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# The Church–Clergy Relationship and Anti-discrimination Law

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*In its recent judgment in* Hosanna-Tabor Evangelical Lutheran Church and School v EEOC, *the United States Supreme Court held that the First Amendment precludes the application of anti-discrimination law to the employment relationship between a church and its clergy. In 2005 the House of Lords had reached the opposite conclusion, ruling, in* Percy v Board of National Mission of the Church of Scotland, *that the decision to dismiss an ordained minister was not a spiritual matter falling outside the scope of anti-discrimination legislation. This article argues that* Percy *largely neglected important aspects of church autonomy and that the reasoning in* Hosanna-Tabor *offers an opportunity to rethink whether secular law should be allowed to affect a religious group's decision to appoint or dismiss a minister.*

**Keywords:** clergy, employment, ministerial exception, Church of Scotland

In a survey of the ecclesiastical case law of the last 25 years published recently in this *Journal* it was noted that in the majority of cases where freedom of religion and secular rules clashed the latter emerged victorious.[1] The latest case in this trend is *Bull v Hall and Preddy*,[2] where the Court of Appeal held that a Christian hotelier had run foul of a prohibition of discrimination on the basis of sexual orientation when he refused to let a double-bedded room to a gay couple in a civil partnership. Other prominent examples that have attracted wide attention include the four cases heard together in the European Court of Human Rights in 2012:[3] *McFarlane v Relate Avon Ltd*,[4] about a relationship counsellor who refused to advise same-sex couples on sexual matters because he believed same-sex sexual activity to be a sin; *Ladele v Islington LBC*,[5] concerning a registrar who refused to perform civil partnership ceremonies for religious

1 C George, 'The ecclesiastical common law: a quarter-century retrospective', (2012) 14 Ecc LJ 22.
2 [2012] EWCA Civ 83.
3 *Eweida and Others v The United Kingdom* (App Nos 48420/10, 59842/10, 51671/10 and 36516/10), 15 January 2013, ECtHR, Fourth Section. The Court found a violation of Article 9 in the case of Ms Eweida, and rejected the other three claims.
4 [2010] EWCA Civ 880. See R Sandberg, 'Laws and religion: unravelling *McFarlane v Relate Avon Limited*', (2010) 12 Ecc LJ 361–370.
5 [2009] EWCA Civ 1357. See Sandberg 'Laws and religion'.

reasons; *Eweida v British Airways*,[6] about an employee who lost her job because she insisted on a wearing a small cross on a necklace, despite the employer's policy prohibiting all neck adornments; and *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust*,[7] concerning a nurse who refused to remove a cross necklace in compliance with the Trust's health and safety policy, which banned the wearing of necklaces. Other cases of interest include *R (E) v JFS Governing Body*,[8] where the Supreme Court found that a Jewish religious school's admission criteria constituted racial discrimination; and *R (Johns) v Derby City Council*,[9] concerning Christian foster carers who viewed homosexuality as morally wrong.

In these cases, the tension between religious freedom and anti-discrimination norms is generated because the believer relies, and wishes to act, on a religious viewpoint about a specific issue (such as what sexual relations are morally acceptable or how membership in a religious community should be defined) that conflicts with a competing viewpoint on the same issue; the religious basis is invoked as justification for any discriminatory impact the believer's action may have. But this is not the only way that such tension may arise. Consider the following example: a religious community appoints an individual as church minister; the two parties fall out with each other; the individual is fired and sues the church, claiming that her dismissal violates an anti-discrimination statute; the defendant responds that the relationship between a church and its clergy is a religious matter that falls outside the reach of anti-discrimination legislation. Here the religious nature of the defendant is pleaded not as justification for a specific discriminatory impact that its conduct may have but as a reason exempting it from anti-discrimination law altogether.

The facts in this example will, no doubt, sound familiar. This is because they resemble closely those of *Percy v Board of National Mission of the Church of Scotland*,[10] the leading authority on the application of anti-discrimination law to the employment relationship between ministers and their church. But they are taken from another case decided very recently by the United States Supreme Court: *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*.[11] Unlike the House of Lords in

6 [2010] EWCA Civ 80. See N Hatzis, 'Personal religious beliefs in the workplace: how not to define indirect discrimination', (2011) 74 *MLR* 287–305.
7 [2010] ET 1702886/2009 (21 April 2010).
8 [2009] UKSC 15. See C McCrudden, 'Multiculturalism, freedom of religion, equality and the British constitution: the JFS case considered', (2011) 9 *International Journal of Constitutional Law* 200–229; P Barber, 'State schools and religious authority: where to draw the line?', (2010) 12 Ecc LJ 224–228.
9 [2011] EWHC 375 (Admin).
10 [2005] UKHL 73. See F Cranmer and S Peterson, 'Employment, sex discrimination and the churches: the *Percy* case', (2006) 8 Ecc LJ 392–405.
11 102 S Ct 694 (2012).

*Percy*, the Supreme Court held that freedom of religion bars discrimination claims against religious institutions by their clergy, affirming, for the first time, the existence of a 'ministerial exception' for churches.

The first part of this article provides some background on the concept of the 'ministerial exception' and its constitutional basis in the First Amendment; the second part discusses the judgment in *Hosanna-Tabor*; and the final part revisits *Percy* in the light of the Supreme Court's reasoning. Two preliminary clarifications are necessary. First, while I use throughout the article terms such as 'church' and 'minister', the same approach applies to all religions and not just to the Christian faith. Second, my argument here is exclusively about the application of anti-discrimination law to the church–clergy relationship. Obviously a religious group may take non-discriminatory measures that negatively affect the clergy, or other measures (discriminatory or not) that affect employees who are not ministers; in those cases different rules apply.[12]

## THE MINISTERIAL EXCEPTION: SOME PRELIMINARIES

The ministerial exception is a principle that bars the application of anti-discrimination laws to the employment relationship between a church and its ministers. Its rationale is that there should be no external interference with a religious community's power to select, appoint and retain its clergy; as those decisions are linked inextricably with the community's religious beliefs, it would be incompatible with freedom of religion to allow state institutions to intervene in any way.

In American constitutional law, the issue of the status of church ministers came up for the first time in the context of internal disputes within a group over the use of church property. *Kedroff v Saint Nicholas Cathedral of Russian Orthodox Church in North America*[13] concerned the use of the Russian Orthodox cathedral in New York. The Church was divided in two factions, with each one recognising a different prelate as the rightful archbishop: on the one hand there was the appointee of the Moscow Patriarchate; on the other was the archbishop elected by the Church's North American congregations, who had split from the Moscow ecclesiastical authority because they believed that it was under the influence of the Communist regime. Following the split, the State of New York had passed legislation giving effect to the declared autonomy of the North American congregations and requiring all Russian Orthodox churches in New York to accept the jurisdiction of the North American hierarchy over that of the Moscow Patriarchate. The right to

12 For a discussion of the application of employment legislation to religious organisations, see M Hill, R Sandberg and N Doe, *Religion and Law in the United Kingdom* (Alphen aan den Rijn, 2011) part VI.

13 344 US 94 (1952).

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occupy and use the cathedral depended on whether the appointment by Moscow or the election by the North American congregations was the valid method for selecting the ruling prelate of the Russian Church in America.

The Supreme Court held that the New York law was unconstitutional because it 'directly prohibit[ed] the free exercise of an ecclesiastical right, the Church's choice of its hierarchy'.[14] It pointed out that the dispute over the use of the cathedral was 'strictly a matter of ecclesiastical government, the power of the Supreme Church Authority of the Russian Orthodox Church to appoint the ruling hierarch of the archdiocese of North America'.[15] The Russian Church was a hierarchical one, and the prelate in North America had always been appointed by Moscow. The effect of the impugned law, which favoured the prelate elected locally, was to 'displac[e] one church administrator with another. It pass[ed] the control of matters strictly ecclesiastical from one church authority to another. It thus intrud[ed] for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment.'[16] The Court explained the wider constitutional significance of its holding in the following terms: 'Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference.'[17]

While *Kedroff* was the first judgment to anchor the right of churches to select their ministers on the Constitution, the origins of the rule can be found in a nineteenth-century case decided under federal common law, *Watson v Jones*.[18] There, the Supreme Court dealt with a split between the anti-slavery and pro-slavery factions within the Presbyterian Church in Kentucky and the ensuing dispute about control of Church property. The national Presbyterian Church, through its governing body, the General Assembly, had taken the side of the federal government in the Civil War and supported the abolition of slavery. The pro-slavery faction in Kentucky had denounced this act as heretical and declared that it would refuse to be governed by it. When the General Assembly approved the election of anti-slavery elders for the local church, pro-slavery elders refused to accept them as proper church officials. The General Assembly then declared the Kentucky Presbytery and Synod recognised by the pro-slavery group to be 'in no sense . . . true and lawful'[19] members of the Presbyterian Church of the United States. However, the Court of Appeals of

14 Ibid, at 119.
15 Ibid, at 115.
16 Ibid, at 119.
17 Ibid, at 116. Following *Kedroff*, the case was remanded to New York state courts, which again found for the locally elected archbishop but, this time, on the basis of state common law. The US Supreme reversed again in *Kreshik v Saint Nicholas Cathedral* 363 US 190 (1960).
18 13 Wall 679 (1872).
19 Ibid, at 693.

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Kentucky held that the pro-slavery group should retain control of Church property because the action of the General Assembly was against the Presbyterian Church Constitution and thus void. The anti-slavery group established federal jurisdiction, brought a claim in the federal circuit court and eventually the case reached the Supreme Court.

The central issue was whether civil courts could adjudicate on issues relating to the title of persons who were church officials and on the validity of internal church proceedings. The Supreme Court drew a distinction between English and American law. Citing the judgment in *Attorney-General v Pearson*,[20] it noted that civil courts in England were required to form a view about what is 'the correct standard of faith in the church organisation and which of the contending parties before the court holds to this standard'[21] where this was necessary for the resolution of the dispute before them. In American law, however, there was no such correct standard that civil courts had to enforce:

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.[22]

Members of religious organisations who felt aggrieved by their decisions could have recourse to internal procedures and tribunals, but it would be inappropriate, the Supreme Court noted, to allow secular courts to intervene because this 'would lead to the total subversion of … religious bodies'.[23] In ecclesiastical matters – matters concerning 'theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them'[24] – secular courts had no jurisdiction.[25]

*Watson* has been described as 'the source of much of the constitutional law concerning church property disputes',[26] and the approach it developed has had a decisive influence on modern First Amendment doctrine. In *Kedroff*,

20 (1817) 3 Merivale 353; 36 ER 135.
21 *Watson*, 13 Wall 679 (1872) at 727.
22 Ibid, at 728–729.
23 Ibid, at 729.
24 Ibid, at 733.
25 The Supreme Court held that since the pro-slavery faction had split off from the central body of the Presbyterian Church and refused to recognise the election of elders approved by the General Assembly it had no right to the disputed property.
26 K Greenawalt, 'Hands off! Civil court involvement in conflicts over religious property', (1998) 98 *Columbia Law Review* 1847.

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the Supreme Court acknowledged the importance of *Watson*: 'The opinion radiates … a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'[27] The effect of *Kedroff* was to elevate to the constitutional plane the right of religious communities to choose their ministers as part of their more general right to self-government.

The aspect of religious freedom that relates to church government has been called the 'hands-off'[28] or church autonomy[29] rule. In broad terms, it means that religious communities should be allowed a privileged sphere where they can function free from state interference. Issues of doctrine and faith and theological disputes over their correct interpretation are obvious examples of what that space encompasses. But the rule is much wider and covers most internal decisions about the organisation of collective religious life within the community.[30] In the case law of the Supreme Court on religious freedom, the idea that ecclesiastical and secular matters are, and should be kept, distinct is a recurring theme. One of its most distinctive formulations belongs to Justice Black, who, in 1948, noted that 'the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere'.[31] Two decades later, in a well-known case concerning a split in the Presbyterian Church in Georgia,[32] Justice Brennan wrote an opinion upholding the right of churches to make decisions about the issues falling within the ecclesiastical sphere, stating that 'civil courts have no role in determining ecclesiastical questions'.[33] This is now the dominant approach in American law, with both the Supreme Court and lower courts being careful to avoid getting involved in ecclesiastical matters.[34]

27 *Kedroff* 344 US 94 (1952) at p 115.

28 R Garnett, 'A hands-off approach to religious doctrine: what are we talking about?', (2008–2009) 84 *Notre Dame Law Review* 837–864; Greenawalt, 'Hands off!', pp 1843–1907.

29 D Laycock, 'Church autonomy revisited', (2009) 7 *Georgetown Journal of Law and Public Policy* 253–278; P Horwitz, 'Churches as First Amendment institutions: of sovereignty and spheres', (2009) 44 *Harvard Civil Rights–Civil Liberties Law Review* 79–131; D Laycock, 'Towards a general theory of the religion clauses: the case of church labor relations and the right to church autonomy', (1981) 81 *Columbia Law Review* 1373–1417.

30 Laycock, 'Church autonomy revisited', p 254: 'when a church does something by way of managing its own internal affairs, it does not have to point to a doctrine or a prohibition or a claim of conscience in every case. It can make out a good church autonomy claim simply by saying that this is internal to the church. This is our business; it is none of your business.'

31 *McCollum v Board of Education* 333 US 203 (1948) at 212.

32 *Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church* 393 US 440 (1969).

33 Ibid, at 447.

34 Greenawalt, 'Hands off!', p 1844: 'The Supreme Court's basic constitutional approach … is that secular courts must not determine questions of religious doctrine and practice. Not only must they refrain from deciding which doctrines and practices are correct or wise, they must also avoid

But what are those matters which secular law and institutions should leave for religious authorities to decide? While the exact boundaries of the sphere of church autonomy are the subject of an ongoing debate,[35] there is no doubt that the selection of clergy falls squarely within that sphere. Ministers play a pivotal role in the collective religious life of the community, giving expression to its dogma and precepts, so decisions about their appointment and dismissal are exercises of the community's right to religious freedom. Where the effect of secular law is to impose on a church an unwanted minister, a fundamental aspect of that right is violated. In other words, the relationship between church and clergy is an ecclesiastical matter, which the principle of church autonomy assigns to the exclusive jurisdiction of the church.[36]

This is how lower courts in the United States have understood and interpreted the ministerial exception. For example, *Petruska v Gannon University* concerned a female chaplain for a private Catholic college, who, when dismissed from her job, sued her former employer, claiming, inter alia, that the dismissal was motivated by her gender and the employer's wish to retaliate because she had taken a firm stance against sexual harassment in the college. The US Court of Appeals for the Third Circuit held that both the discrimination and the retaliation claim were barred by the ministerial exception based on the First Amendment. It asserted that the free exercise of religion included two aspects. First, like individuals, religious groups had an interest in expressing religious beliefs and communicating their faith. Unlike individuals, however, groups do not have their own voice; hence the need to speak through their authorised representatives, the clergy:

> A minister is not merely an employee of the church; she is the embodiment of its message. A minister serves as the church's public representative, its ambassador, and its voice to the faithful. Accordingly, the process of selecting a minister is *per se* a religious exercise.[37]

Second, the selection and appointment of ministers involves the institutional dimension of religious freedom, 'the church's right to decide matters of governance and internal organization'.[38] A college chaplain performs spiritual

deciding which are faithful to a group's traditions.' Garnett, 'A hands-off approach', p 842: 'in our political community, government arms and actors (including courts) steer well clear of theological disputes; they avoid (perhaps to a fault) excessive entanglement with the governance and doctrines of religious communities, institutions, and traditions'.

35 For discussion, see the articles in notes 28 and 29.

36 On church autonomy as the basis for the ministerial exception, see C Lund, 'In defense of the ministerial exception', (2011–2012) 90 *North Carolina Law Review* 35 ff.

37 *Petruska v Gannon University* 462 F3d 294 (3rd Circ. 2006) at 306.

38 Ibid, at 307.

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functions, so decisions about whom to employ relate directly to those functions, which are constitutionally protected from state interference.

Applying similar reasoning, a number of other federal appeals courts also reached the conclusion that the Constitution mandates the existence of a ministerial exception to protect churches from secular law intrusions into their relationship with their ministers.[39] However, the Supreme Court had never ruled on the existence of the exception or the conditions for its application before January 2012.

## THE US SUPREME COURT ON THE CHURCH–CLERGY RELATIONSHIP

Hosanna-Tabor is a member congregation of the Lutheran Church – Missouri Synod. One of its activities is the operation of a school where two categories of teachers are employed. On the one hand, there are 'called' teachers, who are considered to have been called to the vocation by God through election by a congregation; on the other, there are 'lay' teachers, who are appointed by the school authorities without the involvement of the congregation. Both categories perform the same duties.

Cheryl Perich started work as a lay teacher in 1999 and, following the completion of theological training, was asked by Hosanna-Tabor to become a called teacher. In 2004 she was diagnosed with narcolepsy. The principal suggested that she take disability leave for the 2004–2005 school year, telling her that she could return to her job when she was better. However, in January 2005 she informed Perich that the school board intended to change the employment rules, asking employees who were on disability leave for more than six months to resign their 'called teacher' post. Perich replied that she intended to resume her teaching duties in February and produced a note from her doctor that she was fit for work. The school board, however, told the congregation that in their opinion she would be unable to work that year or the next, and the congregation asked her to resign and offered to pay part of her health insurance premiums. Perich refused the offer and reported to work as soon as her doctor had confirmed it was safe to do so. The principal told her that there was no job for her and Perich left the school only after receiving a letter acknowledging she had appeared for work. The same evening the principal told Perich over the phone that she would be fired and Perich replied that she intended to take legal action to assert her rights against discrimination. The school accused her of 'insubordination and disruptive behavior' and claimed that 'by

39 See eg *Rweyemamu v Cote* 520 F3d 198 (2nd Circ. 2008); *Alicea-Hernandez v Catholic Bishop of Chicago* 320 F3d 698 (7th Circ. 2003); *EEOC v Roman Catholic Diocese of Raleigh* 213 F3d 795 (4th Circ. 2000); *Bollard v Society of Jesus* 196 F3d 940 (9th Circ. 1999).

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threatening to take legal action' she had damaged her relationship with the school. A little later, Perich was fired.

Perich complained to the Equal Employment Opportunity Commission, which brought a claim on her behalf under the Americans with Disabilities Act 1990, which prohibits discrimination on the basis of disability and retaliation by an employer against an employee who has opposed a discriminatory practice. At first instance the church was successful in its application for summary judgment on the basis of the ministerial exception, but the Court of Appeals for the Sixth Circuit reversed, holding that Perich did not qualify as minister. In an opinion by Chief Justice Roberts, the Supreme Court unanimously found for Hosanna-Tabor. First it affirmed the existence of the exception as a requirement based on the First Amendment. Citing *Watson v Jones* and *Kedroff*, it explained that both the Free Exercise Clause and the Establishment Clause preclude the application of secular law where the effect would be to interfere with a church's selection of its clergy:

> Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so ... interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.[40]

A considerably longer part of the judgment deals with the interpretation of the term 'minister of religion'. The Supreme Court ruled that it is not only 'the head of a religious congregation'[41] that is covered by the exception and noted that, instead of a 'rigid formula',[42] a case-by-case analysis is necessary. In the present case, Perich had received religious training, was subsequently commissioned by a formal process that included the endorsement of her local Synod and election by the congregation and was accorded the title 'Minister of Religion, Commissioned'. Moreover, she had held herself out as a minister and claimed tax deductions that were available only to ministers. Further, her duties at the school included teaching religion four days a week and leading the students in prayer three times a day; the fact that lay teachers performed the same religious duties, the Court continued, was relevant but not dispositive. Finally, while most of her working day was devoted to secular duties (only 45 minutes per day were consumed by religious work), this was not enough to remove her case from the scope of the exception because the other factors indicated that her appointment was religious in nature. The Court concluded:

40 *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* 132 S Ct 694 (2012) at 706.
41 Ibid, at 707.
42 Ibid.

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> In light of these considerations – the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church – we conclude that Perich was a minister covered by the ministerial exception.[43]

The Supreme Court further rejected the claimant's argument that the religious reasons given by Hosanna-Tabor for her dismissal were a pretext. The church had submitted that she was fired because her threat to bring a civil lawsuit contravened a commitment in the Lutheran faith, endorsed by the local Synod, that disputes should be resolved internally, without recourse to secular authorities. Chief Justice Roberts held that allowing civil courts to enquire into the truthfulness of the religious justifications invoked by a church for dismissing an unwanted minister would undermine the very purpose of the ministerial exception:

> The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful – a matter strictly ecclesiastical . . . – is the church's alone.[44]

Finally, the Supreme Court stressed the limited scope of its judgment, which applies only to discrimination lawsuits by ministers against their church, and left open the question whether other claims can be treated similarly:

> Today we hold only that the ministerial exception bars such a suit. We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers.[45]

The importance of the judgment cannot be overemphasised. The Supreme Court held for the first time that the ministerial exception is a constitutional requirement flowing from the First Amendment. Thus, it goes beyond any statutory exemption from discrimination laws that the legislature has the discretion to grant (or not).[46] It follows that religious organisations have a claim based on

43 Ibid, at 708.
44 Ibid, at 709.
45 Ibid, at 710.
46 In fact, Title I of the Americans with Disabilities Act 1990 creates a statutory exemption for religious organisations that can give preference in employment to persons of a particular religion or require their employees to conform to a specific religious doctrine, but it does not allow them to discriminate on the basis of disability. For example, a Christian organisation may refuse to employ a disabled non-Christian but not a disabled Christian because of his or her disability. This rule applies to *all*

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the Constitution to fashion their employment relationship with their clergy outside the constraints of anti-discrimination law. Second, it affirmed the approach taken by lower federal courts that one does not need to be the head of a local congregation to count as a minister of religion; it is the nature of one's work that is important. In the choice between substance and form, the Supreme Court prioritised the former. This substantive test is not dominated by any single criterion. Rather, judges are expected to approach each case with enough flexibility to allow them to take into account its particular characteristics.

## REVISITING *PERCY*

How, then, should we be thinking about *Percy* under the light of *Hosanna-Tabor*? *Percy* concerned a minister of the Church of Scotland who was forced to resign after an allegation that she had had a relationship with a married elder. She claimed, inter alia, that she was the victim of sex discrimination as defined in the Sex Discrimination Act 1975, because the Church had not taken action against male ministers having extra-marital affairs. The appeal before the House of Lords raised two main issues: whether the claimant and the Church of Scotland had entered into a contract of employment and, if that were the case, whether the jurisdiction of civil courts was excluded by the Church of Scotland Act 1921, which assigns to the Church's exclusive jurisdiction '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' and prohibits any secular interference with 'matters spiritual' or with 'the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction'.[47] The House of Lords held that such a contract did, indeed, exist and that disputes arising under it did not constitute matters spiritual. It is the latter point that gives reason for concern.[48]

Lord Nicholls asserted that 'a sex discrimination claim would not be regarded as a spiritual matter even though it is based on the way the Church authorities are alleged to have exercised their disciplinary jurisdiction'.[49] Lord Hope took the view that such a claim 'has nothing to do with matters of doctrine, worship or government or with membership in the Church'.[50] And Baroness Hale stated that, while the Church 'is free to decide … how it should organise

employees, not merely members of the clergy. On the other hand, the constitutionally mandated religious exception affirmed in *Hosanna-Tabor* relieves churches of the obligation to not discriminate against disabled people but applies exclusively to the clergy.

47 Schedule to the Church of Scotland Act 1921, Articles Declaratory, Article IV.

48 For discussions of the employment contract issue, see Hill, Sandberg and Doe, *Religion and Law in the United Kingdom*, pp 118 ff; J Rivers, *The Law of Organized Religions: between establishment and secularism* (Oxford, 2010), pp 116 ff.

49 *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73 at para 40.

50 Ibid at para 132.

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its internal government, and the qualifications for membership and office',[51] it was not exempted from discrimination claims.

What the comparison of those statements with *Hosanna-Tabor* demonstrates is that the House of Lords underestimated both the spiritual aspect of the relationship between a church and its clergy and the requirements flowing from church autonomy principles. A minister is unlike any other employee, as he or she occupies a position at the centre of collective religious life within the church, and his or her work is directly linked to the substance of religious faith. It is unrealistic and artificial to draw a line dividing faith from the very people who are supposed to be its living embodiment. As Justice Alito aptly noted in his concurring opinion in *Hosanna-Tabor*, in religion 'the messenger matters'.[52] Therefore, secular interference with clergy selection risks undermining the ability of religious groups to fashion the content of their beliefs and communicate it to the wider public.

*Percy*'s neglect of the institutional aspects of religious freedom is equally troubling. The majority of the House of Lords took the view that the case had nothing to do with church governance. But this is wrong: the selection of clergy has everything to do with the internal organisation of religious groups and the functioning of their institutions. In fact, it is one of the most prominent expressions of church autonomy.[53] Where the government penalises a church for dismissing a minister who is no longer wanted or trusted, it restricts that church's free exercise of religion.[54] To the extent that a legal system recognises and protects a private space where churches can make decisions about religious affairs applying their doctrine, the appointment and removal of clergy must fall within that space. This is why the Supreme Court held that making a church retain an unwanted minister or punishing it for dismissing such a minister 'interferes with the internal governance of the church'.[55] *Percy*'s approach is unsatisfactory because, although it accepts that a sphere of church autonomy does exist, it excludes from its scope one of the issues that churches most (and rightly) care about. Unlike *Hosanna-Tabor*, *Percy* was not argued as a freedom of religion case. In future cases, however, courts will undoubtedly be asked to determine

51 Ibid at para 152.

52 *Hosanna-Tabor* at 713 (Alito J, concurring). See also the judgment of the US Court of Appeals for the First Circuit in *Natal v Christian Missionary Alliance* 878 F2d 1575 (1st Circ. 1989) at 1578: '[A] religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents.'

53 See also the point made in Rivers, *Law of Organized Religions*, p 337, that church autonomy includes 'a right to select, train, appoint, and dismiss leaders'.

54 Laycock, 'Church autonomy revisited', pp 260–261; Horwitz, 'Churches and the First Amendment', p 119.

55 *Hosanna-Tabor* at 706. One of the criticisms against *Percy* was that it does not preclude the possibility of courts ordering the Church to re-employ the dismissed minister: see Cranmer and Peterson, 'Employment, sex discrimination and the churches', p 402.

whether secular interferences with the selection of clergy are compatible with the Human Rights Act.

The obvious, and very important, objection to the suggestion that *Percy* should be reconsidered in the direction of providing a more robust protection to the autonomy of religious organisations concerns the danger of widespread discrimination.[56] The law has rightly come to recognise that, by treating someone less favourably on the basis of certain prohibited reasons, the discriminator inflicts on her or him an injustice;[57] its response is the adoption of legislation that prohibits such conduct and provides for remedies when the anti-discrimination obligation is breached. Thus, there is a real and far-reaching governmental interest in preventing discrimination. At the same time, however, every legal system acknowledges the existence of competing considerations – such as religious freedom – that sometimes take precedence. For example, both the Equality Act 2010 and the EU Directive 2000/78 establishing a framework for equal treatment in employment contain various religious exemptions.[58] Here the legislature carves out an area where religious freedom claims trump equality objectives. The judgment in *Hosanna-Tabor* demonstrates that there is probably good reason for courts to adopt a similar approach when dealing with the relationship between church and clergy.

Further, it is possible to structure the ministerial exception in a manner that considerably reduces its adverse impact. First, the exception does not cover every person employed by a religious organisation but only members of the clergy. While the designation of a person as 'minister of religion' is important, it is not the end of the story: the Supreme Court did not treat as determinative the fact that the claimant had been given that title, but examined in detail her appointment procedure, her duties and the benefits she enjoyed, before concluding that the exception applied to her. Justice Alito emphatically stated that in applying the ministerial exception 'such a title is neither necessary nor sufficient'.[59] It is the substance of one's role within the church that makes one a member of the clergy: 'What matters is that [she] played an important role as an instrument of her church's religious message and as a leader of its worship activities.'[60]

56 For criticisms of the ministerial exception, see eg C Mala Corbin, 'Above the law? The constitutionality of the ministerial exemption from antidiscrimination law', (2007) 75 *Fordham Law Review* 1965–2038; M Hamilton, 'Religious institutions, the no-harm doctrine and the public good', (2004) *Brigham Young University Law Review* 1099–1216.

57 See generally J Gardner, 'Discrimination as injustice', (1996) 16 *OJLS* 353–367.

58 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. On religious exemptions in English law, see R Sandberg and N Doe, 'Religious exemptions in discrimination law', (2007) 66 CLJ 302–312.

59 *Hosanna-Tabor* at 713 (Alito J, concurring).

60 Ibid, at 715 (Alito J, concurring). By contrast, Justice Thomas expressed the view that where the church sincerely considers an individual to be a minister of religion this is sufficient for the ministerial exception to apply: ibid, p 711 (Thomas J, concurring).

Second, the exception only precludes discrimination claims. Other causes of action remain available to ministers whose rights the organisation has violated. Thus, in *Petruska*, the Third Circuit held that the claimant's breach of contract claim was not barred by the ministerial exception.[61] Similarly, the Supreme Court narrowed down the holding of *Hosanna-Tabor* by stating explicitly that it only applies to discrimination lawsuits, leaving open the issue of how other claims should be approached.

The Third Circuit summed up the restricted nature of the ministerial exception as follows: 'It does not apply to *all* employment decisions by religious institutions, nor does it apply to *all* claims by ministers. It applies only to claims involving a religious institution's choice as to who will perform spiritual functions.'[62] The Supreme Court affirmed in *Hosanna-Tabor* that the underlying idea of and justification for the exception is indeed the Constitution's concern to protect the right of religious institutions to select those who will give expression to their faith. That right occupies a central place in the intellectual history of freedom of religion and has lost none of its importance in today's world. The problem with *Percy* is that it failed to appreciate both the inextricable link between religious doctrine and those who preach it and also a church's institutional interest in making decisions about its governance free from external interferences.

## CONCLUSION

This article has suggested that *Percy*'s categorical exclusion of discrimination suits by clergy against their church from the sphere of church autonomy is erroneous. A more nuanced approach is required, and the judgment of the US Supreme Court in *Hosanna-Tabor* provides a good starting point for rethinking the issue. Clearly, if a rule similar to the 'ministerial exception' were to be developed, it would require working out the specific details of its application: the definition of the term 'minister', the material scope of the exception, its relationship with the Human Rights Act and so forth. While the answers may not be easy, this is a step that our courts need to take because important religious freedom interests are implicated. It is possible that the development of a narrow exception that would cover those aspects of the church–clergy employment relationship that truly belong to the ecclesiastical sphere is the way forward.

61 *Petruska* at pp 311 ff.
62 Ibid, p 305 (emphasis in the original).

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