CONTROLLING THE CLERGY OF THE CHURCH OF ENGLAND: NINETEENTH CENTURY TO THE PRESENT DAY

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INTRODUCTION

The religious ministry, together with medicine and the law, is one of the oldest professions. Like other professions, ministers of religion have particular rules that govern their behaviour. But unlike other professions, the clergy of the Church of England, formerly of the Church of Rome, have an entirely separate legal system dedicated to the regulation of their conduct, both within the working environment and outside it.

The accountability of the clergy under canon law,[1] in addition to the dictates of secular law, creates a disciplinary procedure that is without parallel in other professional spheres. For example, an infringement of the general criminal law by a clergyperson may result not only in prosecution in the secular courts, but also proceedings in the quasi-criminal jurisdiction of the ecclesiastical courts. Similarly, where proceedings in the secular courts establish the irretrievable breakdown of the marriage of a clergyperson, this may give rise to disciplinary procedures in the church courts, with legally enforceable consequences. This situation is partly the result of the historical evolution of the two legal systems, as outlined below; but it is also partly a concomitant of the particular role that is occupied by members of the clergy. Expectations of parishioners, who contribute to the costs of ministry, and expectations of members of society in general, suggest that higher standards of conduct are demanded of the clergy than of the laity, and their misdemeanours are dealt with by force of law, rather than self-regulation as in other professions.

Although it is usually matters relating to sexual or financial misconduct that attract attention, the system of clergy discipline also extends to matters such as dress, swearing, drinking, and detailed regulations concerning the liturgy and church services. Clergy are also subject to complex regulatory provisions relating to furnishings and ornamentation of churches and care of church buildings.[2]

Apologists for the disciplinary system have argued that a punitive system is necessary for the sake of the community, so that "scandal is avoided and the delinquent understands that the authorities in the church have a prior responsibility to safeguard the common good of the faithful".[3] Whether the system of regulation that has evolved is an appropriate means to achieve this end is another matter.

Public awareness of this separate system and of matters of clergy discipline tends to be limited, but occasionally attention is drawn to the difficulties associated with this area of law. For example, in the nineteenth century, the emergence of the Oxford Movement and the Tractarians engendered public interest and controversy.[4] This led to changes in legislation, the prosecution of clergy in the criminal courts in respect of

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[1] Canon law regulates not only the conduct of the clergy, but also such diverse matters as forms and ceremonies for divine service, church furnishings, and qualifications for post holders such as archdeacons.

[2] This is the faculty law of the Church of England. Clergy must seek a faculty (permission) to make alterations to the fabric or furniture of a church, and civil proceedings in the church courts can ensue.

[3] Working Party on Clergy Discipline and Ecclesiastical Courts (1996) 4 Ecc LJ 18 at 511.

[4] For an account of this period, see WJ Sparrow Simpson, *The History of the Anglo-Catholic Revival from 1845* (George Allen & Unwin Ltd, 1932).

the conduct of worship in church, and the use of the Judicial Committee of the Privy Council as a forum for debate in theological and doctrinal matters. In this century, the debate leading to the enactment of the Clergy Discipline Measure 2003 has resulted in a resurgence of interest in the topic.

This article discusses some of the issues surrounding clergy disciplinary procedures in the Church of England,[5] beginning with an examination of the most readily identifiable sources of law by which the conduct of the clergy has been regulated, these being the legislation of the Church of England, the decisions of the courts, and parliamentary legislation. Special attention is given to the nineteenth century statutes and cases as these throw into sharp focus the complex relationship between the secular and the ecclesiastical legal systems. It is then possible to consider some of the current disciplinary regulations, with an overview of the Ecclesiastical Jurisdiction Measure 1963 and the newly enacted Clergy Discipline Measure 2003. This study will give some indication of the difficulties that abound when the subtleties of professional conduct must be regulated by statute and case law.

SOURCES OF LAW: LEGISLATION OF THE CHURCH

Lord Blackburn, in the case of *Mackonochie v Lord Penzance*[6] remarked that the ecclesiastical law of England "is not a foreign law. It is part of the general law of England – of the common law in that wider sense which embraces all the ancient and approved customs of England which form law". The origins of ecclesiastical law are indeed ancient, for they can be traced back to at least four centuries before the Reformation, to the evolution of the canon law of the Western or Catholic church.[7] In the 12th century, at the time when the common law of England (*ie* common to the whole country) was emerging, the universal law of the church (with the Pope at its head) was also developing into a parallel system which was held to apply to all Christians in all places, parts of which were expressly or by custom adopted in this country. The existence of this canon law alongside the common law resulted in numerous disputes over the next 200 years, as clerics and common lawyers argued over the extent of their respective jurisdictions.

At the Reformation, this body of canon law was not abolished, although appeals to the Pope were no longer possible. Instead, these provisions received statutory recognition, and remained in force except where "repugnant, contrarient or derogatory" to common law, statute or royal prerogative.[8] As a result, this part of the ecclesiastical law was said to be as much binding law as any other legislation, for clergy, laity and those outside the Church of England alike.

Canons

Further legislation of this type followed in the form of the Canons Ecclesiastical of 1603. The Canons were the product of the ancient legislative Convocations (meetings of the clergy) of Canterbury and York, and according to Richard Hooker, were made by "instinct of the Holy Ghost".[9] The Canons reproduced some of the

[5] This article concentrates mainly on the provisions relating to priests and deacons, though similar rules govern the behaviour of bishops and archbishops, with slight differences in procedure.

[6] (1881) 6 App Cas 424 at 446, HL.

[7] For an account of the development of canon law from the early church and through the Middle Ages, see James A. Brundage, *Medieval Canon Law*, (Longman, 1995).

[8] Submission of the Clergy Act 1533.

[9] Known as the prophet of Anglicanism, Hooker's writings were highly influential in the early development of the Anglican church.

pre-Reformation canon law, and gave directions on divers matters relating to the conduct of the clergy, both on and off duty. As such, it seemed that these Canons would be rules for the clergy only, binding in spiritual matters, but the inclusion of regulations concerning marriage, the qualifications of schoolmasters, and other material that did not relate solely to the clergy led to some debate as to whether the 1603 Canons were also binding upon the laity. The debate was apparently resolved by the case of *Middleton v Crofts,*[10] which is regarded as authority for the principle that the Canons of 1603 were binding on the clergy, and on the laity in so far as declaratory of the ancient law and usage of the Church of England, but not otherwise. Lord Hardwicke CJ justified this distinction on the basis that in contrast to much of the Tudor legislation affecting the church, these provisions had never received confirmation from parliament. In addition, members of the laity were not represented in Convocation at the time of the Canons and therefore could not be bound by them.

The 1603 Canons were revised and extended in 1964 and 1969, and the power to legislate by Canon was transferred from the convocations to the principal governing body of the Church of England, the General Synod (formerly known as the National Assembly).[11] The status of these Revised Canons Ecclesiastical, as amended from time to time by Synod, was the subject of correspondence in the *Ecclesiastical Law Journal* in July 1995 and January 1996. In the 1995 edition [12] it was pointed out by Oswald Clark that as the "ordinary man in the pew" (sic) did not subscribe to the Canons, then they would appear to apply only to the clergy or to particular classes of persons addressed by the provisions. In the same edition,[13] Brian Hanson, an authoritative voice in the field of ecclesiastical law, pointed out that *Middleton v Crofts* had settled the issue with regard to the canons made by Convocation. However, Hanson then offered the opinion that as under the Synodical Government Measure 1969, power to make canons had passed to General Synod, on which body members of the laity were represented, all canons passed by the General Synod should be binding on them. Indeed Lord Hardwicke's other main reason in *Middleton v Crofts* for excluding the laity from the effect of the Canons, that is, the lack of approval of Parliament, was addressed in the Synodical Government Measure of 1969, which requires the assent and licence of the Queen before canons may be promulgated.

Whatever doubt there may be as to whether the Canons bind the laity, there is no doubt about the fact that the Revised Canons bind the clergy. In *Bland v Archdeacon of Cheltenham,*[14] Sir Cecil Havers, the Deputy Dean of the Court of Arches, commented that the 1969 Canons "have statutory authority through a Church Assembly Measure passed through Parliament". This version of the Canons imposes duties on the clergy in relation to their professional conduct, their home life, and even their dress. There are also regulations concerning forms of service and doctrine, which are given statutory force by the Church of England (Worship and Doctrine) Measure 1974, and are enforceable through the ecclesiastical courts under the Ecclesiastical Jurisdiction Measure 1963 (as amended). It is the measures of the Church of England that regulate such matters as the jurisdiction of the ecclesiastical courts, the appointment of incumbents of parishes, and the disciplinary system for the clergy. There are two key measures concerned with clergy conduct: the Ecclesiastical Jurisdiction Measure 1963 (as amended) and the Clergy Discipline Measure 2003. Both

[10] (1736) 2 Atk 650.

[11] Synodical Government Measure 1969, s 1.

[12] 4 Ecc LJ 17 at 441.

[13] *Ibid* at 442.

[14] [1972] All ER 1012 at 1018.

of these will be examined in greater detail later in the article, but it is interesting to note at this point the legal status of measures of the Church of England.

Measures

In common with canons, measures of the Church of England are the product of the legislative process of the General Synod. Their legal status is however quite different from that of the Canons, for they are the primary legislation of Synod, and have the force and effect of an Act of Parliament. They are therefore binding on all, clergy and laity, members of the Church of England and non-members alike. Once passed by Synod, measures must be submitted to the Parliamentary Ecclesiastical Committee, which consists of representatives of both Houses of Parliament, for consideration and report. The committee report and the measure must then be laid before both Houses, and be presented to the Queen for Royal Assent.

In an increasingly secular, pluralist and multi-cultural society, the fact that the rules of a religious organisation can acquire the binding force of statute law, by making use of the legislative process of the government, may seem an extraordinary anomaly. But this is, of course, one of the many curious consequences of the Reformation and the resultant Establishment of the Church of England. The fact of Establishment means that the Church of England is recognised as having a particular legal and social status, and such of its disciplinary regulations as are contained within its measures acquire legal enforceability.

The drawback to this arrangement from the perspective of the church might be the fact that in ecclesiastical matters, the supremacy of parliament is still very much a reality. As Briden and Hanson observe,[15] "in the event of unresolved conflict, it is the will of Parliament or the Crown which, for good or ill, prevails", as the Church discovered to its cost during the passage through its parliamentary stages of the Churchwardens Measure 2001.[16]

As with primary parliamentary legislation, the measures also enable the making of subordinate legislation in the form of orders and instruments.

The Book of Common Prayer[17]

The case of *Martin v Mackonochie*[18] established three categories of ecclesiastical practices: things lawful and ordered; things unlawful and prohibited; and things neither ordered nor prohibited expressly or by implication, but the doing of which must be governed by the living discretion of some person in authority.[19] The category of things lawful and ordered is governed, not only by detailed provisions of canon law, but also by the Ornaments Rubric in the Book of Common Prayer.[20] In the past, the rubrics have been held to have the full force of statutory provisions[21] gaining their authority from the Act of Uniformity 1662. Breach of these rules would therefore constitute an offence against ecclesiastical law.

[15] G Moore, *Introduction to Canon Law*, 3rd ed, by T Briden and B Hanson (Mowbray, 1992) at 7.

[16] The Parliamentary Ecclesiastical Committee expressed concern at certain of the provisions of the Measure as presented by General Synod. As a result, Synod had to delete the offending clauses before the Measure was passed by parliament.

[17] This is one of the foundation documents of the Church of England. It is annexed to the Act of Uniformity 1662, and contains authorised liturgy, articles of faith, and instructions to the clergy on matters of liturgy and doctrine.

[18] (1868) LR 2 A&E 116.

[19] *Per* Sir Robert Phillimore, *ibid* at 191.

[20] This is set out immediately before the order for Morning Prayer. Rubrics in the Book of Common Prayer are directions or instructions, and take their name from the red ink in which they were sometimes printed.

[21] See, *eg*, *Westerton v Lidell* (1858) Moore's Special Report at 187.

Although the relevant provisions of the 1662 Act have been repealed,[22] the rubrics continue to determine the legality of matters ritual and ceremonial, and the 19th century cases must be read in that light. It has since become apparent, however, that strict observance of the rules relating to ritual and ceremonial in the Ornaments Rubric has not been enforced by the courts. There is thus an interesting divergence between law and practice, which was remarked upon in the *Report of the Royal Commission on Ecclesiastical Discipline 1906*.[23]

This is evident from the case of *Rector and Churchwardens of Bishopwearmouth v Adey*[24] a case concerning the legality of the practice of reservation of the Sacrament.[25] A complaint had been made that reservation of the Sacrament is forbidden by the Thirty Nine Articles of Religion contained in the Book of Common Prayer. The then Chancellor of Durham Consistory Court, E Garth Moore, took the opportunity to comment on the legal status of the Prayer Book. "The Book of Common Prayer has statutory authority. It is a schedule to the Act of Uniformity 1662. Because the Book of Common Prayer has statutory authority it does not mean that it is itself a statute." Garth Moore argued that the logical consequence is that the Prayer Book should not be interpreted in the same way as a statute. He went on to assert that the Book of Common Prayer is in the nature of a directive written by clergy for clergy, and it should therefore be interpreted liberally according to the occasion. By these means he was able to conclude that the reservation of the Sacrament was not forbidden by either the Articles or the rubrics of the Book of Common Prayer.

Quasi-legislation

According to some commentators, there is an increasing tendency for the activities of the Church of England to be controlled by what has been termed "ecclesiastical quasi –legislation". This is defined as "extra-legal regulatory instruments informally made by a wide range of church bodies",[26] and consists of, for example, circulars, directions, guidelines, and codes of practice produced by a variety of committees within the church. The exact nature and legal status of this type of regulatory material, and its binding force, is a matter of some debate. Doe argues that the purpose of such regulation is supplementary, to fill in gaps in the formal law, or to provide for flexibility in pastoral matters. But he acknowledges the possibility that such rule-making may have legal consequences.[27]

The sphere of clergy discipline provides a good example of this type of regulation in practice. In February 2000, a Joint Committee of the Lower Houses of the Convocations of Canterbury and York was set up to prepare a code of professional conduct for the clergy. (The Convocations, although no longer having power to create canons for the Church of England, continue to meet to consider other matters affecting it.) The Joint Committee prepared a draft document which was published for comment in February 2002 and debated by both Convocations, before final publication as a booklet[28] which was commended to the clergy by the Archbishops of Canterbury and York.

[22] Church of England Worship and Doctrine Measure 1974, s 6(3) and Sched 2.

[23] Cd 3040 para 3630.

[24] [1958] 3 All ER 441.

[25] This involves reserving some of the bread and wine consecrated at a Communion service for use at a subsequent service at which a priest might not be available *eg* for a sick person in their own home.

[26] N Doe, "Ecclesiastical Quasi-Legislation" in N Doe, M Hill and R Ombres (eds), *English Canon Law* (University of Wales Press, 1998) at 93.

[27] Doe, *op cit.*

[28] *Guidelines for the Professional Conduct of the Clergy* (Church House Publishing, 2003).

It is interesting to note that although the original motion of Convocation envisaged the creation of a code of practice, following legal advice, the word "guideline" was substituted for "code". Presumably this was to avoid comparison with other codes that have legal significance, such as the Highway Code and the Codes of Practice attached to the Police and Criminal Evidence Act 1984 (as amended). In the preface to the final version of the guidelines, the chairman of the working party[29] emphasises the fact that the guidelines do not form a legal code, and that they are not "commandments set in stone". This seems to indicate an awareness on the part of the Committee that there is some degree of doubt about the exact legal status of documents such as this. However, despite the chairman's disclaimer, many of the guidelines are couched in normative terms, and many use the terminology of rights and duties, and it is tempting to think that non-observance of the guidelines by a member of the clergy would be strongly indicative of behaviour that might result in disciplinary action.

Whatever doubts there may be about the effect and enforceability of rules of this nature, the Clergy Discipline Measure 2003 provides for the continued use of such quasi- legislation in the context of clergy discipline. The Measure provides for the appointment of a Clergy Discipline Commission consisting of representatives from members of General Synod, both clergy and laity, and at least two senior lawyers of judicial status. The Commission is charged with the duty to "issue codes of practice and general policy guidance to persons exercising functions in connection with clergy discipline".[30] No indication is given as to whether such codes and policies will be binding upon those to whom they are addressed, but Doe sees the proliferation of this type of informal rule-making as indicative of a radical increase in ecclesiastical regulation generally.[31]

SOURCES OF LAW: THE COURTS

The history of the church courts in this country can claim to pre-date the history of the courts of common law and equity, and the interplay between the ecclesiastical and the secular courts is complex. For centuries, the clergy of the Church of England have been subject to the jurisdiction of both the church and the secular courts. This overlap can, however, have undesirable consequences when the secular courts are called upon to consider theological matters for which judges have been neither trained nor equipped.

A clergyperson behaving badly in matters of doctrine, ritual or ceremonial may be dealt with in the particular church court designated to deal with such matters. But where conduct that constitutes a criminal offence is alleged, a member of the clergy can be held accountable under the quasi-criminal jurisdiction of the ecclesiastical courts, in addition to any prosecution in the secular courts. The operation of these specialised ecclesiastical courts has been described as a system of "gothic complexity".[32]

Historical Context

In order to understand the evolution of the modern system of disciplinary tribunals that is introduced by the Clergy Discipline Measure 2003, it is necessary to have an

[29] Hugh Wilcox, *ibid*, at ix.

[30] Clergy Discipline Measure 2003, s 3.

[31] Doe, *op cit.*

[32] Smith, Bailey & Gunn, *The Modern English Legal System*, 4th ed, by SH Bailey, JPL Ching, MJ Gunn and DC Ormerod (Sweet & Maxwell, 2002) at 44.

understanding of the history of the ecclesiastical courts. Because of its position as the established church, the courts of the Church of England occupy a unique position. As Briden and Hanson neatly observe, "the Church's courts are courts of the State and the State's courts are courts of the Church".[33]

However, Dale characterises the history of the church courts as "a story of gradual loss of jurisdiction"[34] as many of the matters that would formerly have been regarded as the concern of the church courts have been transferred to the secular courts, or abolished by statute. For centuries, a plethora of church courts existed, that could exercise jurisdiction not only over the clergy, but also over the laity, in matters ranging from divorce, probate and defamation, through bigamy and incest to brawling. The 19th century saw a gradual reduction in the powers of the church courts in respect of the laity, but the complexities of the system remained well into the 20th century.

Until its repeal by the Clergy Discipline Act 1892, the Church Discipline Act 1840 provided a procedure for the hearing of complaints against clergy. The relevant diocesan bishop would issue a commission to five persons, including the Chancellor or an Archdeacon or rural dean, to investigate the charge. If the commissioners found a *prima facie* case to be answered, the bishop could pronounce summary sentence or proceed to a full hearing in the consistory court. Here the bishop would sit with three assessors, assuming the roles of judge and jury. Alternatively the case might be referred to the Provincial Court, that is, the Chancery Court of York (for cases arising in the northern Province) or the Court of Arches (for cases arising in the Province of Canterbury). Ultimately the parties could appeal to the Judicial Committee of the Privy Council.

The 19th century provides a number of cases that are illustrative of the singular workings of the ecclesiastical courts, and the interplay with parliament and the temporal courts. The catalyst for this was the controversy engendered by the Oxford or Tractarian Movement, which began in 1833 and developed over the next fifteen to twenty years into an Anglo-Catholic revival.[35] The doctrinal questions raised by disputes between the Tractarians and the Evangelicals resulted in legal proceedings against clergy who were accused of not holding to the declared doctrine of the Church of England. Although these proceedings began in the ecclesiastical courts, the final court of appeal for doctrinal cases was the Judicial Committee of the Privy Council, and thus as Sparrow Simpson observes, in these judgments "the respective authority of the secular and the spiritual is apparent in its acutest form".[36]

The Judicial Committee of the Privy Council

One of the most celebrated cases was that of *Gorham v Bishop of Exeter*,[37] which began as proceedings in the Arches Court of Canterbury in a cause of *duplex querula*.[38] In 1847, the Lord Chancellor, Lord Cottenham, offered the living of the parish of Bramford Speke in Devon to the Revd George Cornelius Gorham. The Bishop of Exeter refused to proceed with the appointment, however, on the grounds that Gorham held views of unsound doctrine relating to the Sacrament of Baptism. It was alleged

[33] *Op cit*, at 111.

[34] W Dale, *The Law of the Parish Church*, 6th ed, (Butterworths 1989).

[35] The Tractarian Movement sought to revive the spirituality of the Anglican Church by the dissemination of Tracts, the first of which was written by John Henry Newman. Subsequently the movement became identified with the Ritual party, which sought to re-introduce Roman Catholic practices and church ornaments that had been banned since the Reformation.

[36] Sparrow Simpson, *op cit*, at 46.

[37] (1850) 14 Jur 443 PC.

[38] *Duplex querula* is an action in the nature of an appeal by a clergyman whose bishop has refused to institute to a particular parish.

that Gorham had expressed the view (contrary to the Articles of Religion of the Church of England)[39] that spiritual regeneration was not given or conferred at Baptism and that infants do not automatically become members of Christ by Baptism.[40] The Arches Court found in favour of the bishop, and Gorham appealed to the Judicial Committee of the Privy Council.

Six eminent lawyers heard the appeal, with three bishops in attendance. Lord Langdale, giving judgment, pointed out the Privy Council was not being asked to consider whether Gorham's views were theologically sound or unsound, but whether his opinions were contrary to the Articles of Religion of the Church of England.[41]

> This Court has no jurisdiction or authority to settle matters of faith, or to determine what ought in any particular to be the doctrine of the Church of England. Its duty extends only to the consideration of that which is by law established to be the doctrine of the Church of England, upon true and legal construction of her Articles and Formularies; and we consider that it is not the duty of any court to be minute and rigid in cases of this sort.

The decision of the Privy Council was that Gorham's beliefs were not contrary to the doctrine of the Church of England and that he should not have been refused admission to the living of Bramford Speke.

The Bishop of Exeter later condemned this as a "perversion of justice".[42] It was claimed that the Privy Council judgment would allow priests to teach that regeneration was an open question in the Church of England, and that the state was attempting an interference in spiritual matters, unprecedented in the history of the church.[43] Despite the careful disavowal by the Privy Council of any attempt to express opinion on the theological accuracy of the arguments presented, much criticism was made of the fact that judges with no theological training had decided how the Articles of Religion should be interpreted. Notwithstanding, the Privy Council continued to constitute the final court of appeal for doctrinal matters until its jurisdiction was ended by the Ecclesiastical Jurisdiction Measure 1963.

This was not, however, the end of the litigation arising out of the Anglo-Catholic Revival. The latter part of the 19th century saw the development of Ritualism in the Church of England.

Ritualist Prosecutions

Ritualism developed out of Tractarianism, and particularly from the advanced Anglo-Catholic societies that observed the "six points" of Tractarianism.[44] The *Liverpool Mercury* of 14 May 1874 claimed that Ritualism was a "religious fanaticism generally picked up at the University of Oxford". But it was at Trinity College, Cambridge, particularly under the influence of its senior tutor Revd Thomas Thorp, where much ritual innovation took place. Thorp had been one of a number of vociferous critics of the *Gorham* judgment.

Part of the reason for the Ritualist Movement lay in the perceived need for revival of a church that had become lax in its worship and discipline. But the chosen means

[39] The Thirty Nine Articles contained in the Book of Common Prayer summarise the official view of the Church of England in relation to fundamental issues of theology, doctrine and practice.

[40] Though perhaps his real crime was that he had advertised for a curate who was "free of Tractarian error", and this had apparently caused offence to the bishop.

[41] EF Moore, *The Case of The Rev GC Gorham against The Bishop of Exeter* (Stevens and Norton, 1852) at 472.

[42] Sparrow Simpson, *op cit* at 50.

[43] *Ibid* at 52.

[44] These included wearing full Eucharistic vestments, using lighted candles on the altar, and using incense during the service.

(the six points, the use of the sign of the cross and auricular confession) were widely condemned as Romish practices. Rival groups formed, represented by, for example, the English Church Union (High Church) and the Church Association (extreme Evangelicals). These two groups were soon locked in battle over ritual. The Church Association instigated prosecutions of clergy on the grounds that Ritualist ornaments and practices were inconsistent with the rubrics of the Book of Common Prayer, and the English Church Union sought to defend those who were under attack.

One of the most significant cases was that of *Martin v Mackonochie*,[45] in which the Revd Alexander Mackonochie was accused of various Ritualist practices. The case was brought under the provisions of the Church Discipline Act 1840, which enabled the bishop to try cases himself with assessors, or to send the case to the Court of the Archbishop. Mackonochie's case was duly tried before Sir Robert Phillimore, who commented that the proceedings were of a criminal character, and noted the harshness of this.

Phillimore's judgment was based on an understanding of the rubrics of the Book of Common Prayer as deriving their authority from the Act of Uniformity 1662. It was also impressively learned, involving an examination of New Testament passages in the original Greek, and discussion of passages from Bede in the original Latin. Phillimore's conclusion was the helpful threefold analysis of ecclesiastical procedures referred to earlier, and he found that at least three of the practices of which Mackonochie stood accused were actually lawful. The Church Association, dissatisfied with this conclusion, appealed to the Judicial Committee of the Privy Council, which reversed Phillimore's decision and condemned Mackonochie on all points raised against him. Mackonochie refused to comply with the judgment, and so in November 1870, the Judicial Committee of the Privy Council suspended Mackonochie for three months. This was not, however, the end of the matter. Mackonochie attempted to obtain a judicial review of the decision to suspend him from office, and he was also subjected to further prosecutions involving the Judicial Committee of the Privy Council.

These cases revealed an interesting interplay between the powers of Church and state, and the effect of legal decisions upon members of the Church of England. It was claimed by Bishop Fraser[46] that the meaning of the ambiguous rubrics in the Book of Common Prayer had now been clarified by the Judicial Committee of the Privy Council. But this supposed clarity was achieved at great expense. Mackonochie's case took four years and involved five hearings. Moreover, some of the Ritualists simply ignored what the Judicial Committee had decided. Two senior Canons of St. Paul's Cathedral, Liddon and Gregory, wrote to the Bishop of London[47] asserting that the Judicial Committee was not a synod of the Church of England, its jurisdiction had never been recognised by the church, and that as a matter of conscience, they would not comply with its decisions.

It is interesting to note that many of the Ritualist practices declared illegal by the Judicial Committee of the Privy Council are commonplace in the Church of England today. This was recognised in the *Report of the Royal Commission on Ecclesiastical Discipline* in 1906,[48] in which it was observed that when a court deals with matters of conscience and religion, its judgments will not be effective if they do not carry moral authority. Therefore if clergy refuse to recognise the right of the Judicial Committee of

[45] *Supra*, n 15.

[46] J Bentley, *Ritualism and Politics in Victorian Britain* (Oxford University Press, 1978) at 39.

[47] Sparrow Simpson, *op cit* at 137.

[48] Cd 3040, para 363.

the Privy Council to pronounce on such matters it would appear to mean that its judgments are unenforceable.

Subsequent legislation has expressly reduced the powers of the Judicial Committee of the Privy Council. The Ecclesiastical Jurisdiction Measure 1963, sections 45(3) and 48(5) provides that in matters of doctrine, ritual and ceremonial, neither the Court of Ecclesiastical Causes Reserved nor a Commission of Review is to be bound by any decision of the Privy Council.

SOURCES OF LAW: PARLIAMENTARY LEGISLATION

Clergy of the Church of England are subject to the general law of England as created by Parliament through legislation. Some exceptions exist. For example, the case of *Diocese of Southwark v Coker*[49] established that clergy do not have a contract of employment. Therefore as they are not persons who have a contract of service within the Employment Rights Act 1999, section 230 (2), they do not have the benefit of employment protection legislation. Neither is the Church of England constrained by employment discrimination legislation. As has been seen above, however, in addition to general legislation, clergy of the Church of England are subject to specific legislation in relation to their conduct.

Until 1963, in terms of secular parliamentary legislation, discipline of the clergy was regulated by the Church Discipline Act 1840, the Public Worship Regulation Act 1874, and the Clergy Discipline Act 1892, according to the nature of the offence charged. Examination of this legislation, particularly of the Public Worship Regulation Act 1874, reveals the roots of the 20th century approach to clergy discipline in terms of procedure and practice.

Church Discipline Act 1840

The Church Discipline Act 1840 could be invoked in cases of crimes and acts of immorality committed by clergy but the legislation was also used for the prosecution[50] of Ritualist priests for such matters as "excessive kneeling"[51] and the "truly horrible offence" of wearing a surplice throughout the service![52] Proceedings could take the form of a commission of enquiry consisting of the Diocesan Bishop, the Chancellor of the Diocese (who was usually a High Court judge) and senior clergy, or could be referred to the Provincial Court to be heard by the Chancellor.

Public Worship Regulation Act 1874

In a further attempt to curb the Ritualist movement, the Public Worship Regulation Act 1874 ("PWRA 1874") was enacted; more specific offences were created and the powers of the Consistory Court were put on a statutory footing. Proceedings could be commenced against clergy in this court for such matters as the introduction of illegal ornaments, for example candles and frontals, or failing to observe the services laid down in the Book of Common Prayer.

The PWRA 1874, section 8, permitted prosecutions to be instigated by an archdeacon or churchwardens, or by any three parishioners. The bishop could at this stage stay the action, hear the case himself, or refer it to a judge. Proceedings before

[49] [1998] ICR 140 CA.

[50] Notice that the language used is that of the criminal law.

[51] *Martin v Mackonochie, supra,* note 15.

[52] Prosecution of the Revd AS Prior, reported in *The Daily Telegraph*, 4 January 1870.

a judge took a strict legal form, with evidence given on oath, the judge having the powers of a court of record and the ability to enforce attendance of witnesses in the same manner as a judge of one of the superior courts of law or equity. The court's powers were thus modelled on those of the secular courts, and this fact, together with the power of the bishop to veto proceedings[53] led to problems in the operation of the legislation.

Within two weeks of the PWRA 1874 coming into force, the Church Association against Ritualist priests began a new series of prosecutions. Most of the Ritualist clergy decided that the new court set up under the Act, being secular in nature, had no jurisdiction over them, and ignored its decisions. When they refused to obey court orders (known as monitions) prohibiting them from celebrating communion, the complainants claimed that the clergy were in contempt of court, which carried the sentence of imprisonment. As a result, five priests, two in London and one each in Manchester, Liverpool and Birmingham, served prison terms. This unforeseen outcome had the opposite of the desired effect, and invoked public sympathy for the Ritualists.

Meanwhile, the power to veto cases afforded to the bishops by the PWRA 1874, section 9, rendered the Act difficult to enforce in some cases. In 1886, Edward King, Bishop of Lincoln, refused to permit the prosecution of two priests of his diocese. Consequently, the Church Association turned its attention to King himself, and laid a complaint before the Archbishop of Canterbury that King had committed Ritual offences. Archbishop Benson doubted that he had jurisdiction to act, but was overruled by the Judicial Committee of the Privy Council and accordingly King's case was heard in a specially convened hearing at Lambeth Palace.

The outcome was legally significant, not only because Benson held substantially in favour of King, but also because in so doing, he ignored the judgments of the Privy Council in previous Ritualist cases. Instead of basing his judgments on recent legal precedents, Benson relied on history, citing as authority decisions made at the Council of Hatfield in 680 AD. This approach drew attention once again to the continuing tension between secular and ecclesiastical law.

One of the main objections to the PWRA 1874 was that it was perceived as the product of Parliament only, the views of the Church Convocations having been completely ignored. The issue therefore came to be seen as one of the independence of the Church of England. Was the Church of England free to make its own decisions in matters of doctrine and worship, or could parliament, as the sovereign law-maker, control these matters? And was it appropriate that the final appellate authority in ecclesiastical causes was a non-ecclesiastical body, that is, the Judicial Committee of the Privy Council? In retrospect, it became clear that the PWRA 1874 was "the most unpopular and unworkable of modern Acts of Parliament"[54] and that in the case of conflict between ecclesiastical power and civil power, clergy would rather go to prison than submit to parliamentary sovereignty.

In the Clergy Discipline Act 1892, parliament again attempted to legislate for the behaviour of clergy, this time in the sphere of morality, rather than worship and doctrine. The Church Discipline Act 1840 was repealed, and replaced with provisions for hearing cases before the Consistory Court. Some attempt was made to define the relationship between the temporal courts and the church in relation to clergy misbehaviour. The legislation provided that if a member of the clergy was convicted of

[53] Inserted during the passage of the bill through parliament, as a result of pressure from bishops sympathetic to the Ritualists.

[54] Sparrow Simpson, *op cit*, at 151.

an offence in a secular court, and sentenced to imprisonment, or if found to have committed adultery in a matrimonial cause, or if a bastardy order was made against him, the bishop would have no discretion but to declare his living vacant and would have the option to depose him from holy orders.

The Ecclesiastical Jurisdiction Measure 1963 repealed the 19th century Parliamentary legislation, and brought matters of doctrine and discipline firmly within the ambit of church authority. However, the legacy of secular influence over church matters can still be seen in the 1963 legislation. The remainder of this article will therefore focus on the operation of the 1963 Measure, and the subsequent developments in the Clergy Discipline Measure 2003.

REFORM AND THE ECCLESIASTICAL JURISDICTION MEASURE 1963

Between 1883 and 1952, six commissions recommended reform of the ecclesiastical courts, culminating (in 1954) in the report of the Archbishop's Commission on Ecclesiastical Courts chaired by Lloyd Jacob J, entitled *The Ecclesiastical Courts: Principles of Reconstruction.* The result was the enactment of the Ecclesiastical Jurisdiction Measure 1963, ("EJM 1963") which abolished many obsolete jurisdictions, and restructured the hierarchy and functions of the church courts. For example, archdeacon's courts, which were virtually defunct, were abolished, and the original jurisdiction of the Arches Court of Canterbury and the Chancery Court of York was removed, the latter two courts retaining appellate jurisdiction only. The Measure removed the possibility of appeal to the Judicial Committee of the Privy Council in disciplinary matters, and abolished the power of the Queen in Council to hear suits of *duplex querela.*[55] To that extent, the Measure attempted to regularise the interplay between secular and ecclesiastical legal power. But what the Measure gave with one hand it then took away with the other for it provided that nothing in the Measure was to affect the prerogative powers of the Crown, nor would it affect the power of the High Court to control the proper exercise by the ecclesiastical courts of their functions.[56]

Statutory force was also given to a distinction that has been of fundamental importance in the operation of clergy discipline. Matters of doctrine, ritual and ceremonial, were to be dealt with by a different procedure and in a different forum from matters of morality, unbecoming conduct, and neglect of duty,[57] and this dichotomy persists in the new provisions of the Clergy Discipline Measure 2003. The court system outlined in the Measure also perpetuated the division of jurisdiction into civil and criminal matters. Civil cases comprised the faculty jurisdiction of the courts, and clergy discipline, the criminal jurisdiction.

Unfortunately, as commentators have remarked, the new system of courts and procedures introduced by the EJM 1963 was no less complicated than the system it replaced, and it was predicted that "it is doubtful whether, in some of its aspects, any attempt will be made to use it more than the one time necessary to convince even its authors of its unserviceability for many of the purposes for which it was designed".[58]

[55] EJM 1963, s 82(1).
[56] EJM 1963, s 83(2).
[57] EJM 1963, ss 6 and 14.
[58] G Moore, *op cit,* at 113.

The Court System under the EJM 1963: Doctrine Cases

The EJM 1963, section 14 (1)(a) provided that proceedings could be instituted against members of the clergy for any offence against the laws ecclesiastical involving matters of doctrine, ritual or ceremonial. This provision was designed to regulate liturgical activity, and is therefore the successor to the legislation that enabled the prosecution of the Ritualist priests. It would also cover credal matters, such as denying the doctrine of the Trinity or the deity of Christ.

Proceedings were to be commenced with the laying of a complaint before the Diocesan Registrar by an authorised complainant within the terms of EJM 1963, section 19, which could include six persons whose names are on the electoral roll of the parish church. The bishop had then to give the accused[59] and the complainant the opportunity for a private interview with him.[60] The bishop could at that stage decide to take no further action, but if he did proceed with the case, the next step was a Committee of Inquiry. Again, the Committee could dismiss the case at that stage, or it could refer it to the Court of Ecclesiastical Causes Reserved, a court newly created by the Measure, and consisting of three diocesan bishops, two lawyers who had held high judicial office, and a panel of theological advisers. Appeal from this body lay to a Commission of Review consisting of three Law Lords and two House of Lords bishops. In the light of the experience of the nineteenth century cases, the ecclesiastical legislators took the opportunity to declare in the EJM 1963, section 45(3) that the Court of Ecclesiastical Causes Reserved would not be bound by any decision of the Judicial Committee of the Privy Council in relation to matters of doctrine and ceremonial.

In the 40 years that this provision has been on the statute book, it has not been tested in practice. Given its unwieldy nature, it is perhaps not surprising that there has not been one case heard in this court, and anecdotal evidence suggests that bishops find other ways of dealing with clergy whose views cause concern. It is however interesting to compare the lack of litigation in respect of doctrine, with the abundance of cases concerning Faculty applications. Do modern congregations care more about church furnishings than they do about the doctrinal and liturgical correctness of their clergy?

The Court System under the EJM 1963: Conduct Cases

The EJM 1963, section 14(1)(b) provided that proceedings could be instituted under the Measure against incumbents, charging such clergy with any other offence against the laws ecclesiastical (apart from doctrine etc) including conduct unbecoming the office and work of a clerk in Holy Orders, or serious, persistent or continuous neglect of duty. The EJM 1963 did not define these offences, but did expressly exclude political opinions or activities from the scope of unbecoming conduct, and excluded political opinion from the scope of neglect of duty: apparently leaving political activity as a possible basis for a charge of neglect of duty. No definition was provided of "conduct unbecoming", but a parallel was available in the Revised Canons.[61] Conduct proscribed by the Canons could range from drunkenness[62] to writing a rude letter to a parishioner.[63]

As with doctrine cases, proceedings of this nature were commenced by complaint and were framed in the language and procedure of the secular criminal courts, a feature

[59] Again, note the language of the criminal law.

[60] EJM 1963, s 39.

[61] Canon C26, para 2.

[62] *Marriner v Bishop of Bath & Wells* (1878) 42 JP 436 PC.

[63] *Bland v Archdeacon of Cheltenham supra*, n 11.

that attracted much criticism, given that the charges laid before the Consistory Court would not normally have constituted criminal offences. The bishop of the diocese would interview the parties, after which an Examiner (a barrister or solicitor) would consider whether there was a case to answer, in a manner comparable to committal proceedings in the magistrates' court. A case could be dismissed at this stage, or referred to the Consistory Court, presided over by the Chancellor (as judge) and two clergy and two lay assessors (as jury). The procedure was modelled on that of the Crown Court when hearing criminal cases, and could result in conviction and sentence.[64] Appeal from this court lay to the Provincial Court.

Between 1963 and 2003, only three conduct cases reached the stage of trial in the Consistory Court, the most well known being the trial of the Dean of Lincoln, the Very Revd Brandon Jackson, in 1995. This case attracted much publicity and costs of the parties and the courts came to little short of £100,000. Small wonder that "there is much anecdotal evidence that bishops are unwilling to utilize the 1963 Measure because of the cost both in human and financial terms".[65]

This reluctance also led to "short cuts" that provided alternative methods of dealing with problem clergy. A diocesan bishop could exercise his "pastoral discipline" by adding the name of the cleric to the Archbishop's Caution List (sometimes referred to as the Lambeth and Bishopthorpe register). Prior to the Clergy Discipline Measure 2003, the list (the content of which was confidential to the bishops) contained names of clergy on whom official censure had been passed, and also names of those in respect of whom there was some disciplinary matter or a past history that should be known to the bishops. The latter aspect of the List caused concern, as the procedure for entering such names, and the types of misbehaviour that would justify this were unclear, and the presence of a name on the list would have serious implications for a clergyperson seeking a new appointment. The procedural uncertainty, potential inconsistency, and lack of opportunity for the erring cleric to plead his or her own case made this informal method of discipline at best unsatisfactory, at worst a breach of the rules of natural justice.

A similar lack of clarity surrounded the type of disciplinary proceedings that could be taken against clergy who were not incumbents of parishes.[66] The EJM 1963 did not allow for the fact that increasing numbers of clergy would be appointed to parishes as priest in charge on fixed term contracts, rather than as incumbents. The Measure also did not take account of the growing number of non-stipendiary clergy.[67] Clergy who were not incumbents were governed instead by the Revised Canons. Canon C12, para 5 allows a bishop to revoke a licence summarily without further process. Clergy may appeal to the appropriate archbishop, but from his decision there is no appeal, and this has serious implications for any priest in charge who may lose home and livelihood in summary fashion.

Criticisms of the System

Reference has been made on several occasions to the fact that the system of clergy discipline prior to and under the EJM 1963 was modelled on secular criminal jurisdiction. The language and procedure surrounding ecclesiastical "offences" was

[64] Sentence took the form of a censure that could range from *inter alia* deposition from Holy Orders (unfrocking) through suspension, to rebuke (a reprimand).

[65] The Report of the General Synod Working Party reviewing Clergy Discipline and the working of the Ecclesiastical Courts, *Under Authority*, (GS 1217) (Church House Publishing 1996) at 4.

[66] An incumbent of a parish possesses the living or benefice, and is designated vicar or rector.

[67] Non-stipendiary clergy are ordained and licensed by the bishop to minister in a parish, but do not receive a stipend and are not generally appointed as incumbents.

redolent of criminal law, which was inappropriate in cases in which allegations were not usually criminal in nature, and would not have given rise to a prosecution under secular law. The Ecclesiastical Law Society Working Party on Clergy Discipline and Ecclesiastical Courts reported that the proceedings and standard of proof were modelled so closely on jury trial in the Crown Court that of necessity they became adversarial and combative. The Working Party observed that this could create a polarisation of issues and have undesirable consequences for both clergy and parishioners.[68]

Further serious concerns were voiced by the General Synod report, *Under Authority.*[69] Because the procedures were complex and rarely used, neither clergy nor lawyers were well versed in the legislation, and such expertise as there was varied considerably from diocese to diocese. Despite the availability of ecclesiastical legal aid, costs were prohibitive, and the public nature of the proceedings often gave rise to a "media circus". Similarly, it was often difficult, if not impossible, to find local assessors to sit in the Consistory Court who had not already heard about the case, or who did not know the accused personally.

The advent of the Human Rights Act 1998 also had serious implications for proceedings under the 1963 Measure. Mark Hill[70] noted that the role of the bishop combined elements of investigator, prosecutor and judge, which would contravene the principles of Article 6 of the European Convention on Human Rights. The role of the bishop also gave rise to concern in that his pastoral role as "Father in God" to the clergy would be compromised by the disciplinary role imposed on him under the Measure.

In November 1992, the General Synod Standing Committee recommended that a Working Party be established to review clergy discipline and the work of the courts. The report was published in 1996[71] and recommended that the Church of England should make a radical revision of its disciplinary structures. Over the next five years, an implementation group worked on the draft measure, and it was referred to the Parliamentary Ecclesiastical Committee in 2001. The Clergy Discipline Measure 2003 eventually received the Royal Assent on 10 July 2003, and is being brought into force in stages.

CLERGY DISCIPLINE MEASURE 2003

The new Measure originally rejoiced in the title of the Ecclesiastical Jurisdiction (Discipline) Measure, but mercifully this was changed at draft stage. The Report of the General Synod Working Party[72] had recommended that matters of doctrine be dealt with by the same legislation that would deal with matters of conduct. However, a vote in General Synod resulted in doctrine cases being excluded from the ambit of the new system. At present therefore, the Court of Ecclesiastical Causes Reserved still has jurisdiction in matters of doctrine, ritual and ceremonial under the provisions of the 1963 Measure that have survived repeal by the Clergy Discipline Measure 2003, section 7 ("CDM 2003"). A Working Party set up by the House of Bishops has been considering how best to deal with such cases, and the press has excitedly but

[68] *Op cit,* at 510.

[69] *Op cit.*

[70] M Hill, "The Impact for the Church of England of the Human Rights Act 1998" 5 Ecc LJ at 431.

[71] *Op cit.*

[72] *Ibid.*

misleadingly suggested that "heresy trials" are planned. The draft Clergy Discipline (Doctrine) Measure will be debated by General Synod in July 2004, and will propose the introduction of a doctrinal disciplinary tribunal for matters not dealt with by CDM 2003.

Procedure under Clergy Discipline Measure 2003

The CDM 2003 is intended to provide a "new, modern and workable structure for clergy discipline in non-doctrinal cases".[73] The most fundamental change concerns the replacement of the Consistory Court with a "bishop's disciplinary tribunal" for each diocese.[74] Proceedings may be instituted against a priest or deacon by written complaint.[75] The new provisions make no distinction between incumbents and priests operating on a licence from the bishop. Such a complaint may be made by a two-thirds majority of the parochial church council, or by a churchwarden or any other person with a "proper interest" in making it.

Time limits are imposed within which the Diocesan Registrar makes a preliminary scrutiny of the complaint and reports to the bishop. The bishop has a range of options including dismissing the complaint, penalty by consent, or a formal investigation under the CDM 2003 section 17. A possible outcome may be a hearing before the disciplinary tribunal consisting of two members of the clergy, two laity, and a legally qualified chairman. Rights of appeal to the president of tribunals[76] are available to both sides during the preliminary stages of the process, and the respondent (no longer the accused) may appeal to the Provincial Court against any penalty imposed.[77] Decisions of the tribunal are also open to judicial review by the secular courts.

The new Measure attempts to address many of the concerns that dogged the EJM 1963. Under the previous legislation, there was no effective filter to stop proceedings at an early stage, due to the lack of clear guidance to the bishops in this area. Under the new Measure, the introductory sifting procedure has been borrowed from disciplinary proceedings in other professions, and enables the Diocesan Registrar to consider the quality of the evidence and the *locus standi* of the complainant at an early opportunity. The Parliamentary Ecclesiastical Committee, commenting on the CDM 2003, pointed out that this could add considerably to the work of the Registrar, and underscores the need for that person to be not only a qualified lawyer, but also well-versed in ecclesiastical law.[78] The advantage is, however, that this supplies the opportunity for malicious claims to be identified and dealt with speedily.

The newly proposed tribunal is modelled on secular tribunals. Decisions are by majority vote after a private hearing. Members of the tribunal will not come from the same diocese as the respondent. In contrast with proceedings under the EJM 1963, the standard of proof will be the same as that in proceedings in the High Court in the exercise of its civil jurisdiction, again following the trend set by disciplinary proceedings in other professions.

The question of the appropriate standard of proof was the subject of discussion in General Synod, in terms of attempting to balance the right of the clergy to a safe decision, with the right of congregations to be protected from errant clergy. The decision to adopt the civil law standard was in the event taken on the basis that this

[73] *Report by the Parliamentary Ecclesiastical Committee on the Clergy Discipline Measure* on 3 April 2003.

[74] CDM 2003, s 2.

[75] CDM 2003, s 10.

[76] Appointed under CDM 2003, s 4.

[77] CDM 2003, s 20.

[78] *Op cit.*

was thought to be more flexible than the criminal standard, the degree of probability varying according to the seriousness of the matter in question.[79]

Grounds for Proceedings

It is still possible to recognise the provisions of the EJM 1963 in the wording of the grounds for complaints. Thus in the CDM 2003, section 8, neglect of duty and conduct unbecoming still form the basis of the regulation of clergy conduct. The language of criminal offences has been removed, in response to previous criticism, but worryingly, the type of behaviour that may be defined as misconduct appears to have been broadened. Neglect of duty need no longer be "serious, persistent or continuous" to constitute misconduct, and "inefficiency in the performance of duties" has been introduced as a ground for proceedings. Similarly, conduct that is not necessarily unbecoming, but is "inappropriate" may bring members of the clergy within the disciplinary provisions. This represents a departure from the EJM 1963, and it will be interesting to see whether the result is an increase in complaints against clergy, as behaviour that would not previously have been grounds for complaint is brought within the ambit of the legislation.

Involvement in a divorce, or conviction of a criminal offence by a secular court continue to be matters which may give rise to disciplinary proceedings as they did under the EJM 1963.

Statutory Innovations

The CDM 2003 provides for the creation of a body new to ecclesiastical law, the Clergy Discipline Committee. The Committee will give general advice to the disciplinary tribunals, and issue codes of practice. This general oversight is designed to provide some consistency across the dioceses, and to address the difficulties that were inherent in ensuring comparability of decision-making in the Consistory Courts. The Committee will be chaired by a person with suitable legal qualifications; for example, having held high judicial office. The chairman will also be president of tribunals, and will issue practice directions and act as chairman of a disciplinary tribunal where important points of law or principle are involved.

The CDM 2003 attempts to regularise a difficult area from the previous regime, in that it places the Archbishop's Caution List on a statutory footing. A duty is imposed on the Archbishops by the CDM section 38 to compile and maintain a list of clergy who have been subject to disciplinary proceedings, or who have resigned following a written complaint. Unfortunately for the clergy, the list can continue to be used to name those who have "acted in a manner, not amounting to misconduct, which might affect their suitability for holding preferment". No guidance is given in the CDM 2003 as to how this procedure is to be interpreted and implemented. The clergyperson has the opportunity to ask the president of tribunals to review the decision to place his or her name on the list, but once listed, it appears that a name will remain in place for at least five years. Again, this will be a matter of some concern to clergy whose prospects of obtaining a post may be affected by this provision.

A further innovative feature of the CDM 2003 is that it provides for the creation of a Code of Practice. As mentioned earlier, the Code of Practice is to be formulated by the Clergy Discipline Commission to provide guidance for the purposes of the Measure. It was the view of the General Synod Working Party report,

[79] On the advice of Geoffrey Tattersall QC: Appendix F to the Report by the Revision Committee on the Draft Clergy Discipline Measure GS13474.

Under Authority,[80] that a Code of Practice would be a way of achieving flexibility of procedure in the operation of the disciplinary system. The Working Party was of the opinion that a code could give guidance, highlight best practice, and enable procedures to be modified as time passes, without the need for amending legislation. The Code will thus perhaps address some of the gaps and grey areas that are apparent in the new legislation. Whilst these are valid arguments in favour of such a Code, this does however introduce greater uncertainty into the administration of ecclesiastical law. On the other hand, it provides an opportunity for the ecclesiastical lawmakers to avoid the scrutiny of parliament, as the Code of Practice must be laid before General Synod before coming into force, but not laid before parliament.

CONCLUSIONS

It is too early to tell how much difference the new Measure will make to the conditions of service of clergy in the 21st century. In part this is because grey areas continue to exist in the rules that govern the conduct of clergy. Some of these areas may be addressed by the codes of practice, and in this respect ecclesiastical legislation follows the trend of secular parliamentary legislation, in providing for "quasi-legislation" to "fill in the gaps" more speedily and flexibly than might be the case if amending legislation were required.

The 19th century Ritualist cases provided a dramatic illustration of the consequences that arise from the interplay of secular and ecclesiastical law. Whilst the clergy continue to be subject to the two separate legal systems, the reduction of the influence of the criminal law must be seen as an improvement. What has replaced it seems to be the influence of the civil law, with the introduction of tribunals and a civil standard of proof. But the acid test of the appropriateness of the new system will be the extent to which it achieves the aim set out in the document *Under Authority*:[81] that the community of faith might expect quality and accountability from its clergy, and that "discipline should be handled firmly, fairly and sensitively and without delay".

[80] *Op cit.*
[81] *Op cit.*