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Religion in Scots Law on Education

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(a) The project

At the very foundation of our society is the law. The law encapsulates the way a nation wishes to conduct itself and manage its affairs. It will, or at least should, reflect its principles. But it will also have to reflect two other things. The first is diversity of opinion on these matters, the range of disagreement over matters of principle. The problem immediately, of course, is that not all parts of law can reflect diversity. It is often a matter of either / or choices, as reflected in recent votes in both the Scottish and this week the Westminster parliament regarding the right to medically-assisted dignity in dying. But to take an opposite example, equal marriage came with a suddenness and, more or less, a completeness. The year 2014 saw mainland Britain dramatically shift its legal regard for marriage between persons of the same sex.

The second thing that will inevitable be reflected in law is history - the heritage of principles and positions now long diminished in our society at large but which remain, seen or unseen, as structuring our law. In the drift from a society once called Christendom to a society in which religious faith has diminished in social influence and demographic support, we will find a huge legacy of religious-framed law that lingers. Sometimes this lingering makes little difference; it has fallen into disuse, or as it is called in Scots law desuetude. Sometimes, institutions that support old law manage to restrain legislators from outright abolition. The process of change can be swift, or it can be slow, involving lots of compromises along the way. In short, the law can become a tangle of influence between history, diversity and sudden change.

Just over a year ago, your Society charged myself and my collaborator, Professor Jane Mair, to conduct an audit of Scots Law to ascertain the nature of the intrusion of religious influence. We were to conduct a sweep of parliamentary legislation, of both Westminster and Holyrood. Such surveys used to appear as guides to church and the law, usually dealing with the Church of Scotland in its guise as the Established pr state church of Scotland. But no wider survey had been conducted recently. HSS contacted Jane Mair and myself to undertake this, and with the Society's funding, we employed a skilled history of Scots law, Dr Thomas Green, to work full time for 10 months in trawling the legal data bases. What we have not had time to do is to follow the intricate and complex highways and byways of case law, nor local byelaws, nor regulations or guidelines issued by government departments. We focussed on legislation only, that which remains in force. Much of the legislation is twentieth or twenty-first century, but a lot dated back to the sixteenth century. Yes, we have some very old legislation still in force.

What we will produce with the next 6 weeks is a complete report. The provisional structure is in 9 chapters:

Chapter 1 is an introduction, in which we discuss where one might find religion in law, the historical origins of religion in Scots law, the impact of secularisation, and what we have done in the project.

Chapter 2 is on the Church of Scotland and how it features in Scots Law. A lot of this is historical stretching from before the Reformation until key changes in between 1921 and 1931. What happened in that decade is much disputed: Did it disestablish the Church of Scotland? Did it re-create the church of Scotland as a 'nation' rather than established church? Or did it leave the essential establishment status of the church unchanged? This is a topic I have been

researching and writing upon for many years, and we examine the legislation and the arguments in some depth, and come to some complex conclusions.

Chapter 3 is on Marriage and the Family, an area where there has on the one hand been enormous change in law, abut where on the other hand presumptions about the nature of marriage, and the values embedded in the institution, are often regarded in law as being unchanged and b perhaps by some as unchangeable. Jane Mair is Scotland's expert on this area of law, and she has taken the lead in writing this chapter.

Chapter 4 is on Education, where the writing has been led by Thomas Green with additional work by me. I will come to this in detail shortly.

Chapter 5 is on Employment and Equality, a second area of expertise for Jane Mair. In this, we focus to a great extent on relatively recent changes to the law, much of it promulgated in the context of changing European as much as British or Scottish impulses. Indeed, one of the stories to come of this is the standardisation of rights issues across UK and Europe. But part of the story also is the way there are exceptions to the equality legislation, and many of those exceptions are to do with religion.

Chapter 6 is on the Sabbath, an institution which once defined the Scottish week, and not that long ago. It is now a shadow of what it once was, but there are some areas in which the Sabbath still has resonance in Scots law.

Chapter 7 looks at Blasphemy looks at religious hate speech, the later a longstanding area of European law, the latter a little newer

Chapter 8 is a what we are describing as a General Audit, in which we provide a review of miscellaneous areas of law in which religion intrudes, ranging through areas such as the payment of taxes by ministers of religion.

And finally, chapter 9 is a Conclusion, in which we look at the current state of religion in Scots and make commentary on the direction of change in regard to religion in Scots law.

The whole document is quite substantial, probably in excess of 80,000 words. We are producing a Summary Report that will be available separately, and both the Summary and Full Report will be available online on the HSS and University of Glasgow websites as pdfs to be downloaded.

(b) Education and secularisation

What I shall do of the rest of my talk is explore the findings we have made iin regard to Education. This is an area which is of particular interest to the Society at present, and I have been requested to make this my subject today.

It is clear that education stands out rather distinctively in our survey results of religion in Scots law. For the most part, in all other areas of law, the general trend has been for some time towards the secularisation of law. By this I mean that in general, there has been a strong trend towards the diminution of church influence in law, including the claims of the Church of Scotland to a special form of sovereignty in the law of Scotland and indeed in the UK, and to have courts - church courts - which have rights over all citizens. More generally, religious restrictions upon the freedom of the individual have been either being repealed, modified or in some cases abandoned. In their stead, have come laws, often equality laws, which promulgate freedom for religious and ethnic minorities, provide safeguards for individual to avoid religious strictures, and weaken the general place of religion in Scots law. In addition, many laws have fallen into disuse, and indeed did so in some case in the late Victorian period. Now, there are exceptions to this generalisation ,and our report explores those. But it remains the case, that Scots law overall has been experiencing for at least a century and half the decline of religious influence in law.

The major exception to this is Education. Education is an area in which the influence of religion has changed its form, but has in many ways been increasing. As education has been secularising in some ways, the churches - notably the Church of Scotland and the Roman Catholic Church, but extending in some regards to all Christian bodies - have been securing exemptions and safeguards for their former rights and privileges. The general effect of this has been, paradoxically, to increase the legislative protection for religion and church

interests in education. A recent excellent article by John Stevenson has demonstrated how this applies in the area of religious education in non-denominational schools. The author shows how the legislative framework for religious education was actually extremely thin when state schooling was created in 1872; the legislation was permissive on religious instruction, and the first attempt by the Church of Scotland to make religious instruction compulsory failed in 1918. But it became compulsory in 1945, in the Education Act of that year. The result of this was the universal adoption of unified RE curriculum in non-denominational schools designed by the churches and overseen by new regulations. In addition, church influence in the management of education by local authorities, which was abandoned in 1929, was given a new legislative framework only in 1973, and persists to this day. As I will show, this trend extends into legislation of 1931 which established a legal basis for Christian church influence (and only Christian) in the appointment of those who teach theology and divinity in Scottish universities. Thereby, this regularised the appointment and state financial subsidy of those teaching Christian theology. Other consequences arise which I shall come to.

Now, I must add an important caveat here. The firming up of the legislative arrangements governing Christian influence in the conduct of education in Scotland does not imply that the content of teaching in schools or universities has in some sense become more religious, or more militant, or more fundamentalist. Indeed, there has been considerable evidence for some decades that the teaching of religion in non-denominational schools and in university theology departments has been become strongly influenced by secularising trends, including teaching on multiple faiths, the liberalisation of theology, and more recently the discussion of nonbelief positions. Yes, there have been instances where conservative Christians have reputedly influence religious observance and teaching in schools; but instances of liberalisation and even the decay of religious observance abound, and have done so since the 1960s. So,

what we concentrate on in this report, and me in this talk, is the legislative framework. This has been becoming stronger.

The national system of publicly funded Scottish state schools developed from the Reformation until 1872 through private or voluntary education provided by various religious bodies in Scotland, most notably by the Church of Scotland, the Free Church of Scotland, and the Roman Catholic Church, as well as by charities and by for-profit schools run by individuals. There were two principal phases in the development of the national system of public state schools: the nationalisation of most of the schools of the Church of Scotland and Free Church of Scotland following 1872; and the nationalisation of the schools of the Roman Catholic Church in the decade or so following 1918. These two principal phases have given rise to two distinct religious settlements in Scottish public education, which are designated by referring to the 1872 schools and their successors as 'non-denominational schools' and to the 1918 schools and their successors as 'denominational schools'.

Prior to the nationalisation of Presbyterian schools in 1872, the presbyteries or district courts of the Church of Scotland had enjoyed direct legal jurisdiction in approving and removing teachers from parish schools, and in inspecting such schools. This jurisdiction was abolished in 1872. Nevertheless, the historical influence of the Church and Scotland and Free Church of Scotland over religious observance and religious instruction in respect of non-denominational schools was in effect guaranteed from 1872 through a statutory acknowledgement of the ongoing validity of the 'custom', which became known in a much-used phrase of 'use and wont'. 'Custom' and use and wont, Thomas Green has argued, were subtly different, but in practice what they tended to do was to devolve control of religious instruction in schools to local administration - initially school boards and education authorities down to 1929, and thereafter local authorities. But in the twentieth century, and especially from the 1950s, it seems clear that the real power in determining religious instruction, or religious

education as it became know form the 1970s, was the head teacher. It is head teachers who have in the non-denominational schools held the greatest power over the nature of RE. This was facilitated, and is still facilitated, by the absence of clear legislative control of RE in schools. Custom was in no way defined in the 1872 or subsequent legislation.

Since the creation of non-denominational public schools in 1872, legislation has enshrined the earlier custom of Protestant church schools of allowing parents to withdraw their children from religious observance and religious instruction in such schools, through the statutory recognition of a 'conscience clause'. This right of withdrawal on the ground of conscience remains part of Scots law as per the Education (Scotland) Act 1980, and applies to both non-denominational and denominational schools. The exercise of this statutory right remains a matter for parents rather than pupils; this is an issue we look at in our full report, because it effectively denies rights to a school student, and notably those over 16 years of age. Scotland is alone in this approach – it reflects the fact that in European and international conventions etc it is the right of the parents to have their children educated in accordance with their beliefs which is protected. The fact that the right is given to the parents is also consistent with overall family law – i.e. that the parents have responsibilities (and rights) in respect of their children and that the default position is that children under 16 have no legal capacity. There are however various modifications of this – e.g. there is a provision in family law to the effect that children should be consulted by the parents in respect of any significant decisions affecting them. A key point is that this is not a simply legal issue to change – it is very much embedded within the whole legal framework of parent and child.

In 1945 the continued acknowledgement of the custom of provision of religious observance and instruction in non-denominational schools became a statutory obligation placed upon all Scottish education authorities to make

provision for religious observance and instruction, which obligation, with a change in terminology to 'religious education' or 'religious and moral education' (RE or RME), remains part of Scots law. One point I should make here. From 1872 onwards, it has been a principle in non-denominational schools, as oversees by the Scottish Education Department, that RO and religious instruction should be separated in the timetable from other subjects. Thus, it is not permissible for RE to intrude into science classes. Of course, there are shades of grey in this area, and things may be clear cut in practice, especially in early years of primary schooling.

At the same time as the introduction of this statutory obligation, provision was also made for this obligation to be set aside in any given local authority if a majority of electors within a local authority vote in favour of discontinuation of this obligation, which provision remains part of Scots law; as far as is known, such a plebiscite has never been called, nor even considered, by a Scottish local authority. This may be something that might interest this Society. It might be for instance that a local authority area with low levels of religious adherence and practice, the lowest being the city of Aberdeen, might be one in which plebiscite might feasibly be instituted and even, possibly, passed.

While the provision of religious observance and RME in non-denominational schools is still a statutory obligation placed upon local authorities, the obligation to implement it, and the decision how it is implemented, is devolved in effect upon head teachers. Head teachers are at liberty to continue with the customs of the schools, or in reality to change custom if they find it prudent. They have control for example over the appointment or not of chaplains, the content of religious observance, and the content of the RME curricula. Chaplains are not expressly mentioned in statutory provisions. Nevertheless, as local customs have altered with time, some local authorities have begun to issue more detailed guidance concerning the appointment and role of chaplains in non-denominational schools.

Religious observance and RME are not matters left solely to the discretion of head teachers. The Scottish government regularly provides guidance in respect of religious observance and RME, and local authorities are also supposed to provide guidance to head teachers in such matters, though this varies considerably in practice between local authorities, with the recent guidelines on chaplains adopted by South Lanarkshire Council being widely accepted as an example of best practice in this area. However, your Society may well take a different view, especially as School Chaplains, unlike prison or hospital chaplains, are nowhere mentioned in legislation.

Many of you will know to Scottish Government guidance on Religious observance and RME. Religious observance is expected to occur in non-denominational schools at least six times a year; what RO is has wide interpretations in Scottish government advice, and has in practice been if anything even wider since the 1960s. It need not include acts of worship, need not have reference to Christianity nor any religion, and is largely a matter for head teachers, although they are encouraged by some local authorities to establish Religious Observance Planning Groups religious parental and pupil representatives. Again, South Lanarkshire Council is often referred to as having one of the best policies in this area.

The discretion given to head teachers leads not only to chaplains being appointed, but links created with other belief or occasionally nonbelief bodies. Over the decades, this has led to widespread access of organisations such as the Scripture Union to schools, notably primary schools, where they have certainly in the past conducted worship. While chaplains are appointed at the discretion of head teachers, at least some local authorities exercise a supervisory jurisdiction over such appointments.

Notwithstanding what happens in practice, the ongoing influence of individual denominations in non-denominational schools was not explicitly guaranteed by statute between 1872 and 1973. Then it changed. In the Local

Government Act of that year, three places on each local authority education committee in Scotland were reserved on for the Church of Scotland in procedures controlled by the General Assembly, one for the Roman Catholic Church in all education committees saving those in the Northern and Western Isles, appointments are made by the Hierarchy of the Catholic Church in Scotland, and the remaining place assigned to other denominations or churches according to their comparative strength within any given local authority region.

I don't intend to spend too much time on the advent from 1918 of Roman Catholic Church denominational schools, fully funded by the state, but leaving considerable powers to the Catholic Church. The catholic Church has powers over the religious ethos of the schools, the content of religious education, the admissions policy for pupils, the appointment of teachers, and can demand evidence on religious condition of applicants. This is one area of school management which has special exemption from equal opportunities legislation.

However, I want to highly some elements of the arrangements of denominational schools which are less well known.

The terms of the 1918 nationalisation of Catholic schools and its successor legislation was framed in neutral statutory language, with the result that any denomination or religious body in Scotland may potentially have a denominational school or schools carried on in their interests by a local authority. At present there are 370 denominational schools in Scotland, of which 366 are Catholic, 3 Episcopalian, and 1 Jewish. So, the creation and discontinuation of denominational schools are a matter for local authorities, although their proceedings in such matters are closely governed by regulations currently set out in the Education (Scotland) Act 1980. Any denomination or religious body may petition a local authority to the effect that it establish and carry on a denominational school in the interests of the petitioning body. A local authority may discontinue any denominational school, either by closing it or converting it into a non-denominational school, although this must follow upon

a public consultation, and government consent, and may be reviewed by the Court of Session.

At present, the regulations governing the creation of new denominational schools makes no provision for belief bodies, which now in law covers those like Humanists which not religious. To our knowledge, no belief body has petitioned a local authority for a school. Nevertheless, it is unlikely that a local authority would reject a petition from a belief body in such a case on the ground that the petitioning body was not a denomination or religious body. This is because both Scots marriage law and Scots charity law holds belief bodies and non-religious forms of belief to be directly analogous with and equal to religious bodies and religious belief. Thus, we are of the view that a good case can be made under existing legislation for a nonbelief body, such as a society of humanists, especially one recognised in other spheres as a belief body, to have a school fully funded by the state. It is likely that the grounds to be made for this would be that there are sufficient numbers of parents wanting to send their children to such a school. I don't know of the HSS has been aware of this legislative position, or considered the prospects of conducting a school or schools paid for by taxation. It might be seen by some as an interesting prospect, though it may have its detractors for strategic reasons in regard to the fragmentation of Scottish schools into belief components.

Some general points now. Admissions policies may not discriminate directly against, but may discriminate in favour of, potential pupils on the basis of religious belief. Favouring potential pupils from a particular religious background in an admissions policy is not prohibited by UK equality law. We deal with rights legislation elsewhere in our larger report.

The General Teaching Council of Scotland, which governs registration of teachers, must contain as members one individual nominated by the Church and Society Council of the General Assembly of the Church of Scotland, and one individual nominated by the Scottish Hierarchy of the Roman Catholic Church.

Briefly I need to identify other education organisations established by legislation in which religious issues and churches intrude. Firstly, in denominational schools, at least one member of a school's Parental Council and of Combined Parent Councils must be nominated by the church or denominational body in whose interest the school is conducted. Secondly, since 1931 Scottish Universities are free to enter into agreements with any Christian church or Association of Christians whereby people may be admitted to a chair of theology or divinity . They have done so ever since in relation to the appointment of professors of theology or divinity. This in effect permits the Church of Scotland to be part of the appointments panel for chairs in Theology. It seems that this may de facto permit the likelihood of appointing only Christians or Christian of a particular creed or tradition. In addition, specific chairs at Aberdeen and St Andrews Universities permit special roles for the Church of Scotland.

Thirdly, particular provisions have existed, and may seem to exist, as to the religious belief and character of lecturers appointed to the Glasgow Roman Catholic teacher training college, formerly known as St Andrews College of Education, which is now subsumed in the School of Education at the University of Glasgow. It is unclear whether such provisions can in effect continue to apply under recent equality and rights legislation.

Conclusion

In this way, education has in many ways bucked the trend in the general secularisation of legislation in Scotland since the 19th century. The church of Scotland has had its powers effectively reduced in virtually all areas of influence, except education. Marriage law has seen huge change, with

diminishing public recourse to religious marriage, the opening up of civil marriage from 1940, Humanist marriage from 2005, and same-sex marriage from 2014. These changes were made with great opposition from the churches, and must be seen as undermining especially the authority of the Church of Scotland. Meanwhile, religious rights have been extended to minority religions and detracting from the monopoly rights enjoyed by the Church of Scotland or by Christians in certain areas of civil life. The Christian Sabbath has been shorn of most of its power, largely it must be seen because in Scotland presbyterians neglected to pass laws forcing closure of shops in the way Christina churches did in England and Wales, but also because of weakening resolve to use permissive legislation to ban sports or other activities on Sundays. Meanwhile, hate speech, including religious hate speech, has been outlawed in Scotland, and this should include protection fro, hate speech directed at nonbelief bodies such as Humanists. Religious influence does remain in other parts of Scottish life, and we detail that in our full report. But, in the main, where there is privileged position for churches or the Christian religion in law, it is not increasing.

Except in education. In education, the story of the last 140 years has been a move from permissive, devolved attitudes to religious observance, religious education and church schools towards increasing control and regulation, with RME and RO becoming compulsory inclusions in the school timetable, and with church participation in the governance of local authority schools and education instituted in 1973 exactly 100 years after it was, in the main, abandoned. Why that happened in 1973 is unclear. As an historian I am interested in this issue, and hope to put a student to work researching that. We still have theology and divinity taught in the older Scottish universities of St Andrews, Glasgow, Aberdeen and Edinburgh with posts given special status, aside from the impact of other aspects of employment law. At the same time, there is religious adaptation going on. One I should mention is the recently

developed argument that children require religious literacy - not merely of other religions, but of different faith conditions such as spirituality. This has become a reason to sustain the compulsory status of RME, but is not necessarily one in which nonbelief positions have attained parity in the curriculum. Yet, as I have outlined, there are potential new roles for nonbelief bodies - in conducting their own state-funded schools, or drawing attention to ways to transfer schools from denominational status. Yet, education remains a sector in which the churches continued to inject considerable effort to retain a foothold in a society which is otherwise secularising rapidly.