brought about under the procedure of that act or the Parliament Act of 1949. The Bill would thus re-enact or leave unchanged the provisions of the 1949 Act, as far as delaying powers in respect of ordinary Bills are concerned, but take us back to the pre-1911 position, subject to referendum as far as the existence of the Second Chamber and other fundamental matters are concerned.

The safeguard that this Act would provide against the abolition of the Second Chamber except by consent of the people would probably on its own go a considerable way towards providing the protection we need against violent constitutional change, but other matters could be covered as well. We recognise that the wider the scope of the Bill, the greater the problems of definition but we think that among the other matters that should come up for discussion are:-

a) The Unity of the Realm. If the present Scotland and Wales Bills became law, our Bill would then do something to stabilize the position and prevent frequent and radical changes leading eventually to the disruption of the Kingdom. If they do not become law or are not approved in the referendums that are planned the Bill would ensure that the people of the whole United Kingdom would have to approve a future scheme.

We recognise the difficulty that if the Scottish and Welsh electorates demand a change new animosities may be created if the English electorates deny them the opportunity; but the English have a legitimate interest and once decisions have been taken on the present devolution proposals there may be a good deal to be said for a measure that could prevent a piecemeal advance towards separatism. If a clear majority of the electors of Scotland and Wales are determined to follow a separatist path, it will of course be difficult to ignore their wishes. We propose that if a United Kingdom referendum were to reject proposals to establish a Scottish or Welsh Assembly - or to approve a major transfer of power to these Assemblies which may be established under the present Bills, then within two years there should be a further referendum in which only the Scots or the Welsh would vote.

We believe that there should be a requirement in the Act that a minimum proportion of the electorate would have to vote in favour before the question was approved; and 40%, for which a precedent now exists, might be appropriate.

If the question of Independence should arise in Scotland, Wales, or Nothern Ireland, a positive vote by at least 50% of the registered voters in Scotland, Wales or Northern Ireland would be required.

In dealing with issues of this kind we think it desirable that the constitutional machinery should be outlined well in advance of any sudden crisis of public opinion, so that orderly procedures come to be accepted.

b) The Crown. Although we cannot be certain that today there would be a general desire to entrench the Protestant succession, we incline towards the inclusion of the Act of Settlement; and we see a need for a constitutional guarantee of the free exercise of the prerogative as it relates to the U.K. Parliamentary Government, but with one qualification.

In 1832 and in 1911, major constitutional changes were accepted by the House of Lords after it became plain that the Prime Ministers of the day had persuaded the Crown to create enough Peers to override the blocking majority in the House of Lords which was opposed to major constitutional changes.

It has been argued that if the present powers of the House of Lords are to be safeguarded, some limit should be put on the number of new Peers that can be created in any one year.

We recognise that without specific provision our Bill would not protect the composition of the House of Lords as distinct from its continued existence, and that any such provision could involve limitation on the royal prerogative. If the matter is not dealt with we could be faced with a threat to create a large number of new peers of the kind that led to the 1911 Act. That perhaps is unlikely because the Sovereign might feel it right to await the outcome of a referendum on the issue in dispute before acceding to any such request from the Prime Minister of the day. However, we think that the matter could be covered by a general reference to "changes altering substantially the composition of the Houses" or some similar phrase which would leave the Crown free to increase the number of peers, but not radically; and possibly by an indication of the degree of change that would be regarded as substantial - (the creation of more than 15 peers at one time for example, might be so regarded).

The threat would only arise if the Government of the day sought to pack the Lords in order to repeal the Constitutional Act itself, but unless the circumstances were very unusual indeed, almost amounting to a condition of near revolution, it is hard to imagine that a Government would risk incurring the grave electoral unpopularity which could be expected to arise from an attempt to tamper with the constitutional arrangements.

c) The Bill of Rights. There is no threat to this at present, but putting it in would emphasise what is basic to the constitution, and so give psychological underpinning to the proposed Bill. In any event, the Bill of Rights is far from a dead letter, and we consider that attention needs to be drawn to it. This is because Governments are tempted to exercise the suspending and dispensing power, and need to be reminded that they may not do so. In New Zealand recently the Bill of Rights was invoked by the Chief Justice to curb an exercise of the suspending power of the Prime Minister. As part of the rehabilitation of the rules that curb "elective dictatorship" this re-emphasising of the Bill of Rights might be useful.

d) The House of Commons. We do not exclude the House of Commons, although the things that we would principally be concerned to protect are aspects of its relationship with the House of Lords. It might be useful to make some reference to entrenching the rights of the Commons when dealing with the relationship between the two Houses.

We should also provide that a referendum be held before any new system of choosing Members of the House of Commons comes into force. There is a widespread feeling that an alteration of the rules while the game is in progress cannot be left solely to the players, and this healthy belief must apply with particular force to the question of choosing who the players should be. In other words, any Bill passed by Parliament which changed the method of election, would not be enacted until a referendum had been held.

It seems to us that a reforming package on the lines we have proposed could have considerable appeal and that its undeniably democratic basis would be its own best defence.

Referendum Commission

Experience in Australia, and indeed during the Scotland and Wales Bills, has shown that the framing of the question to be put is likely to be difficult and tendentious. Because of this the wording as well as the substance can generate political opposition. It is desirable for the Government to be insulated as far as possible from criticism of the way a question is framed. For that reason we propose that the Bill should create an independent body to draft the question and to supervise the conduct of the referendum. On the conclusion of the referendum it could report the result to both Houses, and when they have both formally resolved to accept the report, the Bill, already passed, would go to the Crown for the royal assent.

We should recognise that in future the problems of fairness and balance will be very much more difficult to resolve than they were during the E.E.C. referendum. Then there were two well-defined groups faced with a well-defined question. There were, of course, problems of getting spokesmen of the left to sit on the same platform as those of the right; but by and large it was easy to make a fair allocation of broadcasting time and Government money between the two umbrella organisations.

In any future referendum, it will be more difficult to see that there is a proper allocation of broadcasting time and information facilities. For example, some of the supporters of the Devolution Bill will argue that it is only a step towards their goal of total separation. They cannot easily share a platform or a television studio with politicians who back the Bill because they believe it will defuse the argument for independence. Indeed, in any foreseeable referendum, it is difficult to see the opposing forces gathering themselves into tight compact groups.

It would be helpful if the Referendum Commission could try to establish ground rules for the conduct of future referendums well before the campaigns actually begin.

We have considered alternative proposals that the body could be a Referendum Commission separately established or a Referendum Committee of the Privy Council. This is a matter that can be considered further; but in either event it could be composed of three persons, one appointed by the Prime Minister, one by the Leader of the Opposition (both at the time of a new Parliament), while a third could be a judicial member of the Privy Council. The Bill could provide for the Referendum Commission to refer legal questions to the Judicial Committee of the Privy Council for advice and this could be particularly desirable if there were controversy about whether the question accurately encapsulated the issues in the Bill.

Powers to hold other referendums

We have considered very carefully whether referendums should be used on other than constitutional issues, and have examined a number of systems in use in other countries. We describe these below:

A Legislative Veto has some attractions. This is a form of referendum which would enable legislation of a non-constitutional kind to be put to the electorate for approval. It is a form of referendum that might have prevented some of the more controversial legislation that has been forced through in recent times, particularly that affecting human rights or that is quasi-constitutional in character. We are extremely doubtful whether such a weakening of executive authority

or the power of Parliament is desirable and we consider that there are very serious difficulties in finding an acceptable way of triggering such a referendum. We do not believe that it would be acceptable that the House of Lords should have automatic powers to do so, or for that matter, any particular individual (such as the Leader of the Opposition) or group (a given number of Members of Parliament for example). The only reasonable alternative is "the people's veto" on Swiss lines. Laws passed by the Swiss Federal Assembly and major treaties can be challenged by the voters. If within ninety days of the publication of the law a petition is signed by 50,000 voters, the law must be put to a referendum and is rejected if a simple majority is not obtained for it. The population of Switzerland (6,385,000) is rather less than one-ninth of the UK population: the equivalent of 50,000 for the UK would be about 435,000. We do not believe that such a substantial reduction in the power of Parliament to legislate is desirable. We think it important that in a Parliament any Democracy Parliament and Government should accept responsibility for what they undertake, and we see a danger that on this basis, referendums would encourage both to abdicate their responsibilities in favour of a popular vote, as has happened in the case of the Scotland and Wales Bills. In any case we see no practical possibility of such a proposal being acceptable to Parliament at the present time.

The Popular Initiative in which a given number of electors (100,000 in Switzerland) can obtain a referendum by petition was also considered, together with a variation proposed some time ago by Christopher Tugendhat. He suggested that:

"A referendum would be called if 12½ per cent of the electorate, drawn in reasonable proportions from all parts of the country, petitioned for one on a particular subject on two separate occasions. Those occasions would have to be not less than three and not more than five years apart, and a general election would have to take place between the two.

Thus, in order to secure a referendum, there would have to be a sustained nationwide capaign over a significant period of time, and at least two Parliaments would have had an opportunity to consider the subject before the poll actually took place".

Within our committee there was some enthusiasm for such a proposal but among other members opposition was very strong indeed. We do not think we are entirely unrepresentative, and therefore conclude that there is no prospect of so fundamental a change receiving parliamentary approval. The whole basis of representative government in this country would be transformed by such a scheme, not necessarily for the better. We suspect that although those with particular enthusiasms might be pleased if they could obtain popular backing for them, they might be equally dismayed by the results of the referenda on other issues. We do not believe that it will be easy in a large and complex industrial society to carry on government effectively if numerous decisions are made subject to votes by the people; nor do we think it certain that government on that basis would necessarily be more popular than that based on proper debate and consideration by a representative assembly. Such a scheme would introduce a new element of uncertainty into Government and create immense practical problems, particularly if it impinged on tax powers or on treaty obligations. The practical problems would also be formidable in a country such as ours; the difficulties and costs of checking petition lists, for example, and the cost of holding frequent referendums on a large scale. For all these reasons we do not recommend that at the present time we should experiment with the legislative veto or the popular initiative. We want to see the responsibility for government left

firmly in the hands of Parliament, reflecting the will of the people in the historic manner.

None the less we are concerned at the widespread feeling in the country that Parliament is unresponsive to the electorate's views. We should not lightly dismiss the possibility of more effective consultation of the people by Government. We are aware that a General Election does not always allow for opinion to be adequately expressed on particular issues, especially when they are of a kind where opinions cross party boundaries. One paper submitted to us put the argument in this way:

"The case for popular consultations may also be reinforced by the growing complexity and remoteness of modern government, as a result of which many people feel alienated from their political institutions and suspicious of the decisions taken through them on their behalf. ..... Governments may need the explicit support of a popular majority if they are to secure authority for measures to which powerful minority interests are opposed and for which parliamentary approval alone is an insufficient foundation".

Another advocate put it even more bluntly:

"Political attitudes which reflect the views of the people as a whole are scathingly called populist. I prefer populism to unpopulism and my experience has shown that on most matters the public is more often right than are the politicians and experts. I am therefore an unashamed advocate of the "general referendum" (a name I prefer to the "social referendum")".

We think there is room for experiment and that it should be easier for a government with the approval of Parliament to hold a referendum on a particular issue. We think there are objections to doing this by adding the referendum provisions on to particular Bills, and serious practical difficulties if referendums can only be launched by separate legislation on each occasion. Parliament ought not to be burdened with a repetitive process on matters of detail, and once it has decided on the proper way to conduct referendums it should only have to decide whether a referendum is appropriate in particular circumstances.

During the passage of the EEC Referendum Bill, much time was naturally spent on discussing the rules that would have to be followed during the referendum campaign. It would obviously be pointless for Parliament to go into such detail whenever a referendum is proposed - particularly as much of the detailed administrative work should be dealt with by the Referendum Commission which we have proposed.

For these reasons we believe that the opportunity provided by the introduction of a Constitution Bill should be taken to introduce enabling legislation for referendums to be held more easily. We recommend that an additional section of the Bill should provide for the holding of referendums. We propose that the initiative should be left with the Government of the day, and we firmly believe that the referendum should only be held with the consent of both Houses, which could be obtained by the affirmative resolution procedure.

The Referendum Commission would have the same role in relation to referendums held under this section as they would have in the case of those dealing with major constitutional changes. We understand that some of the objections we have discussed in our discussion of the popular initiative will still be applicable to referendums initiated in this way, with the added disadvantage that they may become a tool of political expediency in the hands of government. We still think

an experiment in this direction would be justified, and we cannot see that this modest step would represent a threat to representative government. On the contrary it could well strengthen it. It would give an opportunity for the government of the day to consult the people particularly on issues that divide the parties and, as we discuss later, it might be used by governments to secure authority for measures to which powerful minority interests are opposed.

The criticism may be made that because the initiative would lie with government, subject only to the approval of Parliament, little would have been added to the rights of the people. We think this underestimates the pressures that the electorate would be able to exert on their representatives to hold referendums, although the pressures would be exerted in the normal democractic manner and Parliament could respond in its own time and in its own way. Undoubtedly, though, the change would increase the ability of electors to ensure that, on certain issues, their views were effectively heard.

A referendum of this type would be consultative. It would neither automatically stop legislation or initiate it; but in certain circumstances it could powerfully influence Parliament in the decisions it subsequently took. Parliamentary time is a precious commodity, and while a consultative referendum obviously cannot commit a Government to the introduction of legislation. we believe that there should be an explicit obligation on the Government to provide sufficient Parliamentary time for the full discussion of any measure which had been approved by a consultative referendum. A referendum could encourage the abdication of responsibility by politicians but, equally, used with sense and discretion, it could help to remove the growing grievance of those who feel that their views are too rarely considered. On balance, we feel the potential for good outweighs the potential for evil.

The Cost

The administrative arrangements for the British Referendum on the E.E.C. cost £5 million. Some savings could be made if the referendum coincided with Local Government elections. We are satisfied that this is possible in practice.

Local Government Referendums

We note that in America, in Canada, and even in Switzerland, the great majority of the referendums have been held at local level, dealing with local issues. To a very limited extent this already happens in the United Kingdom. The vexed question of Sunday drinking in Wales was resolved by County polls. Local legislation requires some issues to be put in Town Polls. At least one Local Education Authority has held an informal referendum on its Secondary Education re-organisation plan. We have not examined this question of local referendums in detail and suggest that further consideration should be given to it in due course.

The Authority of Government

We have suggested that in certain circumstances the referendum might be used by government to enlarge its authority. Indeed, many opponents of the referendum fear that governments might be tempted to use it too much with that objective in mind, holding it only in their own time and on a question of their own choosing, and using it to obtain a general vote of confidence in their administration as De Gaulle used it. We think that fear is exaggerated. Even De Gaulle found that the loss of a referendum is as capable of being being fatal as the loss of an election; and we think that probably the risks for a Prime Minister might be even greater than for a President. It seems to us that the more important question is whether the referendum can be used to defeat the overmighty subject. Ian Gilmour has argued: "The Trades Unions are over-mighty subjects who are not fully subject to control by the Ballot Box.....Because the State lacks authority (by which I mean the ability to gain consent), it is not able to control the most powerful corporations in the state - the trade unions. Indeed to some extent they control the state. It is as though the Tudors had been unable to impose a centralised authority in England, and the anarchy of the fifteenth century had continued....."

If a government does not have sufficient authority to defend the national interest against sectional interests or organised groups, it can either try to increase its authority or it can try to weaken the power of the groups. But since the difficulty is caused by its lack of authority; the first is obviously the more promising approach. Only when the forces of legitimacy have been stripped of all their weakening aspects, only when the constitution is properly designed to mobilise popular consent, and only when under those circumstances sectional forces have proved stronger than the Government can one safely say that the problem is intractable".

We can conceive of circumstances when the referendum might strengthen government's authority in such circumstances and we think it useful to add the weapon to the armoury; but we have few illusions about the difficulties and would approach the experiment with caution.

For example, during the 1973/4 confrontation with the National Union of Mineworkers, it would have been difficult to phrase any specific question to put to the electorate which would not, in practice, have been overtaken by events. The administrative problems would also have been substantial. Even in Switzerland, where they have had more than 100 years of experience with referendums, it takes three months to mount a referendum campaign.

It is our view that only on specific issues when the matters in dispute are limited and clearly defined is the referendum likely to prove useful. Thus we think that the outcome might be very unpredictable if there were a general question about the position of Trade Unions, but it is possible that if a government chose to legislate to deal with specific abuses such as those concerning the closed shop that the risks might be worth taking, particularly if the legislation had first been passed and was then being challenged by a noisy minority. We have far stronger doubts about the practicality of using a referendum in order to resolve an industrial confrontation with government. We fear that fighting a referendum campaign in the middle of an industrial dispute would be as uncomfortable as fighting a general election campaign in similar circumstances, and that the results might not be very different, that the argument might not be confined to a single issue and that the Government might not survive if it lost. That is not to argue that a referendum could not be useful in certain circumstances.

Disputes of this kind seldom erupt overnight and it is possible to imagine a situation in which the Government appealed for support for its general policies at a much earlier stage before a strike situation existed. It might also seek endorsement of its policies after a dispute in order to restore its authority. We have already indicated that there would be considerable risks in pursuing any such courses of action, but in circumstances when the democratic system was threatened risks might be worth taking. At least there can be no harm in having this additional instrument in the hands of the Government.

There is one further suggestion in this context on which we feel we should comment.

As the trades unions live partly inside and partly outside our present constitutional system it has been argued that we should recognise their special position by including within the provisions of our Constitution (Fundamental Provisions) Bill a requirement that any proposal to make a major change in their rights or powers should be made subject to a referendum. We are, however, not persuaded that it would be right to confer on the Trade Unions a special constitutional status of this kind, which would be highly contentious, especially in the light of the fact that a referendum could be held in any event under the provisions of our Bill on the initiative of the Government of the day.

Referendums on Capital Punishment and Proportional Representation

We feel an obligation to express our opinion on the propositions that the Conservative Party should commit itself before a General Election to holding referendums on Capital Punishment and Proportional Representation. Clearly these are important political decisions which ultimately must be settled by those responsible for drafting the Manifesto.

A referendum on either topic could not be held before the passing of our own Act or a separate Act of Parliament. Either course will take time and, bearing in mind the other competing pricrities, it seems improbable that the necessary legislation could be complete until well into the next Parliamentary session. There are genuine technical difficulties that cannot easily be overcome. For example in a referendum on capital punishment prior consideration would have to be given to the continuance of the majority verdict by juries for offences that would attract the death penalty; while in the case of proportional representation, we suggest that it would be wholly impractical to hold a referendum - as some commentators suggest - only on the theory of proportional representation. It would not be sensible to sweep aside the very considerable difference between the various systems which command some support. Once commitments on these specific referendums had been made the legislation would be more contentious, because, inevitably members' views on the particular topics would vividly colour their attitude to the enabling Bill prejudicing the important constitutional proposals that we recommend. If our Bill were to become law it would be possible for a future government to hold referendums on these subjects with the consent of the Parliament of the day. We think that this is the time for the political decision to be taken. We attach importance to the constitutional measures we propose. We would be sorry to see their progress prejudiced by an over-eager commitment to a particular referendum on a particular subject at this time.

Early in this report we made a comment about the need to carry opinion with us. Our approach has therefore been cautious. We find that although we hold very different views about the principle and range of referendums, there was common ground on which we could reach agreement. We are optimistic that it would be possible to find similar agreement in the Party and the country for the measures we advocate, and we therefore think it would be unwise to embrace proposals that at this stage could only divide the Party and prejudice what we seek to achieve. It seems sound advice for any political party to fight for what it can agree on and to avoid commitments that will divide it. For that reason we recommend that no commitments be made at this time to the subject matter of particular referendums.

RNE/GIMB/MB
5.7.78.

SUMMARY OF RECOMMENDATIONS

1) We believe that the referendum can be used as an important constitutional safeguard. We propose the introduction of a measure to be described as the Constitution (Fundamental Provisions) Bill which would provide for a referendum before any fundamental change in the constitution occurs. A primary protection sought by this Bill would be the existence of the second chamber.

2) The Constitution (Fundamental Provisions) Bill would re-enact or leave unchanged the provisions of the Parliament Act, 1949, as far as ordinary Bills are concerned, but take us back to the pre-1911 position, subject to a referendum as far as the existence of the second chamber and other fundamental matters are concerned.

3) We recommend that a Referendum Commission should be established to draft the use, and supervise the conduct, of referendums.

4) We recommend that the Constitution (Fundamental Provisions) Bill should include a section to provide for the holding of referendums on non-constitutional matters on the initiative of the government of the day and with the consent of both Houses of Parliament.

5) We recommend that no commitments be made at this time on the subject matter of particular referendums.