Church and State in Scotland:
The Articles Declaratory

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The Church of Scotland's General Assembly of 2008 established a Special Commission, due to report to the 2010 Assembly on the future of the Third Article Declaratory of the Church's Constitution.[1] This is the Article which declares the Church of Scotland to be the national Church in Scotland, and it is the Article which declares its functions to include a territorial ministry throughout the country. The Commission is given the ongoing debate over planning and resourcing as its backdrop, and is authorised to consider the effect of change to the Article. All sorts of outcomes to the Commission's work might be imagined, and some of the possibilities would have implications for the character and self-understanding of our denomination.

I propose in this article to offer some background to the Church's debate, and (being neither a member nor a staff-member of the Commission) to set out the questions I ask myself when I wonder about this subject. If that helps to extend the debate over fraternal lunches and post-Presbytery glasses of orange juice around the country, the best traditions of national Church debate will be served.[2]

In this article I will use 'Church' to mean 'Church of Scotland' unless otherwise indicated, which is not to imply that equivalent challenges do not exist in other denominations in Scotland, each with its own direction of mission.

The Church and the civil magistrate in the last 100 years

The Articles Declaratory

For the first 350 years after the Reformation, Church and state in Scotland tussled over questions about the spiritual role of the civil magistrate and – the corollary of that – the independence of the Church

from secular authority, and the national role of what was then (and to some tastes remains) the Established Church. For the last 90 years the question has instead been largely one of textual interpretation, since Church and state both declared the answers to those constitutional questions in the Articles Declaratory of our constitution, which were appended first to the Church of Scotland Act 1921[3] and later to the Basis and Plan of Union of 1929.

The Church has the power[4] to alter the Articles, subject to restrictions stated in their text. None of these restrictions would prevent alteration to Article III, nor to Articles IV and VI which are the provisions most of interest in constitutional debate. Article IV articulates at some length the independent spiritual jurisdiction of the Church in certain areas; while Article VI expresses the spiritual responsibilities of the civil authority. Article IV continues to form the basis of the Church's claims to some legal autonomy; while Article VI is probably regarded as a dated, unrealistic prescription for Scotland's civil magistrate(s), and it is not considered further here.

It would, I believe, be difficult and artificial to consider Article III and IV apart from each other. The rights claimed under Article IV are claimed for a Church that is somehow 'national', a Church that intends its jurisdiction to be exercised throughout the same territory governed by the civil jurisdiction it seeks to exclude, which is the very territory it undertakes to furnish with the ordinances of religion. The responsibilities the Church acknowledges in Article III are claimed under the same dominical institution and mandate by which the Church's inherent authority is defended. Changes to the Third Article might have unavoidable implications for the defence of the Fourth, to which I turn first.

The independent spiritual jurisdiction of the Church of Scotland

The Church's independent spiritual jurisdiction exists in four spiritual areas, grouped together in the Barrier Act of 1697, listed again in the United Free Church Act anent Spiritual Independence of the Church of 1906, and finally enshrined in the Fourth Article Declaratory. These are: worship, doctrine, (church) government, and discipline.

There are two ways to assess the last 100 years of legal debate over the Church's jurisdiction. A pessimistic view would regard the Church's

area of legal autonomy shrinking over time, and see the advent of new regulations (e.g. in child protection and charity trusteeship) as the erosion of the Church's previous self-regulation; while an optimistic view would see the 'new' regulations as addressing matters which previously were not regulated by either the Church or the civil law – which hardly constitutes an erosion of any substantive authority. The pessimistic view would regard a judicial decision against the Church, like that in the recent *Percy v. National Mission* case,[5] as a moving of the jurisdictional boundary away from the Church and towards the state; while the optimistic view would argue that, in the fog that surrounds what the Church means by that word 'discipline', the dividing line was not drawn with any exactness in the Articles, and the civil courts must simply declare answers to questions which have not been put to them before.

Sometimes the answer to such a jurisdictional question is so easy that the question is unlikely to reach judicial consideration. Sometimes the answer is so difficult that only the judiciary can answer it. Imagine a colour spectrum with three blocks, with red at one end, blue at the other and purple in the middle. Some issues lie clearly at the blue end of the spectrum, the Church's end: virtually no issue of doctrine, or the content of worship, will ever be successfully prosecuted in civil law, because the civil law has no reason to be interested. Some issues lie clearly at the red end of the spectrum, the civil magistrate's end: the Church operates under the country's criminal, taxation and contract laws, for example, without claiming a general exemption from their terms. Those are the easy examples, where one jurisdiction is just not interested in challenging the other.

Until recently, there was only one way – there could have appeared to be only one possible way – to resolve the cases arising in the foggy, purple, middle ground. One jurisdiction had to concede to the other, and if necessary it might take a court action to force the concession. For example, in the *Ballantyne v. Presbytery of Wigtown and Others* case in the 1930s,[6] the Court of Session declined jurisdiction in a case involving the right of a congregation to settle a minister.

Recently, however, the Church has resorted from time to time to a different tactic, passing a legislative measure giving an 'equivalence of protection' that mirrored a very similar provision in civil law. This

involves the Church on the one hand conceding to the civil magistrate the right to determine legal rights and obligations, but on the other hand insisting on designing and administering the detailed rules within the spiritual jurisdiction. The tactic has had varying results. A successful example seems to be the Church legislation from 2007 addressing issues of bullying and discrimination,[7] which was introduced to ensure that the Department for Business, Enterprise and Regulatory Reform (what had been the DTI) would not try to provide civil law regulation in those areas for inducted parish ministers. In a notable failure of the Church's tactic, however, the House of Lords in the *Percy* case dismissed as inadequate the action of the 2002 General Assembly, which had set up a Special Commission to examine Miss Percy's claims and provide a remedy equivalent to any she could have received from an Industrial Tribunal under the Sex Discrimination Act.

Is this 'equivalence of protection' tactic a capitulation by the Church to the civil magistrate? Is it pointless for the Church to retain a jurisdiction, but consent to populate it with laws mirroring the civil law? Elsewhere[8] I have argued that the Church should not try to regulate anything which can be adequately regulated by civil law, and should not seek to maximise its jurisdiction beyond what is necessary to obey an authority higher than the civil. But that is exactly why the 'equivalent protection' manoeuvre is justifiable. The separate, but parallel, regulation of the same rights and responsibilities is necessary whenever the Church needs to retain the ability to do things differently from the secular world. In many areas the Church may wish to go further than the civil law, perhaps setting a higher demand upon its ministers, or providing a greater protection in some area than the civil law affords. Wherever the Church wishes to do better, to do more, than the civil law can do, there is every reason to retain that area within the ecclesiastical jurisdiction; and if it means some duplication of provisions to give re-assurance to the civil magistrate that the lesser secular standard is being fully met, it is neither pointless nor weak to do so.

This argument only works, though, if the Church always seeks to do better and do more to guarantee just dealings with its office-bearers, employees and members. Surely we would not want, in this

day and age, to argue for an independent jurisdiction so that we could offer less protection than the world does. If we did, I think the civil law would now stop us; and I have no difficulty with that.

The changing face of the civil magistrate

Over the centuries, the secular authority which Reformed writers have usually referred to as 'the civil magistrate' has changed in nature. A Genevan city authority, a Scottish monarch, a British monarch, a British parliament, have all provided different kinds of challenge, resistance, support, pretended support, and ceremonial partnership, ever since the Reformation. Things have always been most complicated, most intriguing, and often most fast-moving, when the civil magistrate has presented more than one face to the Church. The Scottish Reformation of 1560 was characterised by the Lords of the Congregation taking a different position from the Stuart Crown. The pre-Disruption cases unfolded against a background of parliamentary machinations, with legislature and judiciary responding quite separately to the same debate.[9] The *Percy* case drew in arguments from European law, which long post-dated the Church of Scotland Act of 1921 and put into question the extent of the protection it offers. The civil magistrate changes and diversifies. The Church is rarely, therefore, in the position of being able to choose to go back to any perceived golden age of the past, because the world has changed too much.

In the age of the framing of the Articles in the early twentieth century, the British state provided a unitary secular partner in the discussion of the issue and the provision of the historic legal solution in the 1921 settlement. Today Parliaments in Europe and in Edinburgh, and the constant proliferation of tribunals and government agencies, create a hugely complex civil law framework; while the social, economic and political impacts of untamed globalisation reduce the ability of recognised authorities to regulate some things (e.g. the Internet, or international missionary activity) very effectively at all.

If the Church seems to be unclear about the future in all these difficult areas of debate, it is because we are just like Gromit perched on a toy train, hurtling across the floor and frantically laying track just in front of us – section by section so fast you can't see our arms whirling round and round – just fast enough that the train has line

enough for its forward momentum. It may be the glory of the Articles Declaratory that they contain quite a bit of text that still means something in a fast-changing world; but that change is the process we cannot choose to stop.

The current debate

The Church of Scotland ministering to society in Scotland today

The Church claims its legal autonomy – however far it does claim it still – to enable it to minister to the people of Scotland according to a confessional basis and subject to no ultimate authority but the divine. The current debate about Article III asks what the Church's duty is, and how it should be territorial in its ministry and national in its character.

Assuming finite resources, and therefore 'zero-sum' calculations at least to begin with, the Special Commission has to consider the legitimacy and effect of any shift of resources (say towards centres of population, centres of existing church strength, or centres of particular evangelical need) which would result in the abandonment of a territorial ministry somewhere else. What is the test to tell if that has happened? The reduction of resources in a sparsely-populated area, or in an overwhelmingly Roman Catholic area, will be managed by the union or linkage of existing Church of Scotland parishes, creating larger and larger charges, while giving the appearance that the National Church still regards itself as reaching over the whole of the map. The day might come when the Church would feel it was more honest to abandon that Article III language, if it rang hollow in places largely untouched by our ministry. When would the reality of the territorial ministry have been abandoned, in practice?: when someone's minister lives more than 50 miles away?; when more than three small islands share one minister?; when a UPA parish has more than 20,000 of a non-Catholic population? Questions about the meaning of the territorial ministry, and the state of it, have to be taken together to make sense.

So too do questions about the territorial ministry and questions about the 'national' character of the Church hang together. Here are questions for a debate: does the Church of Scotland exercise its territorial ministry because it is the national Church with privileges

under the 1707 settlement, or is it rather a national Church because of its willingness to reach the parts of Scotland other denominations do not reach? In other words, does the Church of Scotland have its current character for reasons of history or geography?

What would constitute the relinquishing of 'national Church' status? Would the first abandonment of a piece of Scottish soil, anywhere, mean we had lost the right to use that 'national' label? Would that step absolve the Crown from the undertakings of the Accession Oath, i.e. the preservation of Presbyterian Church government in Scotland?

What would result from that relinquishing of 'national Church' status? Would Scotland flourish better with nothing identified as the national Church? Would some of the expectations placed upon the Church of Scotland – for representation, commentary, ceremonial presence, chaplaincy to social institutions – be transferred elsewhere, to other spiritual providers? Would those consequences happen only in the places from which the Church of Scotland had chosen to withdraw its presence, or would these be effects across the country, reactions to a change of national status?

And, picking up the earlier discussion, what would be the implication for Article IV of this kind of change in Article III? How many changes to our model of national mission does it take before the Church of Scotland is not discernibly different from other denominations – or are we indistinguishable already? How long after such a loss of distinctiveness would our particular form of spiritual independence survive – or does recent legal history suggest it has already died? Which way do the dominoes lean? Can a national and territorial Church (an 'Article III Church') still do its job if it becomes more and more an indistinguishable subject of the civil law, unable to do things its own way, to its own standards? Or can a legally autonomous Church (an 'Article IV Church') justify its privileges if it closes the book on what it promised 90 years ago would be its ministry? Can the Church claim to have some kind of jurisdiction over a society without extending its service to the whole of that society? And if either Article is worth letting go, shouldn't both go at once as a gesture of integrity and humility?

Do not expect answers here to those teasing questions. But what steps are required to reach any answer?

Principle and pragmatism

It seems to me there is a sequence of questions to be answered before it is possible to answer the kind of question which has been posed to the Special Commission. They are the questions which ask how God calls and directs the Church, and where the Church hears the Spirit's voice.

Those who defend Article III in its current form usually do so, I think, as a matter of principle. Is that what it is? Does the Holy Spirit direct the Church by giving principles to follow, principles which have to be defended? That seems to me just a little too much *deus ex machina*. God, dynamic and sovereign, cannot be bound by a principle, but gets done what he wills to do. Article III, I venture to suggest, is not a matter of principle, but in its day it was God's way of getting the Church's work done in this country. It is a pragmatic Article in response to a divine calling to the Church, not a principle derived from natural or divine law.

So those who would defend its terms need to do more than say: hands off; you can't touch that Article, and that's a matter of principle. They have to say: hands off; the mission this text describes is still the best possible strategy, even for our generation. Or they have to say: hands off; too many other pillars will fall if you take this one away, and the unintended consequences would far outweigh any benefits. Or they have to say: hands off; this Church is called to preach the Gospel to the whole world (well, Scotland) and not just to the bits of it which amongst them produce the best harvest. Or they have to say: hands off, because there are places in Scotland that will be reached by no-one if they are not reached by us.

Meanwhile those who would change the Article need to do more than say: let's get rid of the territorial ministry because on principle we don't like being a national Church. They have to say: God's kingdom is strategically better served by another system. Or they have to say: the Church can keep its autonomy and radical obedience even without this geographical constraint on its activities. Or they have to say: there are ways to preach to the whole world (well, Scotland) which are more efficient and effective than this. Or they have to say: there are new ways to reach every place.

The debaters of this immense constitutional question must be

careful in deciding what to include and what to dismiss as they try to discern God's will. May I suggest, though, that nothing is off-limits?

Conclusion

The Special Commission stands on giants' shoulders: men like John White of the Barony, Alexander Martin of the United Free Church College (New College), and Lord Sands (Christopher Johnston). To honour their achievements, and keep the forward momentum that is the calling of a Reformed denomination, is the unenviable task for our generation. The conclusions which follow are simple, 'no-brainer' thoughts, designed – as I said earlier – to generate conversations around the Church.

The civil magistrate, whoever he or they may be today, will not allow us to construct anew a settlement like the 1921 settlement. If any part of it is dismantled, it can never be recovered. So whatever the Church may feel is right, it must do, but if it does the wrong thing it will not reverse the damage.

There are many positions to take on the independent spiritual jurisdiction. There is only one test in choosing among them: what do we require to defend to enable ourselves to fulfil radical obedience to Christ's radical Gospel, to march to the beat of his unique drum, and to be different from the world when, in the very middle of our middles, we know we have to be different?

In our Gromit-on-the-train role, we cannot stop laying the track in front of us. The world does not allow us to stop, and anyway the Church is movement before it is institution, surely?

In the territorial ministry described in Article III, does the Spirit blow where she wills? Without it, is our land becalmed?

Notes

1 http://www.churchofscotland.org.uk/extranet/xchurchlaw/xchurchlawarticles.htm

2 Two long-familiar works covering some of this material are: Francis Lyall, *Of Presbyters and Kings: Church and State in the Law of Scotland* (Aberdeen: Aberdeen University Press, 1980) and Douglas M. Murray, *Freedom to Reform: The 'Articles Declaratory' of the Church of Scotland 1921* (The Chalmers Lectures of 1991; London: T. & T. Clark, 1993). The considerable legal activity in this area which post-dates those works is narrated in Marjory A. MacLean, *The Crown Rights of the Redeemer: The Spiritual Freedom of the Church of Scotland* (The Chalmers Lectures of 2007; Edinburgh: Saint Andrew Press, 2009). An interesting, lawyerly discussion of some aspects of judicial freedom is very readably presented in Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (The Jean Clark Memorial Lectures; Edinburgh: Edinburgh University Press, 2008). For readers who would find it helpful to have an introduction to the Church's legal system, see Marjory A. MacLean, ed., *Legal Systems of Scottish Churches* (Dundee: Dundee University Press, 2009).

3 Church of Scotland Act 1921 c. 29.

4 Article VIII.

5 *Percy (AP) (Appellant) v. Church of Scotland Board of National Mission (Respondent) (Scotland)* [2005] UKHL 73.

6 *Ballantyne and Others v. Presbytery of Wigtown and Others*, 1936 SC 625.

7 Acts IV and V 2007.

8 William Storrar, *Scottish Identity: A Christian Vision* (Edinburgh: Handsel, 1990).

9 See Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution*, which narrates both these aspects of the dispute with fascinating pen-portraits of the main protagonists.