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THE CONTINUATION OF POLITICS BY OTHER MEANS: CROWDFUNDED LITIGATION IN SCOTLAND (2015 - 2021)

Andrew Tickell¹

During the 1990s, when Helen Steel and David Morris were sued for defamation by McDonalds, their McLibel Support Campaign raised an estimated £40,000. At the time, this was a ground-breaking sum, amassed through a combination of high-profile donors – Linda McCartney famously gave the campaign £1,000 – and a mass of smaller contributors who wanted to give Steel and Morris the means to defend themselves in the High Court against the fast food multinational. While Steel and Morris had a website publicising their cause, most of their donations were made using traditional banking forms, including personal cheques, postal orders, and balance transfers. Since then, the emergence of social media and dedicated crowdfunding platforms have made it far easier for anyone anywhere in the world to contribute money towards artists they admire, politicians they support, or campaigns they sympathise with just a few clicks online. Litigation is no exception. Since the McLibel case, the £40,000 Steel and Morris raised has been dwarfed by the sums activists have been able to accrue to support legal actions across the UK.

This article considers the phenomenon of crowdfunded litigation in Scotland. At its most basic, crowdfunding is the practice of appealing for funding for a project or activity by soliciting financial contributions online. Gomez argues that “if the decade old crowdfunding industry is still perceived to be in its infancy, crowd-litigation funding is simply nascent.”² The extent and dynamics of litigation crowdfunding continues to be under-researched, though the topic is gaining international traction, with a handful of published studies considering the advantages and disadvantages of using crowdfunds to bring legal actions, as well as trying to identify factors resulting in more and less successful appeals for funds from the crowd.³ No published study has yet analysed the extent to which crowdfunding has been used to fund litigation in Scotland, though the phenomenon has attracted commentary in the legal press, recognising its potential to increase access to justice, while raising

¹ Lecturer in Law, Glasgow Caledonian University.

² M Gomez (2015) “Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool” *University of San Francisco Law Review* 49 307.

³³ M Elliot (2018) “Trial by Social Media: The Rise of Litigation Crowdfunding” *University of Cincinnati Law Review* 84(2) 529; R Perry (2018) “Crowdfunding Civil Justice” *Boston College Law Review* 59(4) 1357, M Gomez (2015) “Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool” *University of San Francisco Law Review* 49 307.

questions about the accountability and transparency of some campaigns,⁴ as well as the scope for objectively ‘hopeless’ legal cases to attract considerable investment because of their political appeal.⁵

This article attempts to quantify the extent and identify the main characteristics of crowdfunded litigation in Scotland between January 2015 and the end of August 2021. In terms of research strategy, this study sought to identify all crowdfunders launched during the review period which sought legal advice on, threatened, launched, continued or appealed any kind of legal action in the Scottish courts. Because of the public nature of most crowdfunding, higher-profile cases were easy to identify. Lower-value and more geographically localised campaigns were identified by trawling through the main online crowdfunding platforms currently operating. These included Indiegogo, GoFundMe, CrowdJustice, CrowdFunder, and JustGiving pages.

While every effort was made to make this survey as comprehensive as possible, some smaller and less well-publicised campaigns may have been overlooked in the course of this research. In addition to this, some high-profile appeals for funding were made – not using public platforms, but by inviting contributors to transfer funds directly to beneficiaries using online payments systems like PayPal. This has been a particular dynamic in crowdfunding involving people accused of criminal offences. Criminal law crowdfunders constituted a significant proportion of campaigns during the review period, however some platforms impose restrictions on raising funds for this kind of case.⁶ Accordingly, the total figures should be treated as the *minimum* crowdfunded for litigation in Scotland during the last half decade. The total amount of money contributed and number of contributors are certainly higher than the public figures I have been able to verify.

This article argues Scotland appears to have been a comparatively early-adopter of crowdfunded litigation. Crowdfunding has now been used to support an extremely diverse array of legal actions, crossing traditional boundaries between criminal and civil law. What unites the overwhelming majority of high-value, high-contribution crowdfunders, however, has been their clear links to the wider political context, active political questions, or the involvement of politically-aligned or connected public figures in the case – whether as pursuers, defenders, or accused persons.

⁴ See, for example, J Rozenberg (2015) “Is crowdfunded litigation the future of justice?” *The Guardian* 25 May 2015; C Livingstone (2019) “Tread carefully with crowdfunding” *The Scotsman* 2nd September 2019.

⁵ C McCorkindale and A McHarg (2021) “Litigating Brexit” in O Doyle, A McHarg and J Murkens (eds) (2021) *The Brexit Challenge for Ireland and the United Kingdom: Constitutions Under Pressure* (Cambridge, Cambridge University Press) 260 – 291.

⁶ GoFundMe (2021) Terms of Service, para 9. Accessible at: <https://uk.gofundme.com/terms>.

A. CROWDFUNDING IN SCOTLAND: MAIN FINDINGS

This research establishes that crowdfunded litigation is now in rude health in Scotland, raising substantial sums of money from large numbers of people to support legal actions in this jurisdiction. Sixty-three distinct crowdfunding campaigns launched in Scotland between January 2015 and August 2021. In total, these campaigns raised £2,349,054 from at least 77,837 people. Levels of support varied across crowdfunders, both in terms of funds raised and numbers of contributors. The scene is characterised by a comparatively small number of high-value, high-contribution campaigns, and a much larger volume of campaigns raising comparatively modest sums from comparatively modest numbers of people. Between 2015 and August 2021, just under half of all litigation crowdfunders raised less than £10,000 (47%), and almost three quarters received contributions from fewer than 1,000 people (72%). Only 12% of campaigns attracted the support of more than 5,000 donors. By contrast, the ten highest-value Scottish crowdfunders raised a total of £1,624,253 from 65,428 people. These ten campaigns were responsible for 69% of total crowdfunds raised in Scotland and 84% of public contributions during the last five years. The top twenty crowdfunders accounted for 88% of funds raised (£2,069,589) and 91% of contributions (70,943 individual donations).

This study also attempted to classify the main *character* of the legal actions being crowdfunded. Of the sixty-three crowdfunders identified, twenty-nine (46%) involved some kind of judicial review proceedings, eight (13%) were for defence funds for criminal charges or contempt of court, six concerned defamation cases (9.5%), with the balance being made up of a diverse array of actions, including fatal accident inquiries, debt actions, immigration and eviction challenges, divorce and custody disputes, and employment tribunal cases. Whatever the cause of action, every higher value crowdfunder had clear connections with current or former politicians, political writers, active political causes, or social media controversies. Judicial review proceedings made up 65% of the twenty highest-value crowdfunding campaigns. It is tempting to frame crowdfunding as a grassroots, bottom-up mode of litigation funding. It can work this way. However, many of the highest-value Scottish campaigns involved litigants mobilising their already significant political and social capital to pay for going to law.

B. POLITICAL LITIGATION CROWDFUNDING (2015 - 2021)

The first major crowdfunded case in Scotland was the election petition raised in 2015 by constituents of Northern Isles MP Alistair Carmichael in the wake of the UK general election.⁷ The four petitioners argued that the Liberal Democrat MP had committed an illegal practice under the Representation of

⁷ *Petition, Timothy Morrison and Others v Alistair Carmichael MP* [2015] ECIH 90.

the People Act 1983 by falsely denying on Channel 4 News that he had leaked a confidential memo from the Scotland Office to the *Telegraph* newspaper which suggested that Nicola Sturgeon – then First Minister and leader of the Scottish National Party – had told the French ambassador to the UK “she’d rather see David Cameron remain as PM” during the campaign.⁸ While the Election Court concluded this was a “blatant” lie, it upheld Carmichael’s election on the basis that it was not satisfied beyond reasonable doubt his dishonest denial of having been involved in the leak constituted a “false statement of fact in relation to his personal character or conduct” which could have justified voiding his election under the 1983 Act.⁹ Although unsuccessful in legal terms, the “Orkney four” raised £216,590 in support of their case from 10,495 people. More than half a decade on, this remains the highest number of people who have ever contributed to a public litigation campaign in Scotland. Carmichael was left to pay his own costs.

Since, crowdfunds have been launched to support a diverse array of legal actions. In the field of public and constitutional law, Brexit litigation in Scotland relied to a very significant extent on crowdfunding. Working with the Good Law Project, Andy Wightman MSP raised £190,650 to clarify whether Article 50 of the Treaty on the European Union could be unilaterally revoked by the UK. This resulted in decisions of the Court of Session and European Court of Justice.¹⁰ During 2019, £207,970 was raised to challenge the lawfulness of Boris Johnson’s prorogation of Parliament in the Court of Session, culminating in the UK Supreme Court’s judgment in *Miller*.¹¹ Beyond Brexit, many of the judicial review cases have clear political associations, in terms of the litigators involved, or the social policy issues under scrutiny.

The “People’s Action on Section 30” campaign raised the greatest sum through crowdfunding in Scottish legal history so far. Pro-independence activist Martin Keatings secured donations of £268,273 from 9,903 people towards his case against the Advocate General for Scotland. Keatings brought an ordinary action in the Court of Session seeking declarator that a hypothetical independence referendum Bill would fall within Holyrood’s legislative competence under the Scotland Act 1998. The case was dismissed as “premature, hypothetical and academic” by the Lady Carmichael,¹² a judgment affirmed by the Inner House.¹³ This case alone accounted for 11.5% of all of money raised for litigation through crowdfunding in Scotland during the last decade, and 12.7% of all contributors.

⁸ *Morrison*, para 15.

⁹ *Morrison*, para 59.

¹⁰ *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62.

¹¹ *Petition, Cherry and Others* [2019] CSOH 70, *Cherry and Others v the Advocate General* [2019] CSIH 49, *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 41.

¹² *Keatings v Advocate General* [2021] [2021] CSOH 16.

¹³ *Keatings v Advocate General* [2021] CSIH 25, para 55.

Former First Minister Alex Salmond raised just over £100,000 to launch a judicial review of Scottish Government decision-making in the course of an investigation into allegations of sexual harassment against him.¹⁴ The Scottish Government's decision not to launch an investigation into undercover policing was also subject of an unsuccessful petition in judicial review.¹⁵ The Humanist Society raised £3,765 to contest the ECHR compatibility of mandatory religious observance in Scottish schools, but paused their action after securing assurances from the Scottish Government and no petition was ultimately raised. The campaign group "For Women Scotland" launched a judicial review action arguing the Gender Representation on Public Boards (Scotland) Act 2018 was outside Holyrood's legislative competence under the Scotland Act 1998. Having been defeated in the Outer House, they are now reclaiming.¹⁶ The Justice for Sheku Bayoh campaign blends the pursuit of formal legal remedies with public campaigning and political interventions after Bayoh's death in police custody in Kirkcaldy in 2015. Just over £80,000 has been raised so far. A judicial inquiry into Bayoh's death is ongoing at time of writing.

Coronavirus restrictions also generated crowdfunded actions since the spring of 2020. The Night Time Industries Association raised £67,136 to challenge the Scottish Government's Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. The case was superseded by the lifting of restrictions. A coalition of churches successfully challenged the lawfulness of the Scottish Government's prohibition on communal worship during the pandemic in the Court of Session, raising £41,405 towards their costs.¹⁷

The Destiny Church in Edinburgh raised £58,736 to sue Edinburgh City Council, after the local authority cancelled a booking in the city's Usher Hall on the basis of the religious beliefs of one of the guest speakers. The case settled out of court, with the Council admitting liability and paying £25,000 in damages for having failed to take account of the implications under the Human Rights Act 1998 and the Equality Act 2010.¹⁸

From this short survey of judicial review cases, it is clear that the UK Supreme Court's 2011 decision in *AXA General Insurance v the Scottish Ministers* has been important in facilitating much of this

¹⁴ The Scottish Government ultimately conceded the judicial review petition in this case.

¹⁵ Lady Carmichael heard the case in the Outer House of the Court of Session in *Petition, Gifford* [2018] CSOH 108.

¹⁶ *Petition, For Women Scotland Ltd* [2021] CSOH 31.

¹⁷ Lord Braid upheld this challenge to the legality of the restrictions on religious worship. *Petition, Rev Dr William Phillip and Ors* [2021] CSOH 32.

¹⁸ BBC News (2021) "Edinburgh Council pays damages for cancelling religious speaker" 10th June 2021 <https://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-57429026>.

crowdfunded litigation in the years since.¹⁹ Replacing the restrictive test of “title and interest”²⁰ to sue with the more expansive “sufficient interest” test opened the door for these campaign groups to embark on judicial review proceedings many of which would likely to have been excluded from consideration under the old rules on standing.²¹

The political character of successful crowdfunding campaigns has not been limited to public law actions. Funds have been sought from the public both to launch²² and defend defamation cases involving Scottish politicians and political writers,²³ and to support a Catalan academic based at the University of St Andrews in her attempts to resist extradition to Spain in connection offences allegedly committed during the course of her involvement in 2017 independence referendum. Having raised £182,850, the cases ended after Ponsati moved to Belgium, having been elected as an MEP.²⁴

Perhaps surprisingly, criminal or quasi-criminal proceedings represent a significant proportion of crowdfunding efforts in Scotland. These cases generally also tend to have a political context or clear connection to wider issues of public concern. The YouTuber “Count Dankula” raised just under £200,000 from 8,200 people to appeal against his criminal conviction under section 127 of the Communications Act for uploading a YouTube video in which he repeated “gas the Jews” as his girlfriend’s dog raised its paw for the camera.²⁵ The Supreme Court dismissed the case as incompetent and without merit, though the fund attracted considerable support on free expression grounds.

Crowdfunding was also undertaken for two “defence funds” for individuals charged with contempt of court and communications offences in the aftermath of the case of *HM Advocate v Alex Salmond*. One of these men has subsequently appealed for further funds to support a civil action for malicious prosecution against the Crown after he was acquitted of an offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.²⁶ Craig Murray was convicted of contempt of court and was refused permission to appeal by the UK Supreme Court.²⁷ Mani Singh – charged with organising an unlawful pro-independence procession in Glasgow under the Civic Government (Scotland) Act 1982 –

¹⁹ [2011] UKSC 46. See further: C McCorkindale and P Scott (2015) “Public interest judicial review in cross-border perspective” *King’s Law Journal* 26(3) 412-439.

²⁰ *D & J Nicol v Trustees of the Harbour of Dundee* [1915] AC 550.

²¹ *Rape Crisis Centre v Secretary of State for the Home Department* 2000 SC 527.

²² The Sheriff dismissed the action in *Campbell v Dugdale* [2019] SC Edin 32, a decision upheld by the Inner House of the Court of Session on appeal in *Campbell v Dugdale* [2020] CSIH 27.

²³ Lord Clark found in favour of the defender in *Wildcat Haven Enterprises CIC v Andy Wightman* [2020] CSOH 30. £177,933.00 was raised for the defence through crowdfunding.

²⁴ S Carrell (2021) “Scottish Court drops extradition case of Catalan independence campaigner” *The Guardian* 26th August 2021.

²⁵ *Meechan v Procurator Fiscal, Airdrie* [2019] HCJAC 13.

²⁶ R Fairbairn (2021) “Activist Mark Hirst sues for ‘malicious’ prosecution over Salmond case” *The Times* 15th February 2021.

²⁷ *Her Majesty’s Advocate v Craig Murray* [2021] HCJ 2.

raised £6,158 for his defence online before pleading guilty at the Sheriff Court, refusing a community disposal, and being sentenced 72 days imprisonment.²⁸ In 2021, Marion Millar was accused of communication offences aggravated by prejudice on grounds of sexual orientation and transgender identity. Millar raised over £30,000 via the GoFundMe platform towards her defence,²⁹ before the fundraiser was taken down by the company, with contributions towards Millar's defence being solicited instead via direct transfer of funds.³⁰ The climate change campaigners Extinction Rebellion have also established a "Scotland Legal Hardship Fund" to support its members facing arrest in association with its climate change protests.

C. CONCLUSION

Litigation crowdfunding has established itself as a viable way of financing court actions in Scotland during the last five years. Having examined the language of crowdfunding pitches in the United States, Ren et al suggest "emotion and affect influence peoples' decision to fund a case," attributing the success or failure of appeals to the *language* used by would-be litigants in their appeals for funds.³¹ The Scottish data suggests the success of particular crowdfunders is more obviously attributable to the crowd's *pre-existing* political sympathies, antipathies and affiliations, and the emotion and affect which can be stirred by the successful mobilisation of these existing online networks.

Even this short summary demonstrates the breadth of concern which have characterised crowdfund campaigns, the diversity of the legal actions involved, and also the political context within which so many of these actions have resonated, whether in terms of Scottish constitutional politics, the involvement of politicians or public figures, Brexit, Coronavirus restrictions, and controversial issues of social policy, including religious freedom, free expression, and the perceived intersection between women's and transgender rights. While it is beyond the scope of this article to discuss the potential virtues and vices of litigation crowdfunding, the breadth of issues raised in these campaigns suggest we should be cautious before automatically framing all of these actions as "public interest litigation," unless we mean "litigation which happens to interest a section of the public." If litigation can be understood as the continuation of politics by other means, then so should crowdfunding which supports it.

²⁸ BBC Scotland (2020) "Independence march organiser jailed over row with council" 25th August 2020 <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-53909222>.

²⁹ M Wade (2021) "Campaigner Marion Millar raises £30,000 for defence over 'transphobic' tweets" *The Times*, 7th June 2021.

³⁰ J Boothman (2021) "Fundraiser block after cash pours in for feminist charged with hate crime" *The Times*, 6th June 2021.

³¹ J Ren, V Raghupathi and W Raghupathi (2021) "Exploring the Factors that Determine the Success of Litigation Crowdfunding: Implications for Social Justice" *Technological Forecasting and Social Change*, para 5.2.