

Response to Scottish Parliament petition PE1128

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This is a response to the following petition to the Scottish Parliament:

Petition by Ewan Irvine, on behalf of Full Moon Investigations, calling on the Scottish Parliament to urge the Scottish Government to take necessary action to grant a posthumous pardon to all persons convicted in Scotland under all Witchcraft legislation.

I have various points to make in response to this:

1. What was 'all Witchcraft legislation'?
2. Who were 'all persons convicted'?
3. What action would be necessary to grant them a 'posthumous pardon'?
4. On what grounds could a pardon be given?

Let me take these in order. I will then offer some conclusions.

1. What was 'all Witchcraft legislation'?

This principally refers to an act passed by the Scottish parliament in 1563, which said that 'witchcrafts, sorceries and necromancy' were crimes to be punished by death. In practice the act was treated as being about 'witchcraft'. There is a version of the text of the act, with a translation into modern English, on the Records of the Parliaments of Scotland website:

<http://www.rps.ac.uk/>
at reference A1563/6/9.

Almost all the witches executed in Scotland were executed under the 1563 act. There were also occasional non-capital punishments, such as banishment; these, as well as the executions, appear to fall within the scope of the petition.

Small numbers of witches were executed before 1563 under medieval heresy procedures. They were tried in a church court and then handed over to the secular authorities for execution. The church courts used canon law (the law of the medieval church), and the execution itself was a matter of common law. Since there was no 'legislative' basis for such executions, the petition might be held not to apply to them. I think, however, that the spirit of the petition is to seek pardons for all executed witches, even those executed before the statute of 1563.

The 1563 statute remained in force until 1736, when it was repealed by an act of the British parliament. (The date is sometimes given as 1735 owing to a

complication of dating.) This act abolished the crime of witchcraft in both Scotland and England, and replaced it with a new crime of 'pretended witchcraft' with a maximum penalty of one year's imprisonment. The 1736 act was repealed in its turn by the Fraudulent Mediums Act in 1951. Since the 1736 act was called a 'Witchcraft Act', I think it falls within the scope of the petition; I will come back to this in the next section.

2. Who were 'all persons convicted'?

There were perhaps 2,000 executions under the 1563 act. Precise statistics are hard to come by, since for well over half of all witchcraft cases, the main or only record we have of them is an order to hold a trial, with no surviving record of the outcome. We know that there were acquittals, but we do not know how many. Perhaps 4,000 people altogether were formally accused (i.e. named as witches in a legal context); not all of these were tried, and as I have said, not all of those who were tried were convicted. Per head of population, Scotland's execution rate was about four times the European average.

A variety of people were convicted as witches, but the fact that about 85 per cent of them were women has attracted interest. For Europe generally, convicted witches were probably about 75 per cent women. Witchcraft accusations often originated in quarrels between women, and women's curses seem to have been feared more than men's. One typical pattern of accusation was that someone would suffer a misfortune which they would then link back to a quarrel that they had had with someone else; they would conclude that the other person was getting their revenge through witchcraft.

The petition also seeks pardons for those convicted under the 1736 act. Prosecutions under this act were very rare, but there were occasional cases in Scotland, such as that of Jean Maxwell, imprisoned in Kirkcudbright in 1805. There were no executions, of course. It was also under the 1736 act that Helen Duncan (in whom the petitioners have taken an interest) was convicted in 1944. The petition, however, asks for a pardon for 'all persons convicted in Scotland', and this cannot apply to Duncan, who was convicted in an English court (the Old Bailey). I do not think that the Scottish parliament has any jurisdiction over Duncan's case.

3. What action would be necessary to grant them a 'posthumous pardon'?

Trials for witchcraft were held by 'justice courts' – criminal courts exercising jurisdiction over major crimes. One of these, the central Edinburgh court known as the court of justiciary, was the predecessor of the present-day High Court of Justiciary. I assume that it would be the High Court of Justiciary, or an institution with jurisdiction over it, that would be required to grant a legal

pardon. Justice courts were royal courts, and at the time, pardons were available from the crown, under the privy seal. I do not know what the equivalent procedure would be today, but no doubt the Public Petitions Committee would be able to obtain up-to-date legal advice if necessary.

4. On what grounds could a pardon be given?

This is a difficult question. The 1563 act was law at the time. I can see three possible approaches to the issue.

Firstly, it might be possible to argue that the witches were improperly convicted, even under the law as it stood. Such an argument would focus on such things as the use of torture to obtain confessions. Torture appears to have been quite common. However, this is another area where historical evidence is sparse. For most witches we have no evidence on whether they were tortured, and we rely on indirect inference such as general contemporary statements that torture was common. For some witches we have quite detailed evidence indicating that they were probably not tortured; typically such witches were convicted, not on the basis of a confession, but on the basis of statements from their supposed victims (often of the 'quarrel followed by misfortune' type mentioned above). There is also the problem that torture was not necessarily illegal at the time. As a historian I would not be able to state with confidence that *all* witches were improperly convicted under the law as it then stood. Could we pardon some witches and not others, especially when for most individual witches the surviving evidence would be insufficient one way or the other?

Secondly, we might pardon the witches on the simple grounds that we, today, don't believe in witchcraft. A 'pardon' in this sense would amount to a statement that witchcraft should never have been considered as a crime, because it does not, and therefore did not, exist. Such a statement would not rely on any historical evidence, and would thus not be something on which I, as a professional historian, would need or wish to comment.

Thirdly, we might pardon the witches on the grounds that we, today, *do* believe in witchcraft but we want to call it something else. This appears to be the approach of the petitioners themselves. They state in their 'Background information' that 'Many of today's professions have their roots in tradition and what could be seen as mystical wisdom. Professions such as mediumship, herbalists, midwifery, reiki and many alternative therapies, to name just a few.' (They present this phrase, perhaps inadvertently, as being 'provided by' myself and my colleagues in the Survey of Scottish Witchcraft, but this is not so.) Some of the convicted witches had indeed used spells or charms, usually for healing or divination. They were hardly ever convicted simply for this, however; usually healers were accused of witchcraft when they were

perceived as having deliberately harmed their clients for some reason. Moreover, most of the convicted witches were not magical practitioners at all. Pardoning the ancestors of 'today's professions' would cover only a minority of the convicted witches. And again, in most individual cases, we would have insufficient information to be able to state definitely whether they had been magical practitioners.

Some conclusions

There have been posthumous pardons of witches before. Several dozen witches were executed in Arras, France, in 1459-60, and pardoned in 1468. However, the pardon had a contemporary point in assisting relatives, and in clearing the name of at least one fugitive who was still alive, having been convicted *in absentia*. There are people today who claim descent from convicted Scottish witches, but I don't think that this presents them with any problems that need to be solved by a 'pardon'.

As a historian, I regard the proposed use of legal machinery to 'pardon' witches as unhistorical; it's not the approach that historians take to the past. We try and explain the past, and we may even urge people to learn from the past, but we don't try and *change* the past. There are also considerable practical difficulties in identifying grounds on which a pardon might be granted.

The petition is nevertheless well meant. I have two recommendations. One is that its direct aims would be better served by the erection of a *memorial* to the witches. This would help to increase understanding of the past without running the risk of being seen as anachronistic or silly. In the words of one of the members of the Public Petitions Committee, it would 'do something to show how we have moved on'. A memorial would set up a dialogue between present and past, and everyone who saw it would be able to join in.

The other recommendation is that the petition's indirect aims - of rectifying injustice - would be well served by a continuing attention on the part of the Scottish Parliament to rectifying the injustices of the present day. Rectifying the injustices of the present day might even be a fitting response to the witch-hunts of the past.

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