WOMEN PRIESTS
THE LEGAL BACKGROUND

DAVID McCLEAN, D.C.L., Barrister,
Professor of Law, University of Sheffield,
Chairman of the House of Laity of General Synod

In the coming months, the General Synod and then the diocesan synods will be considering legislation enabling bishops of the Church of England to ordain women to the office of priest, and making related provisions as to the manner and effect of this change in the law and practice of the Church of England. The purpose of this article is not to examine that draft legislation, which at the time of writing is still being subjected to line-by-line scrutiny in a Revision Committee of the General Synod, but to sketch in some of the legal background against which it was prepared. In particular, there is a fundamental issue: why is legislation needed? To which may be added: why is Parliamentary authority, expressed by the approval of a Measure, required for any necessary change in the Canons?

The then Legal Adviser to the General Synod gave advice in 1972 in these terms:

> "Because for centuries it has been the custom that men only can be ordained for the ministry, this is as much part of the law as if it had been the subject of legislation . . . There does not appear to be any specific legislation on the point, nor any statutory provision laying down the legal position. There are, however, certain provisions which assume that only men can be ordained (e.g. Canon C1 states that 'no man shall be accounted or taken to be a lawful bishop, priest or deacon in the Church of England . . . except he be called, tried, examined and admitted thereunto according to the Ordinal . . .')."[1]

This opinion requires some elaboration, and in the light of more recent legislation one qualification. By way of elaboration, the limitation of the priesthood to those of the male gender has been a feature of canon law through the centuries. As Chancellor Bursell reminded readers of the last issue of this Journal, any rule of pre-Reformation canon law must be pleaded and proved to have been recognised, continued and acted upon in England since the Reformation, to show that it has been received and adopted as part of the law ecclesiastical recognised by the common law.[2] In the Canons of 1603, as in the current Canons, the male personal pronoun is used throughout when referring to a candidate for the priesthood. For example, Canon 34 of the 1603 set provides "No bishop shall henceforth admit any person into sacred orders, which is not of his own diocese, except he be. . ." and then specifies the necessary qualifications of age and education, etc. It was a consideration of the 1603 Canons which led two members of the Appellate Tribunal of the Anglican Church of Australia (Mr Justice Cox and Mr K. R. Handley Q.C.), to declare that "by virtue of these Canons, and quite independently of the

1. *The Ordination of Women to the Priesthood* (GS 104), paras. 332-333. Mr Woodeforde is identified as the source of the advice in an Opinion of Sir Harold Kent and others set out in GS Misc. 88 (1978), para. 149.

2. R. Bursell, "What is the Place of Custom in English Canon Law?" in issue no. 4 of this Journal at p.15, citing Lord Westbury in *Bishop of Exeter v Marshall* (1868) L.R. 3 H.L. 17.

Ordinal, there was an effective legal barrier to the ordination of women in the Church of England."[3] Given that there is no presumption in the Canons that words importing the masculine gender include the feminine, the consistent use of the male personal pronoun in the various post-Reformation Canons clearly establishes the continued force of the traditional limitation of the priesthood to men.

The only qualification to Mr Woodeford's advice is that reference must now be made to section 1(4) of the Deacons (Ordination of Women) Measure 1986. This provision, inserted during the Revision Committee Stage on the proposal of the present writer for the quieting of doubts, is that "Nothing in this Measure shall make it lawful for a women to be ordained to the office of priest." A corresponding provision was included as paragraph 9 of Canon C3. Though merely declaratory of the effect of the particular legislation of which they form part, these provisions plainly reflect the general understanding of the state of the law.

That understanding also underlies various Opinions given in connection with the position of women ordained to the priesthood overseas but seeking permission to officiate in England. Sir Harold Kent (Dean of the Arches), Dr Carey and Mr Hanson gave an opinion in 1976 that in this context an Act or Measure (to which the presumption in the Interpretation Act does apply) should not be read as applying to women because the established rule of ecclesiastical law meant that a "contrary intention" rebutting the presumption existed.[4] In a later opinion by the Revd. K. J. T. Elphinstone (Dean of the Arches), Mrs Eadie (Standing Counsel) and Mr Hanson, a reference was made to the use of the male pronoun in section 10 of the Act of Uniformity 1662 in the context of the admission of a person to a benefice; the Interpretation Act presumption only applies to Acts passed after 1850.[5] It will be recalled that an attempt to enable women priests ordained in other Anglican provinces to be permitted to officiate in England ended with the failure in July 1986 of the Draft Women Ordained Abroad Measure to obtain the necessary two-thirds majority at Final Approval in the General Synod.

The position of women ordained priest in another province raises what can only be regarded as a point of ecclesiastical conflict of laws. Two Rules may be suggested for inclusion in a future edition of *Dicey and Morris:*

(1) Questions relating to the ordination of a women to the priesthood are governed by the law of the province within which the ordination takes place.
(2) Questions relating to the exercise of ministry of a woman so ordained are governed by the law of the province within which her ministry is proposed to be exercised.

The second of those Rules is well-established, and was the very basis upon which the discussion of the Women Ordained Abroad Measure proceeded. The same should, it is submitted, be the case in respect of the first of those Rules; but a remarkable address by the Archbishop of Canterbury in November 1988 has raised doubts.*

3. August 1985. The opinion cited is a dissenting one, but the dissent rested on a different point.
4. See GS Misc. 88, para. 149.
5. For the opinion, see Appendix A to GS 415, *Women Lawfully Ordained Abroad* (1979); for the presumption see Interpretation Act 1978, ss. 6, 22(1)(3) and Sched. 2, para. 2.

* See statement by the Archbishop of Canterbury on page 9.

His Grace referred to the implicit assumption in the Overseas and Other Clergy (Ministry and Ordination) Measure 1967, which he described as "correct at the time of its being passed",[6] that the orders of clergy of overseas Anglican provinces were recognised by the Church of England. It seems that, in the Archbishop's view, this assumption does *not* apply to priests (of whatever gender) ordained by a woman bishop; and he expressly spoke in terms of "recognition of orders",[7]. So Dr Runcie's thesis must be that the canons of another Anglican province will *not* be regarded in the conflict of laws rules of English ecclesiastical law as governing matters of ordination where a woman bishop is concerned. Put another way, the "public policy" of the Church of England applies not only to the exercise of ministry in the Provinces of Canterbury and York but to the actual ordaining function exercised in another province. Whatever the theologians may make of this, to a lawyer it is novel and surprising; and, with respect, a Presidential Address to the General Synod is not a source of law.

To return to the main theme, there remains to be considered the effect of the various pieces of legislation originating from both Westminster and Brussels designed to remove discrimination on grounds of gender, and their possible application to the holding of office in the Church of England.

Chancellor Newsom caused a stir by his suggestion in *Theology* for May 1984 that section 1 of the Sex Disqualification (Removal) Act 1919 applied. It provides that

> "A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation. . ."

As the learned Chancellor recognised, the breadth of the references to "office", "post", "profession" and "vocation" is cut down by the qualifying adjective "civil", an odd word to find undefined but one arguably excluding ecclesiastical offices and religious vocations. The Act was of course passed to reverse the position established in such cases as *Beresford-Hope v Lady Sandhurst*[8] where, in holding that a woman could not be a County Councillor (even if she had secured the majority of votes cast), Lord Esher M.R. observed that "by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public function".[9] That was, of course, a judgment delivered in the reign of Queen Victoria, so the constitutional bar was not quite absolute! Interestingly, a woman could be a sexton, that not being a "thing of public consideration"; it could not be considered "on a higher foot than governor of a house of correction or gaolkeeper".[10] Chancellor Newsom's view of the 1919 Act was recorded in a report presented to the General Synod;[11] an unnamed lawyer member of the Synod (not the present writer) is cited as rejecting the idea that the Act could apply, without

6. *Report of Proceedings*, vol. 19, p.702.
7. *Ibid.*, p. 703.
8. (1889) 23 Q.B.D. 79.
9. At p.95.
10. *Olive v Ingram* (1739) 7 Mod. 263, cited in the great case of *Chorlton v Lings* (1868) L.R.4 C.P.374, 381.(a woman could not register to vote)
11. GS Misc. 198, *The Ordination of Women to the Priesthood: Further Report* (1984), pp.94-5.

express reference, to the ministry of the Church of England. This does seem the better view, and there is no trace of any idea in 1919 that the ecclesiastical law was being changed.

Of clearer relevance are provisions in the Sex Discrimination Act 1975, and these were closely considered in the Women Ordained Abroad context. The key provisions are sections 13 and 19, which provide in relevant part:

13(1) It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for or facilitates engagement in a particular profession [defined as including vocation] or trade to discriminate against a woman . . .
(e) in the terms on which it is prepared to confer on her that authorisation or qualification.

19(1) Nothing in this Part applies to employment for the 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.

(2) Nothing in section 13 applies to an authorisation or qualification (as defined in that section) for the purposes of an organised religion where the authorisation or qualification 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.

These provisions were considered briefly in the 1979 Report on *Women Lawfully Ordained Abroad*[12] and at greater length in a learned opinion by Chancellor Calcutt obtained at the request of the Revision Committee on the Draft Women Ordained Abroad Measure and taking in part the form of a commentary on an unpublished paper the present writer had prepared for the Committee (of which he was a member).[13] It is clear that the continued exclusion of women from candidacy for the priesthood is protected by these provisions. It was a deliberate decision of proponents of the ordination of women not to oppose them in Parliament, but to allow change to be brought about by specifically Church of England legislation.

If, as is proposed in the draft Priests (Ordination of Women) Measure now before the General Synod, women are admitted to the priesthood but limitations are placed on their ministry out of regard to the conscientiously-held objections of some bishops, clergy and parishioners, the protection of section 19 will be lost as the "authorisation or qualification" (the ordination and licensing) will no longer be limited to one sex. The fact that the "safeguards" in the draft Measure are to protect "religious susceptibilities" does not seem to be sufficient.[14] A special provision was included in the draft Measure to preserve the "ecclesiastical exemption" from the Sex Discrimination Act 1975 in respect of the "safeguards".

Two Directives of the E.E.C. apply the "principle of equal treatment", that is of non-discrimination on the basis of gender. Directive 76/20/EEC of 9 February 1976 applies that principle "as regards access to employment, including promotion, and to vocational training . . ."[15] The concept of "employment" is

12. GS 415, paras, 17-20, drafted by the present writer, and reproduced in GS Misc. 198 (1984), pp.93-4.
13. Chancellor Calcutt's opinion is reproduced in GS Misc. 198 (1984), pp.112-120.
14. See to similar effect Chancellor Calcutt, in para, 2(f) of his opinion; but *Garland v British Rail Engineering Ltd* [1983] 2 A.C. 751 which he cites can no longer be relied upon on the relevant point: *Duke v G.E.C. Reliance Ltd* [1988] 1 All E.R. 626, H.L.
15. Directive, Article 1(1).

generally inappropriate in the context of the priesthood, and, as Chancellor Calcutt put it, "in view of the virtual complete absence of women priests in the Community generally and the lack of any specific religious exemption equivalent to section 19 of the Sex Discrimination Act 1975, there must surely be a strong argument that questions concerning the priesthood do not fall within the scope of the Directive at all". In any case, the Directive preserves the right of Member States to exclude those occupational activities "for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor".[16]

A second Directive, the relevance of which seems not previously to have been noted, is Directive 86/313/EEC of 11 December 1986, applying the same "principle of equal treatment" to men and women "engaged in an activity . . . in a self-employed capacity", including "all persons pursuing a gainful activity for their own account . . . including . . . members of the liberal professions".[17] The clergy might well claim to be members of a "liberal profession" (a term not defined in the Directive); and in this context there is no reservation of the rights of Member States to exclude particular occupational activities. It is, however, clear from the background documents that the authors of the Directive had concerns far removed from the present context. The Directive implements Action 5 of a Community Action Programme presented by the European Commission in December 1981, which spoke of self-employed women, especially those in agriculture as not always having a clearly defined occupational status, making it difficult to identify their contribution to the family income. The Parliament, in its Resolution, is primarily concerned with inheritance rights, separate treatment for tax purposes, and the role of women in agriculture and family businesses.[18] The Economic and Social Committee similarly spoke of two categories of women: those pursuing a gainful activity on their own account and those who share in the running of a family business.[19] There is nothing to suggest that the European institutions gave a moment's thought to the claims of women to be ordained priest by bishops of the Church of England, not to mention the Roman Catholic and Greek Orthodox churches.

Even if it were thought that either of the E.E.C. Directives had any relevance to the question of women priests, the balance of authority is now in favour of the view that they have no direct effect as between individuals, so that a woman could not bring an action against, for example, her bishop![20]

That is, perhaps, not quite the end of the story. There are doubtless other chapters yet unwritten. But readers may care to know that the papers of the Legislative Group which proposed principles for draft legislation in this field contain some jurisprudential material. Discussion of "conscience clauses", for example, was helped by Jeremy Bentham's acidic presentation of legal positivism:

> "If I say openly, I hate the law, *ergo* it is not binding and ought to be disobeyed, no one will listen to me; but by calling my hate my conscience or my moral sense, I urge the same argument in another and more plausible form: I seem to assign a reason for my dislike, when in truth I have only given it a sounding and specious name."

16. Directive, Article 2(2). Cf. Case 165/82 *Commission of the European Community v United Kingdom* [1984] C.M.L.R. 44 (European Ct.) (male midwives).
17. Directive, Article 2.
18. Official Journal No. C172/80 of 2 July 1984.
19. Official Journal No. C343/1 of 24 December 1984.
20. See Case 152/84 *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* [1986] Q.B. 401 (European Ct.); *Duke v G.E.C. Reliance Ltd* [1988] 1 All E.R. 626, H.L.

Perhaps a proponent of the legislation should give the last word to Mr Oswald Clark, a doughty opponent, who found this marvellous passage by Dean Swift on limitations on the sovereignty of Parliament:

> "Put the case that walking on the slack rope were the only talent required by Act of Parliament for making a man a bishop; no doubt when a man had done this feat of activity in form, he might sit in the House of Lords, put on his robes and his rochet, go down to his palace, receive and spend his rents; but it requireth very little Christianity to believe this tumbler to be one whit more a bishop than he was before; because the law of God hath otherwise decreed."[21]

21. *Works* (ed. Scott), vol. 3, p.90, Remarks on a Book entitled *The Rights of the Christian Church*.

https://doi.org/10.1017/S0956618X00000296 Published online by Cambridge University Press