



University
of Glasgow

Religion in Scots Law: Report of an Audit at the University of Glasgow

Written by

Callum Brown

Thomas Green

Jane Mair

Sponsored and published by
Humanist Society Scotland
Edinburgh 2016

The context

Scots law, like many other jurisdictions, is assumed to be broadly secular but there has been little detailed research. Decline in churches, falling church membership and affiliation, and the rising proportion of Scots registered as having “no religion” have transformed church and faith.

Against that background, this project explored contemporary Scots law – principally statute - across a range of areas, with a view to discovering the place of religion: how it is regulated, recognised, respected or privileged.

The Church of Scotland

An established church?

There can be little doubt that the Church of Scotland was once the 'Established' Church in Scotland. During various periods between 1560 and 1690 there were clear 'hallmarks' of establishment.

The Act of Security 1706 appended to the Treaty of Union in 1707 used a new phrase: 'the church of this kingdom as now by law established'. This phrase gave rise to the long standing view within Scottish legal and ecclesiastical circles that the Church of Scotland is the 'Established Church' within Scotland.

A series of schisms during the eighteenth and nineteenth centuries made the position very unclear: this phase of the Church of Scotland's history may be viewed as involving disestablishment. In the 1921 Declaratory Act, no mention was made of 'establishment' or the 'Established Church of Scotland'.

Prior to the 1920s the parishes of the Church of Scotland enjoyed a kind of established status through a system of 'parish states.' This formed the bedrock of the last obvious area in which the Church of Scotland enjoyed the privileges of establishment. These matters fell under the jurisdiction of the Court of Teinds. From the 1920s onwards this entire system of parochial finance was deconstructed. This process has been viewed by some historians as the moment at which the old Church of Scotland ceased to be the Established Church.

This remains a matter on which there are different views and traditions.

A national church?

The 1921 constitution of the Church of Scotland states that it is 'a national Church'.

More recently, the Scottish Government appeared to acknowledge the 'national church' status of the Church of Scotland in the context of authorisation of marriage celebrants.

Helpful questions?

Questions of 'establishment' and 'national church' status in respect of the Church of Scotland may be misleading when trying to understand the present-day place of the Church in Scots law and the British constitution.

Not only is the historical progression complex but the terms 'established' and 'national' have no definite meanings.

Focus instead on areas where Church of Scotland continues to have some specific legal standing.

Ceremonial status Regardless of precise status as "established" or "national", certain ceremonial aspects of relations between the monarchy and the Church of Scotland survive: the appointment of a Lord High Commissioner to the General Assembly of the Church of Scotland
the appointment of an Ecclesiastical Household in Scotland out of the ministry of the Church of Scotland
the status of the Moderator of the General Assembly of the Church of Scotland in the General Precedence of Scotland.

Church courts

The position of the courts of the Church of Scotland – kirk sessions, presbyteries, and the General Assembly – in law still reflects pre-1920s statutory provisions and case law. As

such these ecclesiastical courts are regarded as being part of the Scottish legal system, being courts of the land, whose records are public records, and whose citations may be enforced by warrants from Scottish sheriff courts. That said, the present-day jurisdiction of these courts is restricted to matters of internal government, worship, doctrine and discipline within the Church of Scotland, and it would be an error to suppose that these courts enjoy a jurisdiction to which people living in Scotland are automatically subject, in the way they are subject to Scottish civil and criminal courts. Rather, it may be argued that in practice the courts of the Church of Scotland are no different to the tribunals of voluntary associations, in that office holders within the Church of Scotland voluntarily submit themselves to the jurisdiction of the Church's courts when accepting office.

Universities

Despite the fact that the Church of Scotland lost much of the control it once exercised in respect of office holders within Scotland's four ancient universities – St Andrews, Glasgow, Aberdeen, and Edinburgh – all four universities still in theory make provision within their schools of divinity for the training of candidates for the ministry of the Church of Scotland.

Education

In respect of Scottish non-denominational schools, the Church of Scotland continues to enjoy direct representation on local education committees by virtue of statute. Yet at the same time, the Church of Scotland enjoys little else by way of direct and explicit legal recognition in respect of such schools. Rather, the position of the Church of Scotland in respect to religious observance, religious education, and the appointment of chaplains to non-denominational schools by headteachers, is governed by custom. The Church of Scotland

does not have any right, for example, to vet teachers nominated to posts within such schools, nor does it enjoy the right to inspect the provision of religious education in such schools, which is in marked contrast to its historical role.

Chaplains

In respect of Scottish prisons, the Church of Scotland enjoys unique statutory recognition in that its ministers and licentiates may be appointed as chaplains to every prison in Scotland regardless of the religious persuasions or otherwise of current inmates. Chaplains from other denominations and religions may be appointed to Scottish prisons depending upon the religious persuasions or otherwise of current inmates.

Marriage

The Church of Scotland enjoys unique recognition within the statutory regulation by which the solemnisation of regular marriage is governed in Scots law. This unique recognition reflects the development of these statutory regulations since the early nineteenth century, prior to which marriage could only be regularly solemnised in a ceremony conducted by a minister of the Church of Scotland. More recently the position of the Church of Scotland in this respect has been considered to be a reflection of its 'national church' status by the Scottish Government, a rare instance of an acknowledgement of a correlation between 'national church' status and legal provisions.

Marriage

Religion no longer enjoys any place in the Scots law of marriage in respect of legislative competence or jurisdiction, and there is little evidence of ongoing direct religious influence in terms of statutory provisions.

The only prominent place still occupied by religion is in respect of the ceremonial options within which a couple may validly contract a regular marriage in Scots law.

The 1977 Act still accords the Church of Scotland a unique place of recognition within the regulations governing the contracting of regular marriage, in that ceremonies conducted by ministers or deacons of the Church of Scotland are distinguished both from the ceremonies of other religious or belief bodies, and from the civil ceremonies provided by the State.

The type of ceremony used, be it religious or otherwise, has no effect on the Scots law understanding of regular marriage – all competent ceremonies produce regular marriage. A religious marriage ceremony does not produce a distinctly ‘religious marriage’ in Scots law, but rather valid regular marriage is always valid regular marriage, regardless of the approved ceremony used.

While the formation of marriage is now clearly regulated by statute – Marriage (Scotland) Act 1977 – there is less clarity about what remains of the law as it relates to precise duties, obligations, and patterns of behaviour that pertain to marriage. This has the potential to lead to difficulties in detecting sham marriages, where two persons have fulfilled all the legal requirements relating to the contracting of a regular Scots law marriage, but have nevertheless failed to create a valid marriage.

marry. In such cases, the ordinary civil courts have tended to have recourse to common law definitions of ‘husband and wife’ in order to detect whether or not a couple have actually consented to marriage and entered into matrimonial relations.

From the Reformation on, Scots law has undoubtedly enjoyed the inherent right to define its own objective conception of marriage but, within the context of the Scottish Protestant ascendancy, Scottish Protestant customs and beliefs surrounding marriage almost certainly provided a seemingly self-evident definition of marriage for Scots law. In this, religion defined marriage through custom and Scots law passively accepted that definition. Within the context of same-sex marriage, Scots law has for the first time since the Reformation defined marriage in a way which is directly at variance with the old Protestant marriage customs.

On a more speculative note ...

Should religious or belief ceremonies continue to play a part in the solemnisation of regular marriages for the purposes of Scots law. Or should legal marriage be a purely civil contract?

Is it time for some statutory definition of marriage so that it is clear to all couples marrying in Scotland what it is that they are consenting to? This would be of particular value to the courts in determining which marriages are well intentioned, and which are sham. As things presently stand, it would fall to the courts to formulate the common law definition of marriage.

Education

The national system of publicly funded Scottish state schools developed against an historical backdrop of private education provided by various religious bodies in Scotland. Two principal phases in the development of the national system of public state schools may be observed:

nationalisation of the schools of the Church of Scotland and Free Church of Scotland in 1872
nationalisation of the schools of the Roman Catholic Church in 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.

Non-denominational schools and custom

While the provision of religious observance and religious instruction in non-denominational schools is a statutory obligation placed upon local authorities, the obligation is in effect devolved upon the head teachers of non-denominational schools. In turn, the role of custom is still acknowledged in Scots law in respect of the provision of religious observance and instruction. As such, head teachers are at liberty to continue with the customs of the schools over which they preside in respect of the appointment of chaplains, the content of religious observance, and the content of religious instruction curricula.

Denominational schools

The terms of the 1918 nationalisation of Catholic schools and its successor legislation were framed in neutral statutory language. At present there are 370 denominational schools in Scotland, of which 366 are Catholic, 3 Episcopalian, and 1 Jewish. 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, although this must follow upon a public consultation, and in addition requires the consent of the Secretary of State for Scotland. At present, the regulations governing the creation of new denominational schools make no express provision for belief bodies.

The rights enjoyed by the Hierarchy of the Catholic Church in respect of the 366 denominational schools are principally concerned with promoting the Catholic ethos of such schools and the prioritisation of the appointment of Catholic staff and the admission of Catholic pupils to such schools.

The admissions policies for denominational schools are determined by local authorities, rather than by either the Scottish Government or individual schools. Local authorities may not alter these policies without a public consultation and without obtaining the consent of the Secretary of State for Scotland. Admissions policies may not discriminate directly against, but may discriminate in favour of, potential pupils on the basis of religious of belief.

Education committees

Three places on each education committee in Scotland are reserved for the representative of denominations. The Church of Scotland, presumably reflecting its 'national church' status, enjoys one of these places automatically. The Roman Catholic Church, reflecting its pronounced interest in Scotland's denominational schools, enjoys another of these places in all education committees saving those in the Northern and Western Isles, and such appointments are made by the Hierarchy of the Catholic Church in Scotland.

The remaining place, or places, are assigned to other denominations or churches according to their comparative strength within any given local authority region.

School chaplains

The appointment, or not, of school chaplains and the nature and frequency of religious observance, are areas where there is relatively little or no statutory regulation, but, instead, considerable discretion rests with head teachers. Nevertheless, as local customs have altered with time, some local authorities have begun to issue more detailed guidance and this may be an area where there is potential for further reform.

Parents rights and children's rights

While parents have the right, currently in terms of the 1980 Education Act, to withdraw their children from religious observance and religious instruction, there is no comparable right for the child to undertake this for her/himself.

School curriculum

Since 1872 it has been a principle in non-denominational schools that religious observance and religious education should be separated in the timetable from other subjects. Thus, it is not permissible for these to intrude, for example, into science classes. Of course, there are shades of grey in this area, and things may not be clear cut in practice, especially in early years of primary schooling, but the quality of enforcement of this separation of religious from secular subjects might be an area worth scrutiny for those concerned with the preservation of this longstanding principle.

Trends and Key Concepts

Education stands out rather distinctively in our review of religion in Scots law. For the most part, in other areas, the general trend has for some time been towards the secularisation of the law. By this we mean that in general, there has been a strong drift towards the diminution of statutory support for religion and religious influence. 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. There is no question that education in the school classroom and the university lecture theatre has been secularising for some considerable time, and is continuing to do so. But this is in contrast to changes in curricular and governance structures which have not diminished, but rather strengthened, the place of religion.

While to some extent the place of religion in education has become more explicitly protected through statutory provisions, the twin notions of "custom" and of "use and wont" continue to determine much about the place of religion in the school lives of young people, principally in non-denominational schools. Though "custom" and "use and wont" may have been subtly different, in practice they both tended to devolve control of religious instruction or education in schools to local administration: initially to school boards and education authorities, later to local authorities and, increasingly through the twentieth century, to the head teacher. This, it might be argued was facilitated, and is still facilitated, by reliance on the undefined concept of custom and the absence of clear legislative control of religious education in schools.

A General Audit

Armed services The general protection of the Equality Act 2010 against discrimination on grounds of religion or belief is replicated within the context of the armed services.

The general criminal law approach to religious aggravation is reflected in specific provision for offences committed by service personnel.

In service custody premises, detainees must be afforded such provisions as to permit them to practise their religion

Service law contains detailed provisions concerning the administration of oaths.

Blasphemy

The crime of blasphemy is not unlike the crime of heresy in historical Scots law, in that both presupposed an established church whose doctrines are formally acknowledged in law.

That is to say, blasphemy, like heresy, is a crime relative to a fixed set of beliefs to which people are obliged to adhere under pain of criminal sanctions.

Broadcasting and communications

Religious organisations are variously not permitted to hold broadcasting licences in the United Kingdom.

Ofcom is under a general statutory obligation to oversee and review the nature and content of programming and to pay particular attention to various issues including the nature of religious programmes.

There are various provisions in the Communications Act 2003 which seek to prevent the promotion of discrimination, incitement to religious hatred and general harm

Charities

'Charity' may be argued to have specific roots within religion, but charity law in Scotland encompasses a much more broadly defined concept.

Conscience and conscientious objection

Freedom of conscience is a fundamental element of the protection of individual human rights in respect of religion and belief and the concept of conscientious objection has been a key aspect of the development of the jurisprudence of the European Court of Human Rights.

The concept is relatively little found in UK statute and it is of most significance in the context of abortion, the provision of contraception and assisted reproduction services.

Criminal law and prisons

Criminal law is an area of law where links with religion and morality are perhaps most obvious and there is much to be explored in terms of the values which underpin a system of criminal law.

One way of tackling religious prejudice in Scots law is by treating it as a form of aggravation of otherwise criminal behaviour; an approach which can be seen in the Criminal Justice (Scotland) Act 2003.

The motivating concern in Scotland is often sectarianism and, in particular, sectarian behaviour associated with football.

In respect of Scottish prisons and young offenders' institutions, a loss of liberty as a result of conviction for a criminal act does not entail a loss of freedom to practise religion.

All Scottish prisons are expected to appoint a minister of the Church of

Scotland as a chaplain. Chaplains from other denominations may be appointed, at the discretion of the Secretary of State for Scotland.

Religious belief may be taken into account in determining whether a witness requires protection, or if a witness is vulnerable. Ministers, priests, and those who have taken religious vows so as to live in religious communities, such as monks or nuns, are excused from rendering jury service in criminal trials

Religion in criminal law: some thoughts

Provisions regulating prisons and detention centres are simply a specialised application of the obligations and protections already applied in society in terms of equality and anti-discrimination legislation. In these provisions, religion is one of a list of protected characteristics. Some of the other provisions, for example those relating to exemption from jury duty, can be seen as an attempt to accommodate the particular beliefs and religious obligations of certain individuals in the context of their wider civic obligations. Perhaps of most interest are the new criminal offences being introduced to tackle sectarianism and religious hatred. These provisions are not without controversy: they have been justified on the strength of the need to tackle an apparently deep rooted and very specific Scottish problem but the offences are broadly defined and open to wide application. While arguments can be made in favour of tackling offensive and threatening behaviour, the new statutory offences potentially threaten freedom of expression. While the trend through much of Scots law is towards the disappearance of religion as a factor, this is one area where its presence is growing.

Equality law

One key distinction can be made between provisions which seek to establish formal equality on the basis of equal treatment and those which seek to promote substantive equality and which may require different treatment where that is required by the different needs of particular individuals. There is also something of a distinction between traces of “old style” religion – evident perhaps in the special treatment of denominational schools – and traces of “new style” religion – emerging in the equivalence between religion and belief.

Family law

Key elements of what we now think of as “family law” were governed according to Canon law and, even after the Reformation, many of the principles continued relatively unchanged. Scots family law has been transformed over the last century or so by a process of extensive statutory reform and it might be argued that obvious links to religion have disappeared from what is a “modern” system of secular family law.

Asylum and immigration

Decisions about which individuals may be permitted to enter and remain in the UK and decisions about extradition to other jurisdictions sometimes include consideration of religion. A range of statutory provisions, regulating the process for dealing with asylum and immigration claims, share a particular formula of words. Part of the test for whether or not an individual may be removed from the UK focuses on whether or not the state to which he or she would be returned would be a place where life and liberty would be threatened by reasons including religion. Detention centres, rather like prisons and young offenders’ institutions, make provision for the persons detained in such centres to continue to practise their religion.

Oaths

The words of individual oaths clearly reference particular religions and to some extent there is recognition of religious diversity in the form of permitted variations. Provision is also made in most circumstances for the use of “affirmation” as an alternative to an oath.

Religion and belief definitions

A variety of terms including “religion”, “religion or belief”, “religion, belief or non-belief” and “religious group” are used in various places throughout the laws in force in Scotland. Generally there is a trend towards including “belief” in conjunction with the word “religion” although this is not universal. Even where “belief” is not juxtaposed with religion, it is often made clear that the word “religion” is to be interpreted as including other non-religious beliefs

The Scottish courts have had little opportunity to interpret these various statutory provisions. Human rights and rights in respect of non-discrimination and equality are primarily individual rights but there is provision in several aspects of Scots law for religious groups or bodies. The Criminal Justice (Scotland) Act 2003 defines “religious group” as meaning persons defined by their adherence to their “religious belief, or lack of religious belief”.

Sabbath

The place of the Sabbath in Scots law is usefully set out in one of the last-reported cases dealing with the subject in the Outer House of the Court of Session, namely *Brown v. Magistrates of Edinburgh* (1931, S.L.T., 456.

With the decay of statutory provisions concerning upholding a Christian Sabbath in Scotland in terms of employment, commerce

and licensing, it seems to be the case that in 2016 most lingering Sabbatarian strictures in Scottish society are the product of local authority decisions, many instituted many decades ago, which, when confronted by legal challenge, are found to conflict with other rights - to freedoms to trade and leisure, for instance.

Tax law

There are various provisions in tax law, which take account of the common practice whereby ministers of religion are provided with accommodation tied to their position or with some form of accommodation allowance. Some of these include further provision to take account of the low-paid status of certain ministers.

The profits and gains of contemplative religious communities are exempt from corporation tax.

Manses, presbyteries etc. are not exempt from the payment of Council Tax when they are occupied, however, when a manse, presbytery etc. is unoccupied, it is exempt.

As with many areas of law, there are remnants of special treatment of religion with a long historical past and there are more recent attempts to situate contemporary regulation of religious clergy and religious organisations within broader areas of policy. There is, for example, little evidence of churches and religious organisations being privileged as of right in terms of different forms of taxation but, rather, where there are empty church buildings they are treated in a similar way to other empty properties and manses are, broadly speaking, treated in the same way as other forms of “tied accommodation”.

Conclusions

Scotland has been transformed since the 1960s by the presence of 'other' churches and religions, many as a result of immigration and free movement. A multi-faith society has brought areas of change in relation to human rights, and may bring new areas of demand for those religious groups which conceive of the need to establish legal processes and accommodations in agreement with their faith positions.

Beyond a move from dominant church to pluralist religious beliefs, there is a further striking shift from "religion" to "religion or belief". This is a trend which is most obvious in Scots law within the context of the solemnisation of marriage. The precise parameters of the "religious or belief" groups have yet to be agreed but nonetheless this is a very significant example of the way in which law reform can come about to reflect changing social needs and demands.

Much reform of Scots law has tended to be piecemeal in nature: much change happens bit by bit and often it is reactive. While being responsive clearly has benefits, there can be dangers too, in reform which is too quick or too political. This project has not touched upon the wider moral landscape in Scotland and the influence of individual beliefs in the law-making process – in areas, for example, such as sexual practices, sexualities, medicine, censorship. The direction of travel in the law's dealings with moral issues in the west – ranging from same-sex marriage, assisted dying, advances in medical genetics and teaching – is generally towards taking account of pluralism, the rights of the individual to freedom of speech and action, and the prevention of hate crimes. The Scottish Parliament has committed itself to a system of law-making which places great emphasis on the process of consultation with

the public. While Scots law no longer reflects the dominance of one single religion or religious institution, it does offer considerable scope for the influence and protection of individual religious, or non-religious, beliefs.

Religion: old and new

One broad distinction which might be drawn is between "old style" religion and "new." If we think in Scots law of "old style" religion, then pre-Reformation it was the Roman Catholic Church, whilst post-Reformation it has been Protestantism, most obviously the Church of Scotland. Here, the direction of change in legal terms is quite clearly one of decline. There is relatively little remaining evidence of the protection, privileging or place of one single religious doctrine or institution within Scots law.

"New" religion is the religion of individual human rights and of equality, and in these regards the direction of change is towards increased presence. Since the mid-twentieth century, and particularly in the last few decades, new rights for individuals have been introduced, designed to ensure that they have their religious and other beliefs respected and protected. This is an area where there has been considerable legislative reform and where it seems likely we will now see many more cases in years to come. The trend towards a human rights agenda is clearly the most significant to have emerged in Scots law in recent decades, much of it the result of protection of human rights on global and European levels. Rights in regard to religious, gender, racial and sexual identities have their bearing upon the sphere of religion and belief, and how these rights will develop and be accommodated is still far from clear.