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Briefing for the Public Petitions Committee

Petition Number: PE1754

Main Petitioner: Mark Openshaw

Subject: Calls on the Parliament to urge the Scottish Government to ensure that any referendum advocating constitutional change should have at least a two thirds majority for it to succeed.

Background

The Referendums (Scotland) Bill was introduced in Parliament on 28 May 2019. The Bill provides a framework for the holding of Scottish referendums. The Bill sets out a legislative framework for the holding of Scottish referendums by providing for:

- the franchise and arrangements for voting;
- the conduct of polls and counts;
- campaign rules.

The Referendums (Scotland) Bill also provides for Ministers, by regulation (i.e. through subordinate legislation) subject to the affirmative procedure to hold a referendum.

The petition calls for any referendum on a constitutional issue to be subject to a threshold. A threshold in a referendum is where the result is not based on a majority of votes. Instead, a bar is set and must be reached in order for the referendum to be passed.

The petition suggests a supermajority threshold for referendums on constitutional issues, where two thirds of the votes cast would need to be in favour of change.

The two most recent referendums in the UK, the 2016 referendum on the UK's membership of the EU and the 2014 referendum on Scottish independence, were subject to the default threshold (50% plus one) i.e. a straight majority.

Electoral thresholds where a specified percentage of the eligible electorate is required to vote for the change have been used in the UK. The Scotland Act 1978, for example, required that at least 40% of the total electorate vote Yes in a referendum in order for their provisions to be implemented. As the report of the Independent Commission on Referendums explains, the result in Scotland was that a majority (51.6%) of voters voted Yes, but because turnout was 63.6%, it meant that only 32.8% of the electorate had voted for devolution.

Devolution was therefore rejected in 1979 and the Scotland Act 1978 was repealed. The result caused controversy in Scotland and the “40%” rule was seen as unfair.

The Constitution Society argued in written evidence to the Independent Commission on Referendums that the UK’s ‘strong majoritarian tradition’ meant that referendum thresholds would be unlikely to command public support. The Independent Commission on Referendums noted in its report that “Though supermajority thresholds are used in legislatures in many countries for constitutional amendments…they are strikingly rare in referendums”. The Commission’s report recommended against the use of supermajority or thresholds in referendums in the UK.

The Venice Commission, which is an advisory body to the Council of Europe and made up of constitutional experts, issued its most recent Code of Good Practice on Referendums in October 2018. It states:

“*It is advisable not to provide for:*
a. a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no;
b. an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold.”

Scottish Government Action

The Referendums (Scotland) Bill was introduced by the Scottish Government. The Bill does not provide for a supermajority or any threshold in referendums.

Scottish Parliament Action

During a meeting of the Finance and Constitution Committee on 4th September, Alexander Burnett MSP, asked a question about thresholds and referenced the petition. Replying to the question, Dr Alan Renwick, said he thought a supermajority requirement was 'a very bad idea' whilst Professor Justin Fisher said:

"I see a case for a supermajority for fundamental constitutional change. However, I think that the dual referendum proposal... is a better safeguard and is more defensible. Of course, if people know the rules beforehand, a supermajority is, arguably, defensible. However, on balance, the dual process is a better one."

The Scotland Act 2016 provides for supermajorities (two thirds of MSPs) for some legislation. This includes, for example, legislation on the Scottish Parliament franchise and the electoral system used to return MSPs.

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Senior Researcher
6 September 2019

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