A Bizarre Anomaly? Rights of Political Participation and the Scottish Independence Referendum: *Moohan v Lord Advocate.*

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Legislation: European Convention on Human Rights article 3 of the First Protocol; Scottish Independence Referendum (Franchise) Act 2013; Representation of the People Act 1982.

Case: *Moohan and another v The Lord Advocate* [2014] UKSC 67

Abstract *In* Moohan v Lord Advocate *the United Kingdom Supreme Court has, in the context of a case challenging the exclusion of convicted prisoners from voting in the Scottish Independence Referendum, confirmed the orthodox view that Article 3 of the First Protocol to the European Convention on Human Rights does not guarantee rights of participation beyond voting for membership of an established legislature and, specifically, does not extend to voting in referendums. Two strong dissents in the case recognise the democratic weakness of this position and argue that the Strasbourg position is not as absolute as it may seem and that article 3 can properly be interpreted to*

include referendums in its scope, particularly those which relate to the right of self-determination.

The European Convention of Human Rights (ECHR) guarantees strong rights to political expression and to association and peaceful assembly for political purposes. But beyond these, rights of political participation are relatively thin. Article 3 of the First Protocol (article 3) is the "Right to free elections". "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

On its face article 3 expresses only a duty on states to hold elections under certain conditions. However, the European Court of Human Rights (Strasbourg Court) has inferred from this duty a requirement that states guarantee individual rights to vote, to stand in an elections for the legislature[1] and, if elected, to take one's seat[2]. These individual rights are not absolute and may be limited by the states in ways over which they have a considerable margin of appreciation. However, limitations are subject to the reviewing power of the Strasbourg Court on the basis that they should not deprive the rights of their

essence and should not thwart the will of the people[3]. The Court recognises that only a "democratic" system can properly guarantee human rights. However, the different constitutional structures and traditions of the state parties made it, at the time of drafting, and continue to make it today, very difficult for anything but the most abstract conception of democratic procedures and institutions to be Convention requirements[4]. There is, for example, no need for a directly or fully elected executive; nor need the legislature be fully elected and there is no requirement that the legislature reflect in a proportional way the will of the people[5]. Broader rights to participation are not found and a contrast can be drawn with article 25 of the International Covenant on Civil and Political Rights (ICCPR) which refers to a right, directly or through representatives, to "take part in the conduct of public affairs" and includes a right of "access, on general terms of equality, to public service…".

Moohan v Lord Advocate[6] (Moohan) explores this relatively narrow view of rights to political participation. The decision upholds, in domestic law, the consistent position of the Strasbourg Court that the individual rights to vote, to stand and to sit in the chamber if elected, apply only to elections to the "legislature" and not to referendums (nor local government elections or other

forms of seeking the views of the populace). However the decision is subject to dissenting judgments that point up the relative poverty of participation rights and, perhaps, indicate future developments.

The case involved a challenge brought by serving prisoners who were denied the right to vote in the Scottish Independence Referendum (Referendum) held on 18 September 2014. The legal basis for the ban was section 3(1) the Representation of the People Act 1983 which was applicable to the Referendum by virtue of section 2 of the Scottish Independence Referendum (Franchise) Act 2013[7] - though it should be noted that convicted prisoners were also directly excluded from the Referendum franchise under section 3 of the 2013 Act[8].

In *R (Chester) v Secretary of State for Justice*[9] the Supreme Court had accepted that, as a matter of domestic law under the Human Rights Act, the guarantee in article 3 includes the right of at least some, otherwise qualified, convicted prisoners to vote in General and European elections[10]. The question in *Moohan* was whether this should extend to voting in the Scottish Independence Referendum.

The consistent rulings of the Strasbourg Court

The majority applied the clear and consistent case law of the Strasbourg Court to the effect that the right to vote inherent in article 3 is confined to elections for the legislature. The legislature has not been defined *in abstracto*. The principle of "effective democracy" means that it can only be identified in the context of a state's developing constitutional arrangements[11]. It includes those institutions which, singularly or as a complex whole, have a decisive role in the enactment of primary legislation applying in a country. It is not confined to a single, sovereign, national assembly but can include, for example, devolved or regional assemblies; for EU states it includes the European Parliament, treated *sui generis*[12]. The legislature is concerned with primary legislation and so excludes bodies that are wholly executive[13] or local councils whose law-making powers are delegated and exercised under the authority and limitations of primary legislation[14]. Likewise institutions or procedure that do not have a decisive role in the legislative process but whose function is merely advisory or deliberative are likely to be excluded[15].

The Strasbourg Court's case law has so far been consistent in excluding referendums from the ambit of article 3. For example the referendum over UK's continued membership of the EU in 1975 was of a "purely consultative" character[16]. The Strasbourg case law relates to admissibility decisions and contains no or little discussion. Previous authority is cited to justify a straight forward assertion that article 3 is limited to the "choice of the legislature" and therefore does not "apply to... referendums" [17]. The exclusion of referendums from article 3 was followed, axiomatically, in respect of a referendum approving membership of the EU[18]. There is brief discussion in *McLean v United Kingdom*[19] where prisoners in Scotland complained their article 3 right to vote had been breached. Although inadmissible for other reasons, the Strasbourg Court held that article 3 clearly applied to the General Election and to elections for the Scottish and European Parliaments; but not to local elections. In respect of the United Kingdom's Alternative Vote referendum, 2011, the Court endorsed its earlier case law and, subject to an implied proviso, discussed below, held that article 3 was not violated.

The majority in *Moohan* accepted, for domestic law, that there was no reason, based on fundamental principles of common law, to depart from this clear and consistent line of authority coming from the Strasbourg Court. Section 2 of the

Human Rights Act 1998 does not warrant UK law to provide a more "generous" outcome than would be available in Strasbourg unless it "flows naturally" (and is not clearly at odds with) the Strasbourg jurisprudence[20]. The case law is unequivocal and does not support a possible "direction of travel" towards applying article 3 even to some types of referendum.

The dissenting judgments

Moohan contains two strong dissents by Lord Kerr and Lord Wilson. These dissents have at their centre a sense that the majority's conventional, narrow, reading of article 3 is an arbitrary limit on the support for effective democracy and political participation that human rights should provide. Some form of democracy is the only system in which human rights can be effectively guaranteed and so article 3 should be given a purposive interpretation – it should promote, not restrict, the right of people to participate (at least indirectly) in the processes through which they are governed. Whether or not Scotland was to be an independent country was one of the most important political questions of the age and it was, on the face of it, a "bizarre anomaly"[21] for the right to vote in article 3 not to be effective[22]. In Lord Kerr's view the Preamble to the Convention "envisages the guarantee of an 'effective political democracy' as the foundation of all other rights enjoyed by those within its

protection…it is difficult to see how that purpose would be other than frustrated by preventing the safeguards applicable to ordinary legislative elections from applying to this most fundamental of votes"[23].

The decisiveness of the Strasbourg case law.

For the minority it was not so obvious that there was a clear and consistent line of reasoning coming from the Strasbourg Court. Few, if any, of the cases contain any argument and the focus of article 3 on the legislature is asserted axiomatically with little if any consideration of the purpose of the article in the context of effective democracy. An additional sentence in *McLean v United Kingdom*, suggested, to the minority, that the Strasbourg approach may not be as absolute and axiomatic as thought. The Strasbourg Court reiterated the conventional position but then added that "(T)here is nothing in the nature of the referendum in issue in the present case that would lead the Court to reach a different conclusion here"[24]. This implies that the nature or purpose of the referendum might be relevant and that referendums bound up with the "choice of the legislature" might be within the scope of article 3. There has not been a referendum dealing with secession that has been considered by the Court.

The nature of the referendum: and the wording of article 3

In the view of the minority there were at least two reasons why the Scottish Independence Referendum was of an altogether different quality.

First, if article 3 is read properly, with regard to its purpose[25] the Referendum could and should be brought within its scope. It was a vote relating to the "choice of the legislature" – the choice of which legislature should make the laws for the people in Scotland. In that sense it could be distinguished from, for example, referendums on voting systems or membership of the European Union.

This position was directly opposed by the majority. The Strasbourg Court has not applied article 3 to referendums on membership of the European Union yet they involve voting to accept the authority of a different, more complex, legislature and, therefore, are not very different from an independence referendum. The majority agreed with a concurring judgment, written by Lord Neuberger, which considered the language of article 3. The use of the definite article before "legislature" suggests a "specific and established" entity and so the "choice" relates to its membership rather than the possible adoption of a

new legislature. For the majority, other aspects of the linguistic analysis of article 3 undermined the idea that it should apply to referendums generally. "Elections", which appears in article 3, does not imply a referendum since the latter does not involve anyone being elected. Secondly, article 3 expressly imposes a duty on states to hold elections "at reasonable intervals" and there is no duty under the Convention ever to hold a referendum, let alone at regular intervals.

The nature of the referendum: binding or advisory?

The second reason why the minority took the view that the Scottish Independence Referendum might be sufficiently different in nature from those that had heretofore come before the Strasbourg Commission or Court was that it had binding effect; it could not be understood as being merely consultative or advisory. *X v UK*[26] is an early Commission case with one sentence giving reasons for the exclusion of referendums from article 3. These were, firstly, that there was no legal obligation to hold the referendum in issue and, secondly, it was merely consultative. The Scottish Independence Referendum was different: "both the United Kingdom and Scottish governments had agreed that the result of the referendum would be binding and section 1(1) of the

Scottish Independence Referendum Act imposed the legal obligation to organise the referendum"[27].

Here, again, the majority took a different view; one that engages with an important constitutional uncertainty. In conceptually distinguishing elections from referendums Lord Neuberger argued that an election directly brings about a particular outcome – the election of an MP. A referendum, on the other hand, is only indirectly related to an outcome. It does not directly change the law but requires further legislative steps to be taken – "a 'yes' vote would not have directly triggered independence for Scotland"[28]. Although the political parties had committed themselves, on a "yes" majority, to granting independence, MPs retain their constitutional duty to vote on the basis of their judgement[29] and that judgement would be exercised in relation to an independence bill written after extensive post-referendum negotiations. In this sense all referendums, particularly given the UK's constitutional arrangements, are advisory or consultative and, in the view of the majority, that is how Strasbourg has conceived them.

Lord Wilson, for the minority, thought it “far-fetched” to deny the political reality – that a “yes” vote would bring about the legislative changes necessary for independence. This “binding” character of the Scottish Independence Referendum distinguished it from others and made it all the more compelling that human rights, whose purpose was to protect democratic participation, should protect the right to vote in it.

There was little discussion of this important constitutional issue. It is submitted that it is not obvious that the courts should accept, as a legal principle informing any decisions they are called to make, the idea that any referendum is binding. It was not clear that a (specifically) narrow victory for the Yes Campaign would have created a clear constitutional duty on MPs to vote for the statutory changes required for independence. The Edinburgh Agreement was that the referendum would “deliver a fair test and a decisive expression of the views of people in Scotland and a result that everyone will respect” [30]. This was an agreement made, from the UK side, under the Royal Prerogative. Parliament was not directly involved in the Referendum process nor committed in advance to any understanding of the result. It is not obvious that “respect” for a narrow, and arguably indecisive, “yes” vote would have, necessarily and without doubt, placed a duty on MPs to vote for independence

legislation. The extent to which the Scottish Referendum was binding on Parliament was a matter of disagreement in the Supreme Court in *Moohan* and may be an issue of considerable constitutional significance if there is another referendum on Scottish independence.

ICCPR

The Supreme Court also considered, and divided over, the effect of article 25 of the International Covenant on Civil and Political Rights (ICCPR). Article 25 includes a right to "participation in public life" and, therefore, is not limited to elections to the legislature. Indeed, in *Gillot v France*[31] the United Nations Human Rights Committee expressly applied article 25 to secession referendums and, in its General Comment on article 25, includes, in the idea of "participation", voting in referendums which involve the choosing or changing of the constitution or the deciding of public issues[32]. The issue was whether article 25 ICCPR could have a decisively persuasive impact on interpreting the scope of article 3.

In *Moohan* the majority held that article 25 ICCPR, because of its different wording, would be unlikely to assist in interpretation of article 3. Furthermore,

following the Strasbourg Court, any influence article 25 ICCPR might have on the interpretation article 3 would not displace the focus of article 3 on elections for the legislature. In *Yevdokimov and Rezanov v Russian Federation* 2011[33] the UN HR Committee held that the denial of the vote of prisoners in the Russian Presidential elections violated article 25. In *Anchugov v Russia*[34] the Strasbourg Court, with *Yevdokimov* before it, had found no such breach of article 3 in respect of the same, Presidential, elections.

The majority in *Moohan* upheld the orthodox, "dualist" position that rights in the ICCPR have not been given effect in UK domestic law and so, as an unincorporated treaty, it does not limit the competence of the Scottish Parliament.

Lord Kerr, in the minority, accepted that the position of the Strasbourg Court in *Anchugov* meant that the persuasive application of article 25 ICCPR to the interpretation of article 3 was "problematical". He argued, instead, by reference to the special quality of the Scottish Independence Referendum – that it concerned the right of the Scottish people to self-determination. This is a right found not only in article 1 ICCPR but is also accepted as *jus cogens*; and

so is capable of influencing, even invalidating, any contrary rules of international law[35]. In Lord Kerr's view "it is clearly arguable that the protections guaranteed by article 25 ICCPR ought to apply to any vote taken in the exercise of the article 1 right to self-determination"[36]. Other provisions of international (or domestic) law should not be allowed to restrict this protection. Confining article 3 to votes for the legislature involves such a restriction. To avoid this article 3 can, properly, be interpreted to give effect to article 25 ICCPR, at least in respect of votes involving the right to self-determination[37].

The common law

The claimants in *Moohan* also argued that the ban on Prisoners voting in the referendum violated a common law right to vote. It was accepted that, whilst the common law might well recognise voting as a fundamental right, it could not be asserted against the clear expression of the will of Parliament. The courts should not have a direct role in approving the franchise (i.e. by having the last word on the proportionality of general statutory restrictions on voting). The franchise has always been a matter decided under the Royal Prerogative or, now entirely, by Parliament. It is noteworthy that the majority did accept that serious abuse by Parliament might, perhaps, justify a court declaring a statute invalid. If there is a "new constitutional hypothesis" based

on the idea of a "common law constitution" then protection of democracy from, for example, an attempt by a Parliamentary majority to entrench its position by alteration to the franchise, might join attempts at wide scale abolition of judicial review, as reasons for the court to invalidate a statute[38].

EU law

Finally it was argued by the claimants that the ban of prisoners voting violated EU law. This was rejected unanimously on the grounds that there is no free standing right to vote in EU law. Expressions of the right to vote (such as in Chapter V of the Charter of Fundamental Rights) do not expressly apply to referendums and do not grant rights that go beyond the rights of nationals[39]. The franchise is a matter of national law which is subject to review under the European Convention and the Strasbourg Court[40].

Conclusion

If not an anomaly, the scope of article 3 seems limited and unable to secure full rights of both direct and indirect participation in public affairs as are, for example, guaranteed by article 25 ICCPR. The limited nature of article 3 may be explained, as Lord Kerr suggests, by the reluctance of signatory states to allow non-elected parts of their constitutions to be open to human rights challenges. Nevertheless, there is, today, widespread concern at low level of political

interest and participation. Solutions found within the United Kingdom include opening up some executive or administrative offices to direct election (e.g. directly elected mayors and Police and Crime Commissioners), making local councils more effective and attractive by widening their powers (e.g. introducing a general power of competence under the Localism Act 2011) and by the use of a range of polls and referendums both to decide important local questions[41] but also national questions of supreme importance such as Scottish independence and membership of the EU. In this context, and leaving aside the rights and wrongs of prisoner voting, it might be useful to ensure that only lawful, reasonable and proportionate rules can inhibit the right to vote. The minority opinions in *Moohan* perhaps point a way forward for both the Strasbourg Court and UK law.

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[1] *Mathieu-Mohin v Belgium (1988) 10 EHRR 1, 51*.

[2] *Sadak v Turkey (2003) 36 EHRR 23, 33.*

[3] See, for example, a Grand Chamber's re-statement in *Yumak v Turkey (2009) 48 EHRR 4, 109(i)-(vi)*.

[4] Marks, S. "The European Convention on Human Rights and its "Democratic Society" (1995) *British Yearbook of International Law* 209; cf Mowbray, A. "The Role of the European Court of Human Rights in the Promotion of Democracy" (1999) *Public Law* (Winter) 703-725.

[5] E.g. *Liberal Party v United Kingdom (1982) 4 EHRR 106*, *C(ii).*

[6] *Moohan v Lord Advocate [2014] UKSC 67.*

[7] The 2013 Act defined the franchise for the Referendum by reference to the local government franchise for Scotland, found in the Representation of the People Act 1983. Serving prisoners are disqualified from that franchise under section 3 of the 1983 Act.

[8] This might have been significant in terms of remedies. The courts can invalidate incompatible legislation from the Scottish Parliament but, in respect of UK legislation, can only issue a declaration of incompatibility.

[9] *R (Chester) v Secretary of State for Justice* [2013] UKSC 63.

[10] Applying, on the basis of section 2 HRA, the ruling in *Hirst v UK (2006) 42 EHRR 41* and subsequent European and domestic decisions relating to substance and remedies.

[11] *Matthews v UK (1998) 28 EHRR 361, 40-44.*

[12] *Matthews v UK (1998) 28 EHRR 361* (for Gibraltar but with arguments of general application)

[13] *Boskoski (App. No. 11676/04), admissibility decision of 2 September 2004.*

[14] E.g. *McClean v UK (2013) 57 EHRR SE8, 28*,

[15] *Lindsay v UK (1997) 23 EHRR CD1*

[16] *X v UK (App. (No. 7096/75), admissibility decision of 3 October 1975.*

[17] E.g. *Niedzwiedz v Poland (2008) 47 EHRR SE2*, page 9.

[18] E.g. *Bader v Austria (1996) 22 EHRR CD213, 4;* for the UK see *X v UK (App. (No. 7096/75), admissibility decision of 3 October 1975.*

[19] *McClean v UK (2013) 57 EHRR SE8.*

[20] *Rabone v Pennine Care NHS Trust [2012] UKSC 2,* 112, per Lord Brown. The significance of section 2 HRA is controversial. In *Moohan* Lord Wilson, dissenting, lists developments of the "Ullah" principle which indicate that more generous interpretations of Convention rights are possible (104).

[21] *Moohan* 89, per Lord Wilson.

[22] Baroness Hale, though she agreed with the majority, nevertheless expressed sympathy for the general sense that article 3 is over-restricted.

[23] *Moohan* 67 and 68.

[24]*McClean v UK (2013) 57 EHRR SE8,* 33

[25] I.e. its "ordinary meaning" read in the "light of its object and purposes" (Vienna Convention of the Law of Treaties, article 31).

[26] App. No 7096/75. Admissibility decision of 3 October 1975.

[27] *Moohan*, 73, per Lord Kerr. Lord Kerr is critical of the view that the existence of a legal obligation to hold a referendum should, in any case, be decisive – it allows authoritarian states, choosing not to have elections laws, to evade their Convention duties.

[28] Para 47.

[29] A view that has constitutional and some legal authority though it clearly has to be understood in the context of whipping and of political parties as vehicles for the transmission of the popular will.

[30] Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh, 15 October 2012.

[31] UN HR Committee Communication of 26 July 2002, 932/2000.

[32] Office of the High Commissioner for Human Rights, General Comment 25, 12 July 1996, paragraph 6.

[33] UN HR Committee Communication of 9 May 2011, 1410/2005

[34] *Anchugov v Russia (App. No. 1157/04) Judgment of 4 July 2013.*

[35] Lord Kerr cited: International Law Commission, "Conclusions of the work of the study group on the Fragmentation of International Law: Difficulties arising from Diversification and Expansion of International Law" (2006), paras 33 and 41.

[36] *Moohan*, 83.

[37] Though Lord Kerr's argument is brief it can be placed alongside his position in *R (S) v SSWP* [2015] UKSC 16 in which he accepted not only the persuasive influence of unincorporated international human rights law (the UN Convention on the Rights of Children) on domestic law but also the case for its direct legal application absent any incorporating statute. International human rights law limits the powers of the executive in ways which are internationally agreed to be beneficial. Therefore the argument against direct legal application of international treaties, (that otherwise the law would be made by the executive and in potentially oppressive ways) does not apply. Lord Kerr's assault on the UK maintaining "dualism" in the context of international human rights law has not, however, so far been followed by the Supreme Court.

[38] See Lord Hope's summary of positions adopted, usually non-judicially, in *Axa General Insurance Ltd v HM Advocate [2011] UKSC 46*, 50.

[39] The court followed *McGeoch v Secretary of State for Justice [2013] UKSC 63.*

[40] Cf *Digital Rights Ireland [2015] QB 127* where the Court of Justice of the European Union, licensed by article 52(3) of the Charter, gave a more generous interpretation of Charter privacy rights than is available under article 8 of the Convention; but this was in respect of an EU directive.

[41] See, for instance, Sandford, M. *Local government: polls and referendums* House of Commons Library SN/PC/03409, 18 November 2014.