EMPLOYMENT, SEX DISCRIMINATION AND THE CHURCHES: THE *PERCY* CASE

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In this paper, the authors present different views of the legal implications of Percy v Church of Scotland Board of National Mission, *in which the House of Lords reversed the Court of Session and held that a former minister could sue the Church under the Sex Discrimination Act 1975 and, contrary to previous views, probably had an enforceable contract for services. Cranmer describes the basis for the decision and suggests that it represents a realistic view of the employment status of clergy. Peterson is less optimistic about the decision's legal and practical effects and argues that it undermines the constitutional status of the Church of Scotland as well as overall prospects for religious freedom in Scotland.*[1]

THE BACKGROUND

Helen Percy was ordained as a minister in the Church of Scotland in 1991. In June 1994 she was appointed associate minister of a parish in the Presbytery of Angus. Her duties included conducting worship on Sundays and acting as part-time chaplain at HMP Noranside. In 1997 it was alleged that she had had an affair with a married elder in the parish; she was suspended and a committee of Presbytery found that there was a case to answer. Preparations began for a trial by libel[2] but it never took place; instead, at a mediation meeting arranged by the Church she was counselled to resign and demit status as a minister, which she did in December 1997.[3]

[1] Cranmer has written in support of the majority decision, Peterson against it: but we take joint responsibility for the article as a whole. Peterson wants to thank Sarah Ganz for her suggestions on an earlier draft.

[2] The former disciplinary procedure subsequently abolished by Act III of 2001 [anent Discipline of Ministers, Licenciates, Graduate Candidates and Deacons].

[3] Which meant that should she ever wish to seek a ministerial appointment in future, she would have to apply to the General Assembly for permission to resume her status as a minister.

Ms Percy later regretted her resignation and demission and in February 1998 initiated proceedings in an employment tribunal, alleging unfair dismissal and unlawful sexual discrimination: in essence, that the Church had not taken similar action against male ministers known to have had extra-marital sexual relationships. The tribunal rejected her application for want of jurisdiction. An employment appeal tribunal dismissed her appeal insofar as it related to sex discrimination, on the grounds that the disciplining of ministers with regard to their manner of life was a spiritual matter governed by Article IV of the Articles Declaratory in the Schedule to the Church of Scotland Act 1921 (11 & 12 Geo 5, c 29).

She then made an unsuccessful appeal to the Inner House of the Court of Session.[4] The Lord President, Lord Rodger of Earlsferry, considered first whether Ms Percy was employed by the Board of National Mission in terms of a 'contract personally to execute any work or labour' and concluded that where an appointment was made to a recognised form of ministry within the Church of Scotland and where the duties of that ministry were essentially spiritual, it was to be presumed that there was no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law. The Lord President declared that that presumption was rebuttable; but he was not persuaded that in Ms Percy's case the parties had intended to create relations enforceable in the civil courts. Undaunted, she took her case to the House of Lords who, by a majority of four to one, upheld her appeal and remitted her discrimination claim for determination by an employment tribunal under section 63(1) of the Sex Discrimination Act 1975.[5]

There were three questions before the Appellate Committee:

i. whether Ms Percy was employed under a contract of employment;
ii. if she was not, whether her relationship with the church still constituted 'employment'[6] as defined in section 82(1) of the Sex Discrimination Act 1975 and whether she was therefore protected by section 6 of that Act from unlawful discrimination in the form of a more severe discipline than the church was accustomed to exercise in the case of a male minister in similar circumstances; and
iii. whether, if she *had* been discriminated against, her claim nevertheless constituted a 'matter spiritual' within the terms of section 3[7] of the

[4] *Percy v Board of National Mission of the Church of Scotland* 2001 SC 757, 2001 SLT 497, IH.
[5] *Percy (AP) v Church of Scotland Board of National Mission* [2005] UKHL 73; Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Scott of Foscote and Baroness Hale of Richmond; Lord Hoffman dissenting.
[6] 'In this Act, unless the context otherwise requires ... "employment" means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly ... ': Sex Discrimination Act 1975, s 82(1).
[7] 'Subject to the recognition of the matters dealt with in the Declaratory Articles as matters spiritual, nothing in this Act contained shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature': Church

> Church of Scotland Act 1921 and, as such, was therefore within the exclusive cognisance of the courts of the Kirk.

And on those questions there were–and remain–differing views.

IN SUPPORT OF THE MAJORITY DECISION

Lord Nicholls of Birkenhead noted the line of authorities for the proposition that no contract of service exists between a minister of religion and his or her denomination,[8] and pointed out that it is a statutory requirement that in order to prove unfair dismissal one has to be an employee. Moreover,

> ... an employee is an individual who has entered into or works under a contract of employment, that is, a 'contract of service': see now sections 94 and 230 of the Employment Rights Act 1996.[9]

But that, asserted Lord Nicholls, was not the issue before the Appellate Committee: Ms Percy was claiming sex discrimination, not unfair dismissal.

He then explored the difference between office-holders and employees. Some offices are statutory; others, such as the office of constable, originate in common law; yet others are created where an organisation establishes particular posts within it, such as chairman or treasurer.

> But caution needs to be exercised here, lest the use of this term in this context leads to a false dichotomy: a person either holds an office or is an employee. He cannot be both at the same time. *That is not so.* If 'office' is given a broad meaning, holding an office and being an employee are not inconsistent.[10]

This approach was adopted in *Barthorpe v Exeter Diocesan Board of Finance*[11] in which a stipendiary Reader sued for unfair dismissal. Slynn J rejected the argument that an office-holder could not be employed under a contract of service and added that

> [i]t may be difficult to establish who is the other contracting party, but we are not satisfied that clergy when working within the framework of the Church cannot be engaged under a contract. It may well be that the contract, if it exists, is for services rather than of service.[12]

of Scotland Act 1921, s 3.

[8] *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563; *Scottish Insurance Comrs v Church of Scotland* 1914 SC 16, 1913 2 SLT 261; *President of the Methodist Conference v Parfitt* [1984] ICR 176, [1984] QB 368, [1983] 3 All ER 747, CA; *Davies v Presbyterian Church of Wales* [1986] ICR 280, [1986] 1 All ER 705, HL; *Diocese of Southwark v Coker* [1998] ICR 140, CA.

[9] *Percy (AP) v Church of Scotland Board of National Mission*, para 13.

[10] *Percy*, para 20: emphasis added.

[11] *Barthorpe v Exeter Diocesan Board of Finance* [1979] ICR 900, EAT.

[12] [1979] ICR 900 at 904.

Similarly, in *Johnson v Ryan*[13] Morison J concluded that a rent officer appointed in pursuance of statute was *both* an office-holder *and* an employee of her local authority.

As to the question of contractual relations, Lord Nicholls conceded that there were certainly instances in church affairs in which the parties could not be taken to have intended to create a contract.[14] But the offer of a post by the General Secretary of the Board of National Mission and its acceptance by Ms Percy seemed to be intended by both parties to create legally-binding relations,[15] not least because when Ms Percy attempted to withdraw her resignation, the General Secretary's response referred to 'your letter of resignation from employment by the Department of National Mission'.[16]

He then turned to the question of whether the terms of the Church of Scotland Act 1921 ousted the jurisdiction of the employment tribunal. Article IV of the Articles Declaratory contained in the Schedule to the Act denies to the civil authority 'any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction': in short, the Kirk has exclusive jurisdiction in 'matters spiritual'. But what is a 'matter spiritual'? Lord Nicholls took the view that a sex discrimination claim could not be so regarded since, by entering into a contract of employment, the parties 'have deliberately left the sphere of matters spiritual ... and have put themselves within the jurisdiction of the civil courts'.[17] On those grounds, he found for Ms Percy: because she had a contract with the Board, the employment tribunal's jurisdiction was not excluded by the terms of Article IV.

Lord Hope of Craighead started from the assumption that Lord Kinnear's conclusion in *Scottish Insurance Commissioners v Church of Scotland*[18] was sound: that an assistant minister held his or her position by virtue of the licence from Presbytery. He also noted the Lord President's conclusion that there was a rebuttable presumption that an appointment to a recognised ministry within the Kirk did not give rise to a contractual relationship in civil law.[19] However, the present case was not about unfair dismissal but about sexual discrimination; and 'it is a fundamental rule of sex discrimination law that it is not possible to contract out of it'.[20]

[13] *Johnson v Ryan* [2000] ICR 236, EAT.
[14] *Percy*, para 23.
[15] *Percy*, para 24.
[16] *Percy*, para 32.
[17] *Percy*, para 41, quoting Lord President Rodger in the First Division: 2001 SC 757 at 769, para 24.
[18] *Scottish Insurance Comrs v Church of Scotland* 1914 SC 16, 1913 2 SLT 261.
[19] *Percy*, para 102, quoting 2001 SC 765A.
[20] *Percy*, para 106, citing the Sex Discrimination Act 1975, s 77: '(1) A term of a contract is void where–(a) its inclusion renders the making of the contract unlawful by virtue of this Act, or (b) it is included in furtherance of an act rendered unlawful by this Act, or (c) it provides for the doing of an act which would be rendered unlawful by this Act. (3) A term in a contract which purports to exclude or limit any provision of this Act or the Equal Pay Act 1970 is unenforceable by any person

Lord Hope distinguished between 'the contract issue' (whether or not Ms Percy was employed within the terms of the definition in section 82(1) of the Sex Discrimination Act 1975) and 'the jurisdiction issue' (whether or not her complaint was excluded from civil jurisdiction by the terms of Article IV of the Articles Declaratory).

As to the contract issue, he concluded that there was indeed a contract between Ms Percy and the Board of National Mission and agreed with Lord Nicholls that for the purposes of the 1975 Act[21] Ms Percy was 'employed'. As to the jurisdiction issue, the exclusion under section 19(1) of

> ... employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers

could hardly apply to the Kirk because there was no doctrinal issue involved: women had been admitted to the ministry since 1968.[22]

Under Article 6 of the Equal Treatment Directive,[23] member states are obliged to provide judicial remedies for those who consider themselves wronged by failure to apply the principle of equal treatment; and the Kirk had committed itself unequivocally to this position.[24] In Lord Hope's view, however, the Kirk had failed to put in place an adequate mechanism of redress for those who felt that they had been discriminated against.[25] Finally, he regarded unlawful discrimination as a *civil* matter rather than a spiritual one.

Concurring, Baroness Hale of Richmond quoted with approval the dictum of Carswell CJ in *Perceval-Price v Department of Economic Development*,[26] in which the Northern Ireland Court of Appeal held that full-time chairmen of industrial tribunals and social security appeal tribunals were covered by the Equal Pay Act (Northern Ireland) 1970 (c 32) and the Sex Discrimination (Northern Ireland) Order 1976, SI 1976/1042 (NI 15). Judges, said his Lordship,

> ... are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment ...

in whose favour the term would operate apart from this subsection'.
[21] *Percy*, paras 115, 116.
[22] *Percy*, para 119; Act XXV of 1968 (Anent Admission of Women to the Ministry).
[23] Directive 76/207/EC.
[24] *Percy*, paras 122 & 123.
[25] *Percy*, para 132.
[26] *Perceval-Price v Department of Economic Development* [2000] IRLR 380, N.I. CA.

As for judges, so for clergy; and she concurred with Lord Nicholls and Lord Hope in concluding that Ms Percy's employment 'bore all the hallmarks of a contract'.[27] Moreover:

> It would be surprising indeed if Parliament, when enacting a law in 1975 to combat defined acts of discrimination in defined areas of activity which were, as already seen, capable of encompassing employment for the purposes of an organised religion, including the established Church, contemplated that, alone of all such organised religions, the Church of Scotland should be immune. This would be even more surprising given that, at the time the 1975 Act was passed, the Church of Scotland had already decided to admit women to the Ministry on the same terms and conditions as men.[28]

The argument of the majority seems, in a nutshell, to be this:

i. decisions in previous cases have often rested on a false antithesis between 'office' and 'employment' whereas, in reality, it is perfectly possible for an office-holder simultaneously to be an employee;
ii. though not invariably the case, in certain circumstances it is possible for a minister of religion to have a contractual relationship with his or her Church as an employee;
iii. in the absence of express intention (and there was no such intention ever expressed on the part of the Kirk) the provisions of the Sex Discrimination Act 1975 cannot be set aside; and
iv. by entering into a contract for services the parties bring themselves within the civil law and take the relationship outside the exclusive jurisdiction of the ecclesiastical courts, so that the provisions of the Church of Scotland Act 1921 no longer apply.

In the present case that argument seems to be conclusive. As Lord Hoffman observed in his dissenting opinion, 'To say, as Lord Templeman did in *Davies v Presbyterian Church of Wales*, that a priest is "the servant of God" is true for a believer but superfluous metaphor for a lawyer'.[29] And so it is. *Any* devout believer might claim to be in some sense a servant of God; but he or she would not expect a stipend and manse in return for that service.

Whatever one's theology of the priesthood of all believers, in secular reality the stipendiary ministry must surely be regarded as qualitatively different from lay adherence or membership. As Lady Hale pointed out,

> Miss Percy would clearly have been able to bring legal proceedings had her salary not been duly paid or had she been wrongly deprived of her manse. The consideration for these benefits must have been the performance of the duties she had undertaken. In this day and age, the notion that her 'salary', modest though it was, was simply to meet her

[27] *Percy*, para 148.
[28] *Percy*, para 152.
[29] *Percy*, para 61.

> basic subsistence needs while she devoted herself to her religious and pastoral duties is unrealistic.[30]

It should also be remembered that the original question raised at the tribunal was not 'whether or not an act of adultery by a minister of the Church was a disciplinary issue' but 'whether in a disciplinary case the Kirk was treating a female minister differently from a male one'.

As to whether or not the Church of Scotland continues to have exclusive jurisdiction in 'matters spiritual', in Lady Hale's view the Kirk remains

> ... free to decide what its members should believe, how they should manifest their belief in worship and in teaching, how it should organise its internal government, and the qualifications for membership and office. But the processes whereby they make decisions about membership and office may be subject to the ordinary laws of the land. It will all depend upon what that law says and means.[31]

That said, however, there remains a question mark over an issue that was not raised before the Appellate Committee because it was not relevant to the facts before it. It is (or, at any rate, was) settled law that the courts of the Kirk are also courts of the Realm and that their actings are not reviewable by the secular courts.[32] But Ms Percy was not tried by a church court; instead, she resigned and demitted and subsequently sued the Board of National Mission. Had she gone through trial by libel before her Presbytery followed by an appeal to the Judicial Commission of Assembly, would the outcome have been the same? One cannot help wondering whether their Lordships might have been rather more reluctant to overturn a determination by the Judicial Commission of Assembly than to find against a Church Board. But that was not what they were being asked to decide.

IN OPPOSITION TO THE MAJORITY DECISION

The most important criticisms of the *Percy* case arise from its ahistoricism and from its reliance on an unworkable distinction between civil and spiritual jurisdiction which was unfortunately perpetuated in the Church of Scotland Act 1921. The majority are drawn by the first of these failures

[30] *Percy*, para 148. It might be worth noting that consideration is not a necessary requirement in order to constitute a binding contract under Scots law.
[31] *Percy*, para 152.
[32] For example, Lord Justice-Clerk Moncreiff in *Wight v Dunkeld Presbytery* (1870) 8 M 921: 'If ... this were a case in which we were called upon to review the proceedings of an inferior court, I should have thought a strong case had been made out for our interference. But whatever inconsiderate *dicta* to that effect may have been thrown out, that is not the law of Scotland. The jurisdiction of the Church courts, as recognised judicatories of this realm, rests on a similar statutory foundation to that under which we administer justice within these walls ... Within their spiritual province the Church courts are as supreme as we are within the civil; and as this is a matter relating to the discipline of the Church, and solely within the cognisance of the Church courts, I think we have no power whatever to interfere'.

into treating the Church of Scotland as a voluntary association, which it is not. In addition, based on the second problem, the majority restricts the spiritual jurisdiction of the Church, which may lead to serious problems in future cases.

As Francis Lyall has shown, the Church of Scotland is fundamentally different from the other denominations in Scotland, which are voluntary associations.[33] However, Lord Hope states that because the Church of Scotland has not been incorporated by statute, it is also a voluntary association identical to the other denominations and religious groups in Scotland.[34]

By considering the Church in this way, Lord Hope ignores four hundred years of history; though it is complex and therefore difficult to understand, it is essential at least to make the attempt. Parliament may not have created a statutory corporation called 'the Church of Scotland', but it granted the Church of Scotland a legal monopoly in the Act Ratifying the Confession of Faith 1690, which recognises 'the presbyterian Church Government' as 'the only government of Christ's Church within this Kingdome [of Scotland]'.[35] That monopoly was incorporated into the Act ratifying the treaty uniting the Scottish and English Parliaments (the Union with England Act 1707), which incorporates the Act of Security and provides that 'Presbyterian Church Government and Discipline ... shall remain and continue unalterable ... [and] shall be the only Government of the Church within the Kingdom of Scotland.'[36] Subsequent church-state history is notoriously complex, and the Church of Scotland never enjoyed its apparent monopoly, since the Scottish Episcopalians Act 1711[37] and the eighteenth century secessions from the Kirk, *inter alia*, legitimated competing religious claims. Nevertheless, it is generally agreed that Parliament's abrogation of these rules, especially when it reintroduced patronage,[38] led to the Disruption of 1843 when approximately one-third of the clergy and between one-half and one-third of the laity left the Church of Scotland to form the Free Church of Scotland.

Among the cases leading to the Disruption is the famous *Auchterarder Case*, in which Lord Brougham stated that he was willing to issue an order directing a Presbytery to admit a minister to a benefice, which in the case before him also involved ordination.[39] In response to this and other decisions, in the years following the Disruption Parliament restricted civil

[33] F Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen University Press: Aberdeen 1980), chs 5-6.
[34] *Percy*, para 117.
[35] Confession of Faith Ratification Act 1690 (c 7; 12mo c 5) (Parliament of Scotland).
[36] Act for Securing the Protestant Religion, 1707 (c 6; 12mo c 6) (Protestant Religion and Presbyterian Church Act 1707) (Parliament of Scotland).
[37] Scottish Episcopalians Act 1711 (10 Ann, c 10).
[38] Church Patronage (Scotland) Act 1711/1712 (10 Ann, c 21).
[39] *Auchterarder Presbytery v Earl of Kinnoull* [1839] Macl & R 220 at 309, HL; see also 299.

jurisdiction over the Church. The first such restriction occurs in Lord Aberdeen's Act, which vests the church courts with exclusive jurisdiction over matters involving a presbyterial veto concerning the selection of ministers.[40] When patronage was legally abolished in 1874, Parliament re-emphasised the limited authority of the civil courts over the Church:

> [W]ith respect to the admission and settlement of ministers ... nothing ... shall affect or prejudice the right of the said Church, in the exercise of its undoubted powers to try the qualifications of persons appointed to vacant parishes; and the courts of the said Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof.[41]

It is only in light of these statutes and cases that the following language from the Church of Scotland Act 1921 makes sense:

> This Church ... receives from [the Lord Jesus Christ] and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers ...[42]

Given this history of these Acts of Parliament and given the conciliar nature of the Church of Scotland,[43] the terms 'office' and 'government' in the 1921 Act must include the office of minister. The position that a minister is an officeholder, which Lord Hoffman relied upon in his dissent,[44] finds firm support in the statutory recognition of the office of minister and in Parliament's exclusion of matters relating to the office from the jurisdiction of the civil courts.

The Appellate Committee claimed that if there were any civil jurisdiction, then it must arise from a contractual relation between the parties, and that such a contract must exist if the minister has a right to payment for his or her services. However, even in the absence of a contract—and irrespective of the scope of the term 'office'—under Scots law the remedy of recompense enables a person like a minister to enforce his or her right to the stipend and manse.[45] Thus, in the unlikely event that a minister needed to sue for his or her stipend or manse (the value of which could until recently be

[40] Benefices (Scotland) Act 1843 (6 & 7 Vict, c 61).
[41] Church Patronage (Scotland) Act 1874 (37 & 38 Vict, c 82), s 3.
[42] Church of Scotland Act 1921, Schedule, Articles Declaratory, Article IV.
[43] J L Weatherhead, *The Constitution and Laws of the Church of Scotland* (Board of Practice and Procedure: Edinburgh 1997).
[44] *Percy*, paras 56, 61-62.
[45] W D H Sellar, 'Obligations' in S T Smith and R Black, (eds) *The Laws of Scotland: Stair Memorial Encyclopaedia* (The Law Society of Scotland: Edinburgh 1994) vol 15, para 59.

converted to manse maill[46]), the question whether ministers can bring suit based on these patrimonial interests can be answered in the affirmative, contrary to the arguments of the majority in the *Percy* case, and their ability to do so does not imply that they are in a contractual relationship with their employer.

Finally, this line of statutes demonstrates beyond question that the Church of Scotland is not a voluntary association but instead is a national Church recognised by the state as having exclusive statutory jurisdiction over matters of ecclesiastical discipline. As ecclesiastical lawyers, our preoccupation with how (although less frequently with whether) the distinction between established and non-established Churches may apply to the Church of Scotland[47] has sometimes distracted us from other questions about the relevant legal categories which may apply to the Church and which may be of more use in deciding real legal questions like those involved in the *Percy* case. This continuous statutory recognition of the Church of Scotland, including Parliament's restriction of the civil courts' jurisdiction over matters involving ministers, demonstrates that, in spite of Lord Hope's view to the contrary, the Church is something more than a voluntary association.[48]

Had the Law Lords fully appreciated the finer legal arguments that led to the Disruption, they would also have made more of an effort to redefine or to re-characterise the distinction between civil and spiritual jurisdiction, which is of limited use in addressing these problems. During the conflict that led to the Disruption, little effort was made to argue that the patrons and their ministerial candidates should not be entitled to the patrimonial interests associated with the benefice: the stipend and manse discussed above. There was general agreement in the nineteenth century that the courts' civil jurisdiction ran to the patrimony but not to the spiritual affairs of the Kirk, but this civil/spiritual distinction did not prevent Lord Brougham from speculating that he would be willing to order a presbytery to admit a minister to a charge, even if that involved an order to ordain him to the ministry.

Because the rights in this case, like the patronage rights involved in the *Auchterarder* case, are inchoate, remedies for their infringement can be very expansive. Although compensation is available to Ms Percy if the Church is found liable under the Sex Discrimination Act 1975,[49] the panel may also recommend that a respondent take action 'appearing to the tribunal to be practicable to obviate or reduce the adverse effect on the complainant of

[46] That is, until the Church of Scotland (Property and Endowments) Act 1925 (c 33), s 40, was repealed by the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5), Sch 12, para 16(11).
[47] See eg C R Munro, 'Does Scotland Have an Established Church?' (1997) 4 Ecc LJ 639.
[48] See, generally, I R Guild and C Ferguson, 'Associations and Clubs' in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 2, paras 801 ff.
[49] R C Hay, V C Craig et al, 'Employment' in *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 9, para 378, citing the Sex Discrimination Act 1975, s 65(1)(b).

any act of discrimination'.[50] Thus, it is at least conceivable that a tribunal could attempt to direct the Church to re-employ Ms Percy or to change its internal disciplinary procedure. In this case, where Ms Percy has demitted her status as a minister and *not* simply her post in the Presbytery of Angus, re-employment could occur only with the consent of General Assembly. The potential implications of such an order include events similar to the infamous pre-Disruption *Strathbogie Case*, in which the Court of Session sought to prevent the General Assembly from punishing ministers who had ordained a presentee to a benefice in violation, it was argued, of church law.[51] So, too, interference with the courts of the Church and their procedure is simply inconsistent with the plain language of the 1921 Act. Some legal rule must prevent situations like *Strathbogie* from occurring, and the House of Lords has not only failed to articulate any such rule but has rejected the rule relied on by the Court of Session: the presumption that no contract exists with a minister, so that the Sex Discrimination Act 1975 does not apply in this or other similar cases. No objective criteria are identified in *Percy* that could assist the Church, or another court, in determining where the line between the civil and spiritual jurisdictions lies.

Although Lady Hale argues that the Church remains free to determine matters involving belief, forms of worship and instruction, organisation and qualifications for membership and office,[52] serious borderline issues are involved in making any of those decisions, and as long as discipline remains subject to the civil law, the potential for intrusion in matters of doctrine is evident. For example, Ms Percy was accused of an ecclesiastical offence—adultery—that the secular law no longer recognises. To use a counterfactual hypothetical, if the Church chose on entirely religious grounds, as it does not, to define the offence of adultery differently for men and women (while still employing women as ministers), would that be improper discrimination? What if there were disciplinary offences, such as acting as a commercial surrogate mother, which applied to women ministers but not to men? In either of these two cases, the Church could run afoul of the Sex Discrimination Act 1975, and nothing stated or implied in the *Percy* case prevents a minister from asking the civil courts to reinstate him or her as a remedy. The fact that a contract exists between the Church of Scotland and its ministers does not mean that the employment relationship is entirely civil and must therefore meet all of the requirements for non-discrimination under civil law, as the judges seem to think it does. In fact, the relationship between a Church and its clergy, even as it relates to matters of compensation, housing, and certainly as it relates to disciplinary offences, is largely spiritual, and the civil courts should recognise this fact.

Because space is limited, it is not possible here fully to develop a legal theory that might support a general rule restraining judges from interfering

[50] Ibid, citing the Sex Discrimination Act 1975, s 65(1)(c).
[51] F Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland*, pp 37-41.
[52] *Percy*, para 152, quoted at n 31 above.

in ministerial employment. However, the remaining part of this article will identify some principles that make judicial deference to religious organisations desirable and will show what sources might be available to construct a constitutional theory of such deference that could apply in Scotland. Because of the limitation on space, the arguments are in summary and are intended to provoke discussion, not to be legally definitive.

As Marjory MacLean has pointed out, it is possible to argue that religious institutions can be bearers of rights under European law.[53] Quoting Sophie C van Bijsterveld, MacLean has written that religion has 'social, institutional and communicative dimensions which should be taken into account by the law: structural or institutional arrangements transcending the individual-liberty approach are necessary'.[54] In another place van Bijsterveld has argued that the recognition of fundamental religious rights requires 'the core of church and state relations to be at the national level of the member states, and does not allow the EC/EU to be a vehicle for change for these national church and state legal systems'.[55]

The Treaty of Amsterdam endorses the principle of autonomy for churches, stating that 'The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in Member States.'[56] The Church of Scotland is entitled to such autonomy with regard to employment matters. Moreover, according to van Bijsterveld, the affirmative rights granted to individuals may apply to the Church of Scotland as well. Thus *Perceval-Price v Department of Economic Development*,[57] which extended the Equal Pay Act 1970 to the excluded statutory judicial office-holders by applying the 1976 Equal Treatment Directive (76/207/EC), need not necessarily apply in the case of a church. Since Ms Percy is arguably a statutory office-holder under the Church of Scotland Act 1921 (when it is viewed in an historical context), her rights and obligations should be governed by church law, rather than by the Sex Discrimination Act 1975 or other statute law.

Superimposing civil jurisdiction on employment matters relating to Church of Scotland ministers constitutes a serious deviation from the past relationship between the government of the United Kingdom and the Church, a relationship defined by statutes dating from at least the sixteenth

[53] M A MacLean, *Crown Rights of the Redeemer: A reformed approach to sovereignty for the national church in the 21st century* (University of Edinburgh 2004), pp 152-153.
[54] Ibid, quoting S C van Bijsterveld, 'Religion International Law and Policy in the Wider European Arena: New Dimensions and Developments' in R J Ahdar (ed) *Law and Religion* (Ashgate, Dartmouth 2000)163.
[55] S C van Bijsterfeld, 'Religions and Community Law: Separate Worlds or Growing Understanding?' in *European Consortium for Church-State Research, Proceedings of the Colloquium: Luxembourg-Trier, November 21-22, 1996* (A Giuffrae, Milan, 1996).
[56] *Declaration 11 on the status of churches and confessional organisations*, Official Journal C 340, http://europa.eu.int/eur-lex/lex/en/treaties/dat/11997D/htm/11997D.html#0133040028 .
[57] *Perceval-Price v Department of Economic Development* [2000] IRLR 380, NI CA.

century. The rule announced in *Percy* is a change of the kind to which van Bijsterveld objects. These principles could serve as a general basis for precluding government intervention in matters concerning Church of Scotland ministers.

It must, of course, be granted that the Sex Discrimination Act 1975 contains an explicit exception for Churches that do not ordain women, such as the Roman Catholic Church and (currently with respect to bishops) the Church of England. Putting to one side the wisdom of framing the exception in that way, which is highly questionable, it does not necessarily preclude the recognition of other statutory exceptions.

The only remaining question is whether such organisational independence belongs exclusively to the Church of Scotland. Statutorily, it belongs to all the Christian Churches in Scotland; however, human rights principles require its extension to other religions as well. Section 2 of the Church of Scotland Act 1921 states that nothing in the Act or in other laws 'shall prejudice the recognition of any other Church in Scotland as a Christian Church protected by law in the exercise of its spiritual functions', thus extending all of the immunity from civil jurisdiction properly belonging to the Church of Scotland *pro tanto* to other Christian Churches. On this basis, every Christian Church should be permitted to exercise exclusive jurisdiction regarding the discipline of its own clergy. Enforcing this statute with respect to Christians exclusively, however, would violate Article 9 of the European Convention on Human Rights, which protects religious freedom except when necessary 'in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of rights and freedoms of others'. Similarly, Article 14 protects the rights and freedoms under the Convention 'without discrimination on any ground such as ... religion'. Treating the religious freedom of the Church of Scotland and the Christian Churches differently from that of other religions would violate the principles in these articles. Thus, selective enforcement of section 2 of the 1921 Act would violate the Convention, and it should be interpreted to extend to all religions, not just to Christian Churches.

Why is it desirable to engage in such exercises in an effort to develop such a theory more fully? Because the theory is more efficient. Judges should decide cases that merit judicial attention. Legal rules that are broader and more predictable are more desirable than those that are narrow and fact-based. Some decisions will be necessary on the approach advocated here, regarding whether religious institutions (such as Scientologists, for example) are really religions at all and therefore entitled to the exemption, and this may sometimes be difficult, but the borderlines, once determined, have a general effect, since they apply to an entire institution.[58] Moreover, legal reasoning can articulate rules to distinguish between religious and non-religious institutions, which will be generally applicable and which will lead to predictability for the institutions involved.

[58] *United States v Ballard* 322 US 78 (1944), US SC.

It could be argued, in response, that once a particular disciplinary system has been deemed fair and non-discriminatory, employees (whether ministers or not) will not be able to challenge employment decisions. However, *Percy* shows that this is not the case. Ms Percy did not say that the Church of Scotland's system as a whole failed to function properly or that it generally discriminated against women. Rather, she argued that similarly-situated male ministers were treated differently from females in cases where they were accused of adultery. If she can litigate this question, then each individual employment decision by the Church, whether based on church law or not, becomes a potential source of litigation, and lawyers will have to be paid to minimise the risk that there will be an adverse judicial decision.

While the House of Lords' decision marks out a fruitful source of employment for lawyers, it is not a wise use of Church or government resources. It is not a good use of Church resources, because the resources of even the most misogynistic Churches are more often than not devoted to promoting other desirable social objectives, such as caring for the poor and disadvantaged. It is not a good use of government resources, because the risk of non-intervention (that is, discriminatory hiring) is better handled through social opprobrium. Two of the most politically powerful discriminators in the United Kingdom—the Roman Catholic Church and the Church of England—already have their statutory exceptions; such exceptions should not be granted based on political power. The best way to counteract unjust, discriminatory action by religious bodies, assuming that it *is* unjust (and both authors think it is), is not through targeted legal regulation, which can easily be misdirected, manipulated and misused, but through the ability of adherents to vote with their feet and to choose not to participate in religions that engage in practices that are unjust. The civil courts, however, should use every effort to avoid involvement in these kinds of disputes.

CONCLUSION

One of us believes that the assertion that a minister of religion is a 'servant of God' (and therefore outside the ambit of employment law) was never very well founded and that, in this respect at least, the judgment in *Percy* represents a sensible accommodation with twenty-first century reality. The other is less sanguine and believes that in ignoring the historical constitutional status of the Church, the House of Lords has abandoned an opportunity to increase the free exercise of all religion in Scotland.

What we both agree on, however, is this: that the decision in *Percy* tends to weaken the constitutional position of the Church of Scotland by putting it on the same level as the other Churches, which are regarded as voluntary associations in Scots law. By doing so it certainly levels the playing field; but it may also diminish the status of the Kirk as a national institution with unpredictable and possibly unintended results.