

Language, Law And Liberty

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‘.....Scots as a community language has proved remarkably resilient and continues to flourish in several modern forms.....it is part of our cultural heritage and, if we value that heritage, we need to cherish the language and aim to see it used with respect and sensitivity.’

Sam Galbraith, Ministerial Foreword to *The Scots Language: its place in education* (1998)
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Introduction

In debating notions of national identity and cultural heritage, it is inevitable that the role of language, which is an integral and living part of any national culture, will be discussed. The impact of recent constitutional changes combined with a general conviction that we are witnessing a cultural renaissance have provided an added stimulus to the debate concerning the role of the Scots language in the educational, social, cultural, commercial and political life of Scotland.

Whilst it is not the purpose of this paper to discuss the linguistic legitimacy of the Scots language for that has been fully explored elsewhere (Kay, 1986; McClure, 1997a; 1997b), it is worth noting the unique nature of Scots:

‘.....its linguistic distinctiveness, its occupation of its own ‘dialect-island’ bounded by the Border, its individual history, its own dialect variation, its varied use in a remarkable literature, the ancient loyalty of the Scottish people to the notion of the Scots language, as well as the fact that since the sixteenth century Scots has adopted the nation’s name - all of these are attributes of a language rather than a dialect. Manifestly Scots is to be seen as much more than simply another dialect of English.’

The Concise Scots Dictionary (1985)

This article has three principal aims: (1) to identify reasons why Holyrood is unlikely to be enthusiastic about promoting the Scots language; (2) to describe the kind of strategies which have been employed by governments to hinder progress; and (3) to speculate on the possibility of a legal challenge.

Government resistance

There are a number of reasons for governmental resistance to the wider recognition and adoption of the Scots language. The first is of a political nature and sufficiently wellknown that it warrants only brief discussion here. As the Scots language is

inextricably bound up with considerations of national identity, and as the only political party wanting to see Scots adopted as an official language also seeks independence, there is a political problem. Whilst some members of the 'unionist' parties may be sympathetic to the case argued by supporters of the Scots language, they are unlikely to sanction any measures which they believe may fuel the aspirations for separate nationhood and the consequent fragmentation of the United Kingdom.

The second reason, which is constitutional in nature, is less often heard yet merits some attention. If the Scots language was to be accorded greater recognition by Holyrood, there could be increased political pressure for Scotland to become a signatory, in its own right, to the European Charter for Regional or Minority Languages. However, only the Westminster Parliament has the legal authority to act as a signatory to the Charter, given that it is an international treaty and that the responsibility for the discharge of foreign affairs resides solely and exclusively with Westminster not Holyrood and Westminster is under no legal obligation to allow Scotland to become a signatory to the Charter.

There is a nice political point here. What would happen if the Scottish Parliament took a strong collective view that Scotland should be a signatory to the European Charter? What would be the impact on the domestic political scene in Scotland should Westminster refuse? The UK government faced by a united and determined Scottish Parliament would be in a no-win situation. If it acceded to the request and Scots was recognised as one of the official languages of the country, this could contribute to a growing sense of national identity and self-confidence which might accelerate pressures for independence. On the other hand, a failure to respond sympathetically could fuel national disaffection and increase the desire to sever links with the Westminster Parliament.

The third, least heard and perhaps most compelling, reason for the government to resist pressures to recognise Scots as an official language is financial. If implemented the Articles of the European Charter would incur a very heavy economic cost. It is instructive to look at a few of the obligations that a Scottish Parliament would have to assume if Scotland became a signatory to this charter. Three areas are briefly examined: (a) education; (b) cultural activities and facilities; and (c) economic and social life.

Under the terms of Article 8 of the Charter, a Scottish Parliament would be obliged: (a) to make the Scots language available at all educational levels (i.e., pre-school, primary, secondary, technical and vocational, university, adult and continuing education); (b) to ensure that the historical and cultural context to the Scots language was taught; (c) to provide basic and further training of teachers required to implement these educational changes; and (d) to set up an advisory body or bodies responsible for monitoring the measures taken and the progress achieved in establishing or developing the teaching of the Scots language and for drawing up and publishing periodic reports of the findings.

Article 12 would oblige all public authorities in Scotland: (a) to promote measures to ensure that the bodies responsible for organising or supporting cultural activities have at their disposal staff who have a full command of the Scots language, as well as of the languages of the rest of the population; (b) to encourage direct participation by Scots language users in providing facilities and planning cultural activities; and (c) if necessary, to create and/or promote and finance translation and terminological research services, with a view to maintaining and developing

appropriate administrative, commercial, economic, social, technical and legal terminology in the Scots language.

Article 13, which relates to economic and social life activities, would oblige the Scottish Parliament: (a) to oppose practices designed to discourage the use of the Scots language; (b) to ensure that social care facilities such as hospitals, retirement homes and hostels offer the possibility of receiving and treating Scots language users in their own language; and (c) to arrange for information provided by the competent public authorities concerning the rights of consumers to be made available in the Scots language.

It will be apparent from an examination of this small number of obligations that the overall cost of implementing the Charter would be extremely high. At a time when resources are scarce and there are difficulties in maintaining existing financial commitments to health, education and social services, it is unlikely that any government - unionist or nationalist - would agree to the allocation of public money to introduce, support and monitor the kind of extensive changes required, even if they were to be phased in over a number of years. However, it is very much open to question whether this particular Charter is legally enforceable.

Suppression

The Scottish Executive knows that until it can be demonstrated that a significant number of people speak Scots, it can be treated as a subject of trivial importance - a non-issue. In a recent publication *A National Cultural Strategy* (1999), the Scottish Executive disingenuously states that it has 'no precise figures' of the number of people who speak Scots. The implication being that until 'precise' figures are available, it is not possible to hold an informed debate. Yet when the point is made that the decennial census could be used to determine precisely how many people speak Scots, the government's response is that it is not the purpose of the census to raise public awareness of social issues. But it could be argued that it is not in the government's interests to determine the exact numbers involved. This continuing lack of precision is important for it enables the government to challenge the reliability of any figures advanced by advocates for the Scots language on the grounds that they can only be estimates and as estimates they are not worthy of examination.

However, in order to appear reasonable and accommodating, hints have been dropped that relevant questions to elicit this information may be included in the 2011 or a later census. The government's position here appears inconsistent and illogical. Firstly, what is being sought is statistical information. Secondly, if questions relating to the Scots language cannot be included in the 2001 census on the grounds that they may heighten popular awareness of a sensitive social issue, then why is this same argument not deployed in relation to the 2011 and 2021 censuses? Thirdly, the Westminster government raised no objections to the inclusion of questions on Irish language ability in the 1991 Northern Ireland census.

McClure (1997a) has shown that for a long period vernacular Scots speech and writing was suppressed by the Scottish education system. But that suppression may still be with us but in more subtle form. It is claimed that in June 1998 the Scottish Consultative Council on the Curriculum suppressed a draft report on Scottish culture and the curriculum. Robertson (1998) has argued that the publication of the report came at a

politically inconvenient time for a supposedly ideologically neutral national agency, such as the SCCC, to report on the relationships between culture and the curriculum.

Robertson became aware that discussions concerning Scottish culture and the matter of national identity were causing unease among some members of the Council. Particular disquiet was evident in relation to the possible role of the Scots language in the curriculum. Robertson is in little doubt that whilst the Scottish Office may not have instigated the opposition to the report, it supported that opposition. The Scottish Office's reservations may have been only partly coloured by the resource implications, perhaps more worrying for the Scottish Office was the argument consistently advanced throughout the report that the experience of Scottish culture should be seen as part of a continuous entitlement for all learners across the curriculum. By presenting access to the content of the curriculum as a right, the discussion moved from being an educational to a political issue.

However, it is quite possible that the Scottish Office had no need to apply pressure, overt or covert, given that the future of the SCCC was under review and members of Council would have been anxious not to offend their funders. As Robertson (1998) observed: 'the wish to be subservient must have been irresistible.'

Even though the group responsible for producing the draft report were satisfied that its content would be endorsed by all shades of political opinion, it was evident to Robertson that some members of Council saw it as a Scottish nationalist political tract. In Robertson's opinion (1998) this 'shabby episode' provided a revealing glimpse of the way in which the nation's gatekeepers in the field of education seek to control intellectual traffic. Paradoxically, it could well have been the report's moderation, coherently expressed argument and readability that may have occasioned more concern, as it is probable that it would have enjoyed widespread support. This would have then left the SCCC with the not inconsiderable problem of having to implement the report's ambitious aims. For Robertson the whole experience was a chastening one and one that left him wondering how any kind of significant curricular change can ever be introduced without being stifled by the deadweight of bureaucratic considerations.

The importance attached to the role of the Scots language in the draft report may have led some members of the SCCC to reject it for fear of offending The Scottish Office. There may also have been a reluctance to become too closely identified with what might be regarded in official circles as a controversial or suspect field (Jackson, 1999). The recent publication of the encyclopaedic tome *Scottish Education* (Bryce & Hume, 1999) is a case in point. It is claimed by the publisher, Edinburgh University Press, that the book offers 'a fresh, frank and authoritative commentary on every aspect of education in Scotland'. Yet in a book containing no fewer than 114 chapters, with one complete chapter devoted to Gaelic education, there is no chapter on the Scots language. Is it possible that the editorial team, picked presumably because of its extensive knowledge of developments in the educational field in Scotland, were unaware of all the development work in the Scots language that has taken place over the last decade?

- The publication of the 5-14 national curriculum guidelines in English Language, Environmental Studies, Expressive Arts and Personal and Social Education which have highlighted the importance of the Scots language in fostering a sense of personal and national identity.

- The recognition in published policy documents from the SOEID of the significance of the Scots language and Scottish literature at all stages of education up to and including H grade: the introduction of an optional Scots language paper in the new Advanced Higher.
- The publication by various educational bodies of reports supporting the development of the Scots language: The Educational Institute of Scotland (1991) *Scots Language (Lallans) and Culture in the Primary School Curriculum*, Grampian Regional Council (1993) *Scots Language and Heritage in Schools*.
- The production by the Scottish Consultative Council on the Curriculum of the acclaimed and award winning *The Kist/A'Chiste* an anthology of Scots and Gaelic texts, chosen to meet the needs of language in the 5-14 curriculum.
- The publication by the Scottish National Dictionary Association of materials for use in schools, including the development of an electronic Scots School Dictionary.
- The growing body of literature on Scots in education: McClure (1997) *The Scots Language in Education*; Niven & Jackson (1998) *The Scots Language: its place in education*.
- The creation of a Scots Language Development Officer post in the Dumfries & Galloway Region (1992-1996) and a similar post part-funded by The Saltire Society in Tayside Region (1992-1993).
- The existence of the Scots Language Resource Centre which is supported by the Scottish Arts Council and which provides a specialised library and information service is in the process of creating a Scots language database and acts as a focus for campaigning and a locus for a rapidly growing communication network.

In his review of *Scottish Education*, David Eastwood (1999) tellingly observes that the book appears to be the professional educational establishment's view of itself. Too strong and public display of commitment to, and interest in, the role of Scots in education by members of the educational establishment might prejudice their professional standing and progress. The increasing politicisation of the educational process not only places limits on the extent to which certain areas can be explored but it provides clear signals of those areas, like the Scots language, which are perceived to be 'off limits'.

Notwithstanding the professional and public acclaim which greeted the publication of *The Kist/A'Chiste* and the fact that copies of this Saltire Society/TESS award winning publication have sold out, the publishers Nelson have indicated that they are not prepared to undertake a reprint. This negative response probably results from the fact that Nelson is no longer based in Scotland having transferred its head office south of the border. An educational publication targetted solely at Scottish schools is clearly not an economically attractive proposition to a UK publisher.

The disappearance of an indigenous educational publishing sector in Scotland when combined with the growing influence of a few monolithic educational publishing houses based in London and New York pose problems for a small country like Scotland wishing to promote and produce its own educational materials. The domination of such

publishing houses is likely to lead to the creation of an increasingly homogenised and anglocentric culture in which there is no place for the Scots language.

If the Scottish Executive is committed to seeing the publication of high quality learning resources in the Scots language, then it has the option of either ring-fencing and directly dispensing government funds or channelling funds through an appropriate agency to enable such curricular material to be published. Douglas (1997) has highlighted the present absurd position where schools are officially encouraged to include a Scottish dimension in their 5-14 courses yet no funds are made available. Niven (1999) has drawn attention to the situation in other European countries where national governments have allocated funds in their education budgets for the publication of minority language materials.

The Scottish Executive may hold to the view that the publication of any kind of educational material is a commercial matter which should be left to the market and not the government. If that is its position, it is tantamount to conceding that 'minority' curricular material will very rarely get published in Scotland.

By taking no action at all the suspicions of those convinced that the Scottish Executive is not committed to the promotion of the Scots language will be confirmed. A failure to take action could also be construed as a discriminatory act, for by sanctioning a situation where schools are progressively starved of Scots language materials, the Scottish Executive would, in effect, be extinguishing at an early and critical stage the growing interest in the Scots language so recently evidenced in Scottish schools.

A national cultural strategy

At the beginning of the consultative document *A National Cultural Strategy* published by the Scottish Executive, it is affirmed that 'we believe that arts and culture have a central role in shaping a sense of community and civic pride in the new Scotland.' In an earlier document *The Charter for the Arts in Scotland* (1993) it is stated that 'culture is a key component in defining human identity at individual, community and national level'. It is very difficult to reconcile this proclaimed centrality for the role of arts and culture with the fact that 'culture' was only one of a number of areas covered by the mega-ministry of Education, Culture and Sports created by Donald Dewar. However, discussion by MSPs of cultural matters, including the role of Scots language, appears now to have been relegated by Henry McLeish, the new First Minister, to a sub-committee of the newly formed Sports and Culture Committee. What better way to bury a potentially troublesome subject!

The fact that most MSPs represent, and are themselves drawn from, the predominantly English speaking population in the Central Belt is hardly likely to be conducive to creating a climate in the Scottish Parliament where the case for the Scots language can be heard with understanding and sympathy.

The paragraph devoted to the Scots language in *A National Cultural Strategy* is somewhat mealy-mouthed. First, it declares that Scots has been disparaged as a language for many years. The fact that successive governments have been largely responsible for that disparagement is glossed over. Second, it is conceded that the Scots language may have some value in releasing the expressive potential of children, albeit within the restricted environment of the classroom. Third, it is indicated that there is a continuing debate

about the extent to which Scots should be taught at secondary level in order to facilitate an understanding of Scottish literature. What is revealing about this paragraph is the way in which Scots is seen as having an important role to play but only within an educational context. There is no recognition of the wider role that Scots might play in Scottish life and culture.

In this connection, it is instructive to juxtapose this limited and limiting vision of the role of Scots with that of Gaelic which is set out in the *A National Cultural Strategy*. But then the government can afford to be generous to the Gaelic lobby because it does not pose a significant political (or more crucially constitutional) threat. The government's attitude would be different if Gaelic was the main language spoken north of the Central Belt and throughout the Highlands and Islands. In other words, this debate appears to have very little to do with the respective merits of Gaelic or Scots as languages, and everything to do with political considerations. Gilchrist (1999) has observed, that whilst a 'debate may rage on about how effectively or otherwise the funds for Gaelic television and other support for the language have been spent.....the fact remains that Scots scarcely gets the sweepings from the table'.

It is worth noting that *A National Cultural Strategy* is not only printed in English and Gaelic but is also available in Urdu, Cantonese, Punjabi, Hindi and Gujarati. Scots speakers although numerically outnumbering these five groups put together have to make do with the English version.

A Scots Language Alliance?

It could be argued that those organisations which have sought a greater role for the Scots language would be more effective if they joined to form a Scots Language Alliance. But it is difficult to envisage the creation of such an Alliance given the gulf between those that espouse a gradualist approach where the process of Scotticisation occurs in small incremental steps and those who want the immediate restoration of Scots as an official national language.

There are those, too, whose attitude to the Scots language is unashamedly ambivalent. On the one hand, they celebrate the language with great enthusiasm on Burns' Night and St Andrew's Day but, on the other, they shun the language for the remaining 363 days of the year. They are content to engage enthusiastically in a closed and token ritual but keenly anxious not to be identified publicly with any moves to promote the wider adoption of the Scots language.

The success of the Gaelic lobby in promoting its cause results in part from the fact that it has been able in recent years to present a united front, has a clear view of what it is seeking and has possessed the resolution and resource to pursue its goals. Also there can be little doubt that the popular image of the Scots language suffers in comparison with that of Gaelic. In many people's eyes Gaelic is indissolubly linked to the romantically attractive and enduring perception, fostered by Sir Walter Scott and other Scottish writers and artists, of a magical Highland landscape enveloped in mists and myths. In stark and unappealing contrast, the Scots language is frequently portrayed as firmly enmired in the cauld and clartie kailyard.

Legal challenge

As it seems unlikely that Holyrood will change its position with respect to the Scots language in the immediate future then those bodies seeking its wider adoption and/or official recognition may be forced to consider mounting a legal challenge. The legal basis for such a challenge might rest on articles drawn from the *United Nations International Covenant on Civil and Political Rights* and *The European Convention on Human Rights*.

Article 26 of the *UN International Covenant on Civil and Human Rights* (1976) makes clear that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

Article 27 of the Covenant further states that: ‘in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language’.

Article 14 of the *European Convention on Human Rights* (1966) makes clear that: ‘the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. However, the UK government has a reservation against Article 14 on the grounds that the right to education is subject to it not involving unreasonable additional public expenditure.

To have any chance of success a litigant would need to cite a specific instance of discriminatory treatment. It would not be sufficient to make a general claim that local authorities and/or central government tend to act in a discriminatory manner, for such a vague claim would be thrown out. It is possible that a case could be advanced that in publishing the consultative document *A National Cultural Strategy* in English and Gaelic and in five non-territorial languages, the Scottish Executive acted in a discriminatory manner by excluding a Scots language version.

For a legal challenge to be sustained, it would be necessary to establish (i.e., prove) that Scots is a language and not a dialect. For its part the government is likely to draw attention to Part 1, Article 1 of the *European Charter for Regional or Minority Languages* which deals with definitions. Here it is made clear that the term ‘regional or minority language’ does not include dialects of the official language(s) of the State. Whilst linguistic experts may be able to persuade academic colleagues used to dealing in subtle definitional niceties and nuances that Scots is a language, it is another matter to present a convincing case in a court of law where clear cut answers to questions are demanded.

Establishing that a government has acted in an unfair and discriminatory manner would not be easy to prove. The fact that the Gaelic language, unlike Scots, has benefited from considerable financial support is likely to be justified on the grounds that Gaelic is

generally recognised to be a distinct language in its own right. No such universal recognition has been conferred upon the Scots language.

However, any legal team representing the government would need to proceed cautiously and guard against exhibiting a prejudicial attitude toward or engage in making disparaging comments about the Scots language for such actions, in themselves, could be construed as discriminatory. A charitable disposition towards the Scots language from the judicial bench cannot be guaranteed for it is only six years ago that a defendant in Stirling Sheriff Court was imprisoned for speaking in Scots (Horsburgh & Murdoch, 1998).

An interesting situation could arise if a litigant instructed his counsel and encouraged supporting witnesses to speak only in Scots! If the High Court ruled against the use of Scots then such an action might be interpreted as unlawful on the grounds that it was discriminatory and infringed the litigant's rights under the terms of the European Convention on Human Rights, recently incorporated into Scots law. Thus what started as a challenge to the government could broaden to include a challenge to the Scottish judiciary.

It is a little difficult to reconcile any possible proscription on the use of the Scots language in a Scottish court of law with the fact that Scots law itself has drawn directly and extensively on the Scots language for many of its own legal terms. If the use of Scots is proscribed, it will be interesting to learn the grounds advanced in justification of proscription. If there is no statutory impediment then it seems likely that the argument will rest on custom and usage over the past 400 years. Whilst the Scots language was widely employed in Scottish courts in the 16th century, its use rapidly declined from the 17th century onward.

There is one form of legal challenge that could be made that has the potential for creating even greater media interest, legal discomfiture and political embarrassment. There are a number of people who have been so incensed by the refusal of the Scottish Executive to determine the number of Scots speakers in the 2001 census that they are giving serious consideration to spoiling their census forms. The protestants intend to exploit the fact that failure to complete a census form invites legal sanctions. It is anticipated that persistent refusal to comply with their legal obligations would result eventually in a summons to appear in a court of law. A court appearance would provide a public forum within which the protestants would be able to present a reasoned argument in defence of their actions.

The court would be faced with a number of problems. If the use of the Scots language in the court was proscribed but the defendants insisted in speaking in Scots, their action could be construed as a contempt of court, which could result in the imposition of a custodial sentence. But would any Scottish court be prepared to make a disposal which was wholly disproportionate to the nature of the offence and which would help to create 'martyrs'. If, on the other hand, any Scottish court of law accepted the Scots language as a legitimate medium for communication then a crucial precedent would be established. Given judicial recognition of the Scots language, it would be very difficult for the Scottish Executive to maintain its dismissive official attitude towards Scots.

The refusal to complete or to spoil a census form is manifestly a form of civil disobedience. What the Scottish Executive needs to note is that history is littered with instances of governments being wrong-footed by acts of civil disobedience which do not,

in themselves, constitute a serious threat to the security of the state. In seeking an appropriate response, the Scottish Executive would need to be careful not to act too heavy-handedly or to be contemptuously dismissive as both responses are likely to be counter productive.

European Year of Languages

2001 is a uniquely opportune year for the protestants to make their case. Apart from being the year of the national decennial census, 2001 is the European Year of Languages. The Scottish Executive would presumably want to avoid the huge international embarrassment of celebrating the European Year of Languages at the same that there were court cases up and down the land where people were protesting their right to speak and write in their own language.

It is worth noting that one of the principal aims of the European Year of Languages is to raise awareness of the richness of the linguistic diversity within the European Union. At the same time the European Year of Languages seeks to encourage member states to attach equal value to all languages. Whilst there is token reference to linguistic diversity in *A National Cultural Strategy*, there is little evidence to indicate that the Scots language is equally valued in practice. To that extent the Scottish Executive's position runs counter both to the spirit and intent of the European Year of Languages.

If as a result of a successful legal challenge the government was obliged to recognise Scots as an official language, the economic, social and political consequences flowing from that recognition should not be underestimated. However the question remains as to whether there is any individual or organisation, sufficiently committed to the promotion of the Scots language, prepared to take on such a challenge.

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