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## Religion and the Secular State in Scotland

### I. INTRODUCTION

The history of the relationship between religion and the state in Scotland is complex.<sup>1</sup> Scotland is part of the United Kingdom of Great Britain and Northern Ireland. United with England for many purposes since 1707, Scotland has its own legal system, and, since 1999, a devolved legislature has sat in Edinburgh. The Scottish Parliament has jurisdiction in all matters except those reserved to the Westminster Parliament by the Scotland Act of 1998. Formally speaking, we have no “U.K. Constitution.” No single or small group of documents, authoritatively promulgated or otherwise adopted, provides a statement, or even guidance, as to the framework of government in Britain, or as to the mutual relationships between the branches of government. Nonetheless, our constitution is to be found in legislation, case law and practice and constitutional law is studied in our universities. The U.K. accession to what is now the European Union means that the rules of that organization also play a role. Last, the U.K. has ratified the 1951 Convention on Human Rights and decades later incorporated much of that Convention and portions of its Protocols into U.K. law by the Human Rights Act also of 1998.

### II. CHURCHES AND FAITHS

#### A. *The Church of Scotland*

The main church in Scotland remains the Church of Scotland – the “Kirk,” as it is commonly known. It is the only church that has specific top-level statutory recognition. Reformed in 1560 by a “bottom-up” movement within the Kirk itself,<sup>2</sup> the position of the Kirk was finally secured just prior to the union of Scotland and England in 1707. Confirmation of the Church of Scotland as Presbyterian and of its Faith as expressed in the Westminster Confession of Faith of 1643, was given by the state by the Confession of Faith Ratification Act 1690, c. 7.<sup>3</sup> In the negotiation of the Union of the Scottish and English Parliaments, the status and governance of the Kirk were not negotiable.<sup>4</sup>

In 1843 the Kirk split in what is known as the Disruption. The points at issue were whether the Kirk could determine the creation of new parishes without the intervention of the state, whether the Kirk alone could determine who might be a member of a presbytery, and on the question of the appointment of a minister to a congregation. These had resulted in a series of court cases, but the government of the day refused to change the law when

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1. Lyall, F., *Of Presbyters and Kings: Church and State in the Law of Scotland*, Aberdeen: Aberdeen UP, 1980; Burleigh, J.H.S., *A Church History of Scotland*, Oxford: OUP, 1960.

2. The English Reformation was a messy affair. In England, the Reformation of 1533 was, to a degree, top-down, the result being that the English church was less thoroughly reformed. What was at stake was “who is the head of the church?” rather than the belief system that the church espoused. Due attention was not given to matters of belief until the drafting of the Thirty-nine Articles of Religion (1563, but in final form only in 1571).

3. For intervening history see Lyall, supra n. 1.

4. See The Protestant Religion and Presbyterian Church Act 1705, c.50 appointing the Scottish Commissioners to negotiate with England excluded the “worship, discipline and government of the Church of this kingdom as now established” from their remit. The Protestant Religion and Presbyterian Church Act 1706, c. 6 (the “Act of Security”) ratified the 1690 Confession of Faith Ratification Act, and both these Acts were inserted into the legislation implementing the Treaty of Union of both Parliaments, the Union with England Act, 1706, 1707 c.7 (Scotland), and the Union with Scotland Act, 1706, 6 Anne c.11 (England). See generally, Lyall (1980), supra n.1, at 21–22.

the decisions went against the argument of the Kirk. Those who left the established Kirk in 1843 formed the Free Church of Scotland, a Presbyterian denomination which has been subject to further schism. In 1847 a number of smaller mainly non-Presbyterian churches and denominations formed the United Presbyterian Church. That church and the bulk of the Free Church united to form the United Free Church of Scotland the bulk of which united with the Church of Scotland under a Basis and Plan of Union in 1929. To facilitate that union the state recognized as lawful “Articles Declaratory of the Church of Scotland in Matters Spiritual” by the Church of Scotland Act 1921. These Articles, negotiated between the two uniting churches, remain major constitutional documents of the Kirk, the Westminster Confession of Faith being acknowledged as being its principal subordinate standard of belief, the Word of God being primary. The Kirk is therefore acknowledged by the state by statute and has an independent jurisdiction of its belief, governance and discipline.<sup>5</sup> For decades the General Assembly of the Church of Scotland was influential and spoken of as being the intra-Scotland forum for the expression of Scottish concerns. With the establishment of the Scottish Parliament in 1999, that position has declined, if not reversed.

While the affairs of the Kirk are generally protected from interference by the civil arm, the Kirk has adapted its procedures to conform to the requirements of civil law. Notably by the Act III, 2001, “Anent Discipline” (as amended), the function of complaint, investigation, prosecution and judgement in cases of discipline have been separated.

A new development has been as to the status of Christian ministers. For many decades it was considered that ministers were ‘employed by God’ not by the congregation they served or the Kirk general and that therefore ordinary employment law did not apply. However, in *Percy v. Church of Scotland Board of National Mission* [2005] UKHL 73 it was held that an “Associate Minister” whose employment and duties had been very clearly specified had a contract of employment, and therefore access to the Employment Appeal Tribunal system to allege discrimination against the Kirk.<sup>6</sup> This case may have reverberations not only for the Kirk, but for other churches and religious organizations which hitherto have had a similar view of ministers. The Percy case is Scottish, but in that the judgements of the House of Lords refer to many English cases, it is clear that a similar result may come in England.

### B. *Other Churches and Faiths*

As indicated above, there are a number of churches, some Presbyterian in organization, other than the Kirk. There is also now a strong Islamic presence, with a lesser Hindu and Sikh presence. The Scottish Episcopal Church is a remnant of the church which the Stuarts sought to impose in the Seventeenth century. Roman Catholicism was severely affected by the Scottish Reformation. It was re-introduced (or was re-emergent) in the Nineteenth century, the Roman Catholic Relief Act of 18xx, being a major step in the UK as a whole and the Roman Catholic hierarchy in Scotland was reconstituted in 18xx. Roman Catholicism in Scotland was boosted by emigration from Ireland particular into central Scotland and remains a significant force. All churches other than the Kirk, remain in law private unincorporated associations, their property being held by trustees. Only the Kirk has formal statutory recognition as a body and its decisions are not subject to review in the other civil courts since its courts are of equivalent status.<sup>7</sup> However, at formal state occasions there is now usually an attempt to be inclusive of many Christian denominations and all major Scottish faiths, including Islam. It remains to be seen how the Coronation of the successor to Queen Elizabeth II will be organized.

Non-Kirk religious bodies are considered private associations whose proceedings will

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5. Cf. *infra* n. xx and accompanying text.

6. See *infra* n. 21.

7. *Logan v. Presbytery of Dumbarton* [1995] S. L. T. 1228; *Wight v. Presbytery of Dunkeld and the General Assembly of the Church of Scotland* [1870] 8 M. 921.

not be subject to judicial review by the civil courts unless they contravene basic principles such as natural justice.<sup>8</sup> Their property may, however, otherwise be subject to contention in the civil realm and they are open to the normal procedures in respect of Employment Law, unfair dismissal and the like.

### III. PROPERTY

In Scotland property may be owned by an individual or by a legal person (an incorporated entity or a partnership). Property is otherwise held by trustees on the terms and conditions on which the trust was constituted. The famous case is that in which the minority of the Free Church, unwilling to enter the union with the United Presbyterian Church to form the United Free church was held entitled to retain the whole assets of the Free Church.<sup>9</sup> What is important is the terms on which the property is held. The terms of that trust will generally be enforced.<sup>10</sup> What may happen if the Kirk splits over homosexuality remains to be seen.<sup>11</sup>

### IV. EDUCATION

The Kirk was important in the provision of education and the administration of poor relief, its parishes being in effect the units of local government until mid-Victorian times.<sup>12</sup> However, after a civil school system was established by the Education (Scotland) Act 1872, its influence declined. Other private schools continue to exist. However, over time the Roman Catholic Church found the expense of maintaining its own schools prohibitive and, in 1918 another Education (Scotland) Act permitted the Catholic schools to be incorporated into the state system but with the Catholic Church having a major voice in the appointment of teachers and the running of “their” schools. This remains the legal position, although recently it has been criticized as discriminatory against teachers not of the Roman Catholic persuasion. We await a court case to clarify this area.

### V. CHARITABLE ACTIVITY

Charitable activity has always been a religious duty for most faiths. Thanks to several instances of fraud and embezzlement by the trustees of certain charitable bodies, Scottish charity law was revised. Now the Charities and Trustee Investment (Scotland) Act 2005 (2005 asp.10) of the Scottish Parliament has tightened the requirements on all bodies seeking or receiving charitable status with attendant tax and other benefits, including the churches and other faith groupings. These requirements as to statement of purposes, disclosure of assets and their use, and independent certification of accounts applies to all charities. Some would see this as a secular intervention in the concerns of religious bodies, but there is a strong argument for the Act as deterring the exploitation of donors to the benefit of unscrupulous operators using “religion” as a convenient prompt towards generosity. Considerable taxation and other reliefs are afforded to religious bodies so long as they conform to the requirements for charitable status.<sup>13</sup>

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8. *Brentnall v. Synod of the Free Presbyterian Church of Scotland* [1986] S. L. T. 471.

9. *Bannatyne v. Overtoun* [1904] 7 F. (HL) 1; [1904] 12 S. L. T. 297; [1904] A.C. 515. In fact the property involved was so vast that the rump of the Free Church could not administer it, and by a Commission established under the Churches (Scotland) Act, 1905, the property was divided between the two denominations.

10. *Free Church Continuing v. Free Church* [2005] S.C. 396; [2005] CSOH 46; *Smith v. Morrison* [2009] CSOH 113. But see supra n. 9.

11. Cf. infra n. 15.

12. Under the *First Book of Discipline* (1560) the parishes of the new Kirk set up local schools and paid for the schoolmaster. See J.K. Cameron, ed. *The First Book of Discipline*, Edinburgh, 1972.

13. In *Gallagher v. Church of Jesus Christ of Latter-day Saints* [2008] UKHL56; [2008] 4 All ER 640, a Mormon Temple was held ineligible for rating relief though allied premises were, because the actual Temple was not open for public access.

## VI. HUMAN RIGHTS AND SECULARISM

Within the past decade secular/humanist voices have become clamant, attacking religious-based concepts. This has produced a willingness by non-religious persons to demand changes in the law to eliminate discrimination in favour of religion, and to require the acceptance of life-styles previously unacceptable (in formal law at least).<sup>14</sup>

Within the Kirk there has been recent debate which continues. The introduction of the Civil Partnership Act 2004 led to a call to allow ministers to conduct a service of blessing for such partnerships without being subjected to discipline for contravening church doctrine. This was voted down by presbyteries. However, in 2009 the settlement of a homosexual minister was allowed, and the matter has been sent to a Special Commission which will report in 2011.<sup>15</sup> Some have said that the Kirk may then split once again, the rift between the traditional view and those of others being fundamental. If so, property questions will arise.<sup>16</sup> In the meantime by Act V, 2007, "Anent Discrimination" the Kirk has banned discrimination within its operations, including on grounds of homosexual orientation, but not on ground of homosexual practice. The Episcopal Church of Scotland appears to be more tolerant.

The UK was influential in the drawing up of the 1951 Convention on Human Rights. However it was not until 1998 that much of the Convention and portions of its Protocols were incorporated into UK law by the Human Rights Act. The Act contains a "safeguard" for religious belief. Section 13 of that Act allows a court deciding a case with a religious element to take into account the importance of the freedom of thought, conscience and religion of a religious organization.<sup>17</sup> What this means remains obscure. Elements of the 1951 Convention had already been acted on. Discrimination on various grounds, sexual, racial and disability, was attacked over the years, and is now largely consolidated in the Equality Act 2006 which brings together much of the equality statutes and consolidates the agencies that formerly policed that legislation. Religious discrimination was (and is) of course a potential ground of discrimination or complaint particularly in the area of employment. Section 15 allows for religious belief in the case of organizations, but only in their doctrine, membership and practice, not where they are in effect acting as secular businesses. However, it will come as no surprise to find that the question of homosexuality has emerged as a point of difficulty, given the traditional attitude taken by Christian denominations. Accordingly in the Equality Act (Sexual Orientation) Regulations (2007 SI 1263) Regulations 14.3 and 4 protect freedom of doctrine and allows a religious organization to restrict its membership or participation in its activities where this is an outcome to its doctrine. Again, however, this does not apply in commercial activities of religious organizations, and, in an extension to previous law Regulation 14.2 specifically disapplies these exemptions in relation to education.

New questions may arise as to "religious belief." In two very recent English cases involving the Equal Opportunities Tribunal system, it has been held that a strongly held belief in environmental conservation can qualify as a "belief" protected by the law.<sup>18</sup> Further in another case as yet unreported, involving a police training officer, it was stated that spiritualism and consulting the dead "could be construed as being religious beliefs"

14. Notwithstanding the law, the history of the Victorian and later eras show a tacit acceptance at least in the higher echelons of society of a variety of life-styles dis-conform to the religious norm.

15. Cranmer, F. "Human Sexuality and the Church of Scotland: *Aitken et al. v. Presbytery of Aberdeen*" (2009) 11 *Eccles. L.Rev.* 334, 334-39.

16. See supra n. 7-8.

17. Human Rights Act 1998, c. 42, s. 13. Freedom of thought, conscience and religion: (1) If a court's determination of any question arising under this Act might affect the exercise by a religious organization (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right. (2) In this section "court" includes a tribunal. Id.

18. *Grainger Plc v. Nicholson* [2009] UKEAT 0219/09/ZT (explaining that an asserted belief in man-made climate change and the alleged resulting moral imperatives arising from it were capable of constituting a philosophical belief for the purpose of the Employment Equality (Religion or Belief) Regulations 2003).

under Employment Equality (Religion or Belief) Regulations Act 2003.<sup>19</sup> Apparently in the 2001 UK Census revealed that 390,000 people entered “Jedi” as their religion.<sup>20</sup> Some curious cases may eventuate from the broadened scope of “belief” not recognized by the state.

Finally I refer back to the Percy case, in which an allegation of discrimination has also been responsible for a major breach in the Kirk’s status as a separate jurisdiction.<sup>21</sup>

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19. The [London] Times, 13 Nov 2009, *available at* <http://business.timesonline.co.uk/tol/business/law/article6914978.ece>.

20. <http://news.bbc.co.uk/1/hi/uk/2757067.stm>. As to the distribution see <http://www.statistics.gov.uk/census2001/profiles/rank/jedi.asp/>.

21. See *supra* n. 6.