

## THE IMPACT FOR THE CHURCH OF ENGLAND OF THE HUMAN RIGHTS ACT 1998

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### INTRODUCTION

Though the first nation state of the Council of Europe to ratify the European Convention on Human Rights<sup>2</sup> on 18th March 1951, and though permitting individual petition to the European Court in Strasbourg since 1966,<sup>3</sup> the United Kingdom declined to give effect to the Convention in its domestic law until the government recently passed the Human Rights Act 1998. The Act received the Royal Assent in November 1998 and will come into force on 2nd October 2000.<sup>4</sup>

### THE PURPOSE OF THE ACT

Broadly speaking, the Act has two purposes. First, it requires the courts to interpret primary and subordinate legislation so far as is possible in a manner compatible with Convention rights<sup>5</sup> and, in so doing, they must take into account—though not necessarily follow—the decisions of the of European Court of Human Rights at Strasbourg.<sup>6</sup> Secondly, the Act renders it unlawful for any public authority to act in a way which is incompatible with a Convention right.<sup>7</sup> It also makes provision for

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<sup>2</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms ('The European Convention on Human Rights') (1950).

<sup>3</sup> See generally A. Lester, 'Fundamental Rights: The United Kingdom Isolated' [1984] *Public Law* 47, and A. Lester, 'UK Acceptance of the Strasbourg Jurisdiction: What Really went on in Whitehall in 1965' [1998] *Public Law* 237.

<sup>4</sup> Note that in respect of certain devolved powers, the Human Rights Act 1998 is already in force in Wales (Government of Wales Act 1998 (c 38)), Scotland (Scotland Act 1998 (c 46)) and Northern Ireland (Northern Ireland Act 1998 (c 47)). Certain parishes of the Church of England are in Wales: see 5 Ecc LJ 252, 253. The implementation of the Human Rights Act 1998 in England has been delayed mainly to permit the judiciary to be trained in its operation and in the jurisprudence of the European Court of Human Rights and of the Commission. Foremost in the education of the judiciary has been Lord Justice Sedley, who will be speaking at the Ecclesiastical Law Society Residential Conference in Trinity Hall, Cambridge, on 30th March to 1st April 2001. See also J. Laws, 'The Impact of the Human Rights Act on Judicial Decision-making' [1998] EHRLR 676–682.

<sup>5</sup> Human Rights Act 1998 (c 42), s 3(1). In the event of there being an irreconcilable inconsistency, the domestic legislation prevails subject to a 'fast-track' system of executive action to bring English law into line with the Convention: see s 4 (declaration of incompatibility), and s 10 (power to take remedial action). 'Convention rights' is defined in s 1(1) by reference to specific articles of the Convention and its Protocols, listed under the heading 'Convention rights' below.

<sup>6</sup> *Ibid.*, s 2. This jurisprudence includes judgments, decisions, declarations or advisory opinions of the European Court of Human Rights, opinions and decisions of the Commission and decisions of the Committee of Ministers, whenever made or given: s 2(1)(a)–(d). The latter two ceased to produce such decisions and opinions as from 1st November 1998.

<sup>7</sup> *Ibid.*, s 6(1). 'Public authority' includes a court or tribunal and any person certain of whose functions are of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament: s 6(3). 'Parliament' does not include the House of Lords in its judicial capacity: s 6(4).

compensation to be paid in the event of breach.<sup>8</sup> The Church of England, being the established church in England, will be affected in each of these ways.

### THE CHURCH OF ENGLAND AS LEGISLATOR

Since it legislates by Measure and since such Measures are classified under the Act as primary legislation,<sup>9</sup> once the Act comes into force they will fall to be interpreted, wherever possible, in a manner compatible with Convention rights.<sup>10</sup> Note that such an interpretation applies also to subordinate legislation, such as rules and statutory instruments.<sup>11</sup> Such a reading is to be adopted irrespective of when the relevant primary or subordinate legislation was enacted.<sup>12</sup> Commentators have suggested that the effect of this provision is significantly to change the common law principles of statutory interpretation.<sup>13</sup> From the coming into force of the Act, courts will be obliged to use as the first guide to the construction of all primary and subordinate legislation not parliamentary intention<sup>14</sup> but compatibility with Convention rights. If no compatible reading of a piece of primary legislation is possible, the court may make a declaration of incompatibility.<sup>15</sup> However, fast track remedial action by ministerial intervention is not available in respect of Church of England Measures<sup>16</sup> in the event that a competent court makes such a declaration.<sup>17</sup> Note also that the one provision of the Act that is already in force, namely the requirement for ministers to issue statements of compatibility for Bills in their passage through Parliament, does not apply in relation to Church of England Measures.<sup>18</sup>

### THE CHURCH OF ENGLAND AS A PUBLIC AUTHORITY

Secondly, since the Church of England and its institutions<sup>19</sup> are public authorities, any of its acts which are incompatible with a Convention right are unlawful<sup>20</sup> unless the authority, pursuant to primary legislation,<sup>21</sup> could not have acted differently,<sup>22</sup> or, in the case of a provision of or made under such legislation which cannot be read or given effect in a manner compatible with Convention rights, the authority was act-

<sup>8</sup> See *ibid.*, s 8(2). In determining whether to make an award and how much to give, a court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention: Human Rights Act 1998, s 8(4).

<sup>9</sup> *Ibid.*, s 21(1) 'primary legislation' (d), (e).

<sup>10</sup> *Ibid.*, s 3(1).

<sup>11</sup> *Ibid.*, s 3(1). The interpretation section (s 21) would seem to be sufficiently broadly drafted to include a Canon as subordinate legislation, being an 'other instrument' made under 'primary legislation' (ie the Synodical Government Measure 1969 (No 2)); see s21(1) 'subordinate legislation' (f).

<sup>12</sup> *Ibid.*, s 3(2)(a).

<sup>13</sup> See eg A. Smith, 'The Human Rights Act 1998: The Constitutional Context', a paper delivered at the University of Cambridge Centre of Public Law at a conference entitled 'The Human Rights Act and the Criminal Justice and Regulatory Process' on 9 and 10 January 1999.

<sup>14</sup> Note the extent of the search for legislative intent as discussed in *Pepper v Hart* [1993] AC 593, [1993] 1 All ER 42, HL.

<sup>15</sup> See the Human Rights Act 1998, s 4(4).

<sup>16</sup> See *ibid.*, s 10(6).

<sup>17</sup> Competent courts include the High Court, the Court of Appeal, the House of Lords and the Privy Council: *ibid.*, s 4(5). The High Court has relevance for the Church of England in relation to committal for contempt and judicial review, as to which see M. Hill, 'Judicial Review of Ecclesiastical Courts' in N. Doe, M. Hill and R. Ombres (eds), *English Canon Law* (Cardiff, 1998), pp 104–114. The Privy Council is of more than theoretical importance: see *Cheesman v Church Comrs* (1999) 5 Ecc LJ 305, PC.

<sup>18</sup> This is to be inferred from the silence of the Human Rights Act 1998, s 19, and the anomalous parliamentary procedures for legislation by Measure as discussed in M. Hill, *Ecclesiastical Law* (London, 1995), pp 19 ff.

<sup>19</sup> ie synods, councils, commissions, courts, tribunals and committees and perhaps also bishops, incumbents and churchwardens. For the meaning of 'public authority', see note 7 above.

<sup>20</sup> Human Rights Act 1998, s 6(1). The Convention rights are summarised below.

<sup>21</sup> eg a Measure, the meaning of which is apparent on its face.

<sup>22</sup> Human Rights Act 1998, s 6(2)(a).

ing so as to give effect to or enforce that provision.<sup>23</sup> A 'victim' of such unlawfulness may initiate proceedings seeking redress or may rely upon Convention rights in other proceedings.<sup>24</sup> Whether institutions within non-established or disestablished churches are public authorities and whether the Act will have general application to other religious organisations remains to be seen.<sup>25</sup> Recent High Court decisions have suggested that the Provincial Court and the Governing Body of the Church in Wales, which is not established, do not have a sufficiently public element for the purposes of obtaining relief by way of judicial review,<sup>26</sup> nor do decisions concerning the disciplinary processes affecting Rabbis<sup>27</sup> or Imams.<sup>28</sup>

## CONVENTION RIGHTS

The Convention rights are lifted from the European Convention on Human Rights and from two of its protocols. They are set out in Schedule 1 of the Human Rights Act 1998, and comprise the following:

- Article 2 Right to life
- Article 3 Prohibition of torture
- Article 4 Prohibition of slavery and forced labour
- Article 5 Right to liberty and security of person
- Article 6 Right to a fair trial
- Article 7 No punishment without law
- Article 8 Right to respect for private and family life
- Article 9 Freedom of thought, conscience and religion
- Article 10 Freedom of expression
- Article 11 Freedom of assembly and association
- Article 12 Right to marry
- Article 14 Prohibition of discrimination
- Article 16 Restrictions on political activity of aliens
- Article 17 Prohibition of abuse of rights
- Article 18 Limitation on use of restrictions on rights

### First Protocol

- Article 1 Protection of property
- Article 2 Right to education
- Article 3 Right to free elections

### Sixth Protocol

- Article 1 Abolition of the death penalty
- Article 2 Death penalty in time of war.

As will be immediately apparent, it is not merely Article 9 (which makes express reference to religion) which will have an impact on the Church of England. It is, however, convenient to turn to it first.

<sup>23</sup> *Ibid.*, s 6(2)(b).

<sup>24</sup> *Ibid.*, s7(1).

<sup>25</sup> The only assistance afforded by the Human Rights Act 1998 is the somewhat circular s 6(3), for which see note 7 above.

<sup>26</sup> See *R v Provincial Court of the Church in Wales, ex parte Williams* (1999) 5 Ecc LJ 217 (Latham J); and *R v Dean and Chapter of St Paul's Cathedral and the Church in Wales, ex parte Williamson* (1998) 5 Ecc LJ 129 (Sedley J).

<sup>27</sup> *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249, [1992] 1 WLR 1306. See also *R v London Beth Din, ex parte Bloom* [1988] COD 131. Note however *R v Rabbinical Commission, ex parte Cohen* (1987) (unreported), where the decision of the commission as to licensing matters under the Slaughterhouses Act 1974 was deemed to have the necessary public element for judicial review.

<sup>28</sup> *R v Imam of Bury Park Jame Masjid Luton, ex parte Sulaiman Ali* [1994] COD 142.

## FREEDOM OF RELIGION

Article 9 of the Convention, which is entitled 'Freedom of thought, conscience and religion', provides as follows:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

In response to concerted lobbying from various religious organisations within the United Kingdom a statutory concession—the value of which is doubtful—was introduced the Human Rights Act 1998, section 13 of which now reads:

- (1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.
- (2) In this section 'court' includes a tribunal.'

It remains to be seen how this section, which appears to create a statutory hierarchy of rights, will, in practice, affect the balancing of freedom of religion against, say, freedom of expression.<sup>29</sup> For what it is worth, the Home Secretary at the committee stage of the Bill said:

'The intention is to focus the courts' attention in any proceedings on the view generally held by the Church in question, and on its interest in protecting the integrity of the common faith of its members against attack, whether by outsiders or by individual dissidents. That is a significant protection ... If a case is brought against a charity, and the charity can show that what it is doing is to maintain and practise the religious beliefs which it shares with its parent Church, we consider that [section 13] would come into play so as to ensure that due consideration was given to those beliefs ...'<sup>30</sup>

## THE JURISPRUDENCE OF STRASBOURG

The experience of continental Europe and the jurisprudence of Strasbourg seems to indicate a reluctance on the part of the European Court of Human Rights and the Commission to enter into the internal affairs of religious organisations in member states, whether established or not.<sup>31</sup> The European Commission on Human Rights has declined to entertain a claim arising out of clergy discipline procedure in the Church of England on the basis that the Commission did not consider the charge of conduct unbecoming a priest to be criminal under Article 6(1) of the Convention.<sup>32</sup> It also considered the consistory court to be a sufficiently independent and impartial tribunal. However, this is an aspect which will need further and more detailed examination in the coming months, as will the content and effect of the draft Clergy Discipline Measure currently before General Synod.

<sup>29</sup> European Convention on Human Rights, Art 10.

<sup>30</sup> See HC Official Report ('Hansard') 20th May 1998, col 1020.

<sup>31</sup> I am particularly grateful to Professor Cole Durham and Monsignor Roland Minnerath for their helpful observations on my paper, 'Church Autonomy in the United Kingdom', presented to the Second European/American Conference on Religious Freedom, 'Church Autonomy and Religious Liberty', University of Trier, Germany, 27th to 30th May 1999 (publication forthcoming)

<sup>32</sup> *Tyler v United Kingdom* (1994) 4th April, ECHR 21283/93.

It must also be remembered that the European Convention on Human Rights is a 'living instrument' and the jurisprudence which has emerged from Strasbourg falls to be carefully considered in the light of changing *mores*. Cases of some antiquity must be applied with caution. Also one must be careful to differentiate between the manner in which the Convention is applied in Strasbourg as compared with that in domestic courts. It has been repeatedly said that the procedures of Strasbourg are 'subsidiary to the national systems safeguarding human rights'.<sup>33</sup> It has been observed:

'By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions.'<sup>34</sup>

Thus Strasbourg has developed a doctrine of 'margin of appreciation' showing deference to the customs, traditions and practices of individual nations. However, when Convention rights are directly applicable and justiciable in domestic courts, no such margin of appreciation will be necessary.

### HORIZONTAL EFFECT

Although, as stated above, the two major effects of the Human Rights Act 1998 are (1) to alter the principles of statutory interpretation exercised by the courts, and (2) to regulate the acts of public authorities, commentators have suggested that the Act will be more far reaching. The so-called vertical effect is obvious—it concerns the hierarchical interaction between the citizen and the state. However, to the extent that a court is itself a public authority, prohibited from acting in a way incompatible with Convention rights, such rights will fall to be considered in resolving private disputes between individual litigants. The development of the common law in this manner has been styled the 'privatisation' of human rights.<sup>35</sup> The nature and scope of this horizontal effect remains to be evaluated on a case-by-case basis.

### THE IMPACT OF THE ACT

The impact of Human Rights Act 1998 extends far beyond the express provision for freedom of religion in Article 9 of the Convention. It is impossible to provide a definitive and complete statement of the ways in which the Church of England is likely to be affected by the Act, still less accurately to predict the manner in which the judiciary will resolve issues. What follows is a selection of possible applications. It does not purport to be exhaustive.

#### *The ecclesiastical courts*

It is settled case law of the European Court of Human Rights that whereas 'courts of the classic kind' (eg Crown, magistrates or county) must fully comply with the rights guaranteed by the Convention, particularly the right to a fair trial under Article 6,<sup>36</sup> special professional or disciplinary tribunals are not required to do so provided they are subject to subsequent review by a judicial body that has full jurisdiction and provides all the guarantees of Article 6.<sup>37</sup> It is of interest that the Employment Appeal Tribunal considered it arguable that an employment tribunal may not be 'independent

<sup>33</sup> This quotation is from *Handyside v United Kingdom* (1976) 1 EHRR 737 at 753, para 48. E Ct HR.

<sup>34</sup> *Buckley v United Kingdom* (1996) 23 EHRR 101 at 129. E Ct HR.

<sup>35</sup> See A. Clapham, 'The Privatisation of Human Rights' [1995] EHRLR 20, and A. Clapham, *Human Rights in the Public Sphere* (Oxford, 1993).

<sup>36</sup> *Findlay v United Kingdom* (1997) 24 EHRR 221. E Ct HR.

<sup>37</sup> See eg *Edwards v United Kingdom* (1992) 15 EHRR 417. E Ct HR, and *Gautrin v France* (1999) 28 EHRR 196. E Ct HR. In relation to the disciplinary decisions of doctors, see *Albert and Le Compte v Belgium* (1983) 5 EHRR 533. E Ct HR.

and impartial' for the purposes of Article 6 since lay members were appointed and paid by the Secretary of State and their appointment may be determined by him with the consent of the Lord Chancellor. The *amicus curiae* contended that there was a lack of transparent objective independence and that it was anomalous that employment tribunals should have such close links with an executive arm of government.<sup>38</sup>

As to the overlap of judicial and legislative functions exercised by the Dean of the Arches and the Vicars General of Canterbury and York, who are *ex officio* members of General Synod, thought will need to be given to the effects of the decision of the European Court of Human Rights in *McConnell v United Kingdom*,<sup>39</sup> which concerned the apparent conflict between the judicial and legislative functions exercised by the Deputy Bailiff of Guernsey.

The role of the bishop, in the present system of clergy discipline, combines elements of investigator, prosecutor and judge. As such it is unlikely that he would be regarded as independent and impartial for the purposes of Article 6(1).<sup>40</sup> It may also be that a deputy chancellor who has no security of tenure and whose appointment is not subject to judicial review may not be regarded as an independent tribunal.<sup>41</sup> Further, although the discipline of clergy may not be a criminal process,<sup>42</sup> it does determine a clergyman's 'civic rights and obligations' such as his income, pension and the provision of accommodation. Rights of a pecuniary nature are considered 'civil' rights within meaning of Article 6(1).<sup>43</sup>

Note that Article 6 speaks of a 'fair and public hearing': thus disciplinary hearings ought to be in public<sup>44</sup> even though the press and public may be excluded from part or all of the trial in the interest of morals, public order or national security. Furthermore, the requirement of a fair hearing imposes an obligation to provide a reasoned judgment in respect of any decision which is decisive of the outcome.<sup>45</sup> A clear, albeit brief, statement of reasons will probably suffice.<sup>46</sup> Although the function of the jury (which does not give reasons) is not considered to be in breach of Article 6, it may well be that the roll of assessors in disciplinary proceedings in the consistory court is.<sup>47</sup> It may also be arguable that declaring an individual to be a vexatious litigant and delimiting his access to the courts is a breach of Article 6.<sup>48</sup>

### *Vacation of Benefices*

Equally with Provincial Tribunals established under the Incumbents (Vacation of Benefices) Measure 1977<sup>49</sup> (as amended), because pecuniary rights are determined,

<sup>38</sup> See *Smith v Secretary of State for Trade and Industry* (1999) Times, 15th October.

<sup>39</sup> *McConnell v United Kingdom* (Application 28488/95). Times, 22nd February 2000, noted in Recent Ecclesiastical Cases at pp 491f of this issue.

<sup>40</sup> See generally *De Cubber v Belgium* (1984) 7 EHRR 236, E Ct HR, and *Findlay v United Kingdom* (1997) 24 EHRR 221, E Ct HR. Note also *Cable v United Kingdom* and *Hood v United Kingdom* (1999). Times, 11th March, E Ct HR.

<sup>41</sup> See *Starrs and Chalmers v Ruxton* [2000] UKHRR 78, High Ct of Justiciary, noted in Recent Ecclesiastical Cases at pp 489f of this issue. In the light of this decision, all assistant recorders in England and Wales have now been appointed full recorders by the Lord Chancellor, thereby giving them greater job security.

<sup>42</sup> *Tyler v United Kingdom* (1994) 4th April, ECHR 21283/93.

<sup>43</sup> See A. Lester and D. Pannick, *Human Rights Law and Practice*, para 4.6.10.

<sup>44</sup> The Commission declared it to be an admissible matter that the lack of a public hearing in small claims cases in the county court constituted a breach of Article 6 of the Convention: *Scarth v United Kingdom*. Note also *R v Chancellor of the Chichester Consistory Court, ex parte News Group Newspapers* [1992] COD 48, discussed in M. Hill, 'Judicial Review of Ecclesiastical Courts' in N. Doe, M. Hill and R. Ombres (eds), *English Canon Law* (Cardiff 1998), pp 104–114.

<sup>45</sup> See *Hadjianastassiou v Greece* (1992) 16 EHRR 219, E Ct HR, and *Hiro Balani v Spain* (1994) 19 EHRR 565, E Ct HR.

<sup>46</sup> See *Stefan v General Medical Council* (1999) Times, 11 March.

<sup>47</sup> See the Ecclesiastical Jurisdiction Measure 1963 (No 1), s 28(e), discussed in M. Hill, *Ecclesiastical Law* (London, 1995), pp 349–353, and M. Hill, 'Ecclesiastical Judicial Process' in *Clergy Discipline in Anglican and Roman Catholic Canon Law* (Wales, forthcoming).

<sup>48</sup> This has been the case in *Attorney-General v Williamson* (1998) 6th March, CA (unreported).

<sup>49</sup> See the Incumbents (Vacation of Benefices) Measure 1977 (No 1), s 7(1), Schedule, Pt II.



the hearing must be in public. At the very least judgment should be pronounced publicly. Difficulties may also be encountered under section 7A of the Measure,<sup>50</sup> which empowers a tribunal to direct an incumbent to undergo a medical examination, and to draw inferences from any failure to comply. An examination is of little use unless the examiner has access to the incumbent's medical history and his records. To compel disclosure of such items would be a breach of Article 8 of the Convention, the right to respect for private and family life,<sup>51</sup> and to draw an adverse inference from the exercise of that right in failing to give disclosure would be a breach of Article 6, the right to a fair trial.

#### *Legal aid*

The operation of the Church of England (Legal Aid) Measure 1994 may fall to be reconsidered in the light of the decision that the unavailability of legal aid may represent a breach of Article 6 or of Article 13, the right to an effective remedy.<sup>52</sup>

#### *Archbishops' Caution List*

The lists of clergy maintained by the Archbishops of Canterbury and York are to be put on a statutory footing under the Clergy Discipline Measure.<sup>53</sup> Care must be taken however, in the disclosure of information affecting the employability of clergy since to do so may breach Article 8 which protects an individual's private life. In a recent case judicial review was granted to prevent the disclosure to a potential employer of unproven allegations of sexual abuse in an individual's past.<sup>54</sup>

#### *Homosexuality*

The rights enunciated by the European Convention on Human Rights were drafted in the 1940s when homosexual acts were illegal in the United Kingdom and elsewhere in Europe. The Convention is silent as to sexual orientation. This is not one of the grounds set out under Article 14 that deals with prohibition of discrimination. The European Court of Human Rights resolved the question of gays in the armed forces against the United Kingdom government on the basis of Article 8, which deals with respect for private and family life.<sup>55</sup> It was considered that investigations conducted into a soldier's sexual orientation constituted a grave interference with his private life. A claim by a layman or clergyman brought under this article might be met by the proviso concerning the protection of morals or the rights and freedoms of others<sup>56</sup> or, more likely, by reliance on section 13 of the Human Rights Act 1998. Equally, Article 12 of the Convention provides a right to marry and to found a family according to the national laws governing the exercise of this right. The effect of this provision on same-sex unions will need to be considered.<sup>57</sup>

#### *Consecration of women as bishops*

Had section 1 of the Priests (Ordination of Women) Measure 1993 been differently worded so as to make the consecration of women to the office of bishop unlawful, the

<sup>50</sup> *Ibid.* s 7A, was added by the Incumbents (Vacation of Benefices) (Amendment) Measure 1993 (No 1), s 5.

<sup>51</sup> See *MS v Sweden* (1997) 3 BHRC 248.

<sup>52</sup> See *Airey v Ireland* (1979) 2 EHRR 305, E Ct HR, and *Benham v United Kingdom* (1996) 22 EHRR 293, E Ct HR. Note Article 6(3)(c) of the Convention, which provides that a defendant in a criminal case has the right to defend himself in person or through legal assistance of his own choosing, or, if he cannot afford to pay for legal assistance, to be given it free when the interests of justice so require. In relation to the availability of civil legal aid more generally, see *Faulkner v United Kingdom* (30308/96) (2000) Times, 11th January.

<sup>53</sup> See clause 40 of the draft Clergy Discipline Measure which is currently before General Synod.

<sup>54</sup> *R v A Local Authority in the Midlands and a Police Authority in the Midlands, ex parte LM* [2000] UKHR 143 (Dyson J).

<sup>55</sup> *Lustig-Prean and Beckett v United Kingdom* (1999) Times, 11th October, E Ct HR.

<sup>56</sup> ie the European Convention on Human Rights, Art 8, para 2.

<sup>57</sup> For a discussion of the doctrinal issues raised in relation to the ordination of those openly engaged in same-sex unions, see *Stanton v Righter* (1996), the trial of a bishop in the Episcopal Church of the United States of America.

Church of England would be able to rely upon section 6(2)(a) of the Human Rights Act 1998 in not consecrating women as bishops, arguing that the Measure (primary legislation) meant they could not act differently. However, the 1993 Measure is merely declaratory, asserting that 'Nothing in this Measure shall make it lawful for a woman to be consecrated to the office of bishop'.<sup>58</sup> In resisting any legal challenge regarding women and the episcopacy, reliance cannot be placed on this Measure. Rather arguments will have to be advanced under Article 9 of the Convention and section 13 of the Human Rights Act 1998.

### *Episcopal Ministry Act of Synod*

This Act of Synod has no statutory force and is neither primary nor subordinate legislation. The Church will be unable to rely on it in defending an action for breach of Article 14 of the Convention, which prohibits discrimination on the ground of sex. However, the prohibition only applies to the enjoyment of Convention rights and there is no Convention right to employment.

### *Property*

Three human rights points were run in the recent High Court case concerning the liability of the lay rector for chancel repairs.<sup>59</sup> It was argued that there was (1) a deprivation of possessions contrary to Article 1 of Protocol 1 of the Convention; (2) discrimination contrary to Article 14; and (3) infringement of freedom of religion under article 9. All three were rejected by Ferris J.

### *Church schools*

Article 9 of the Convention provides a right to freedom of religion and to manifest one's religion or belief in worship, teaching, practice and observance. It applies to staff and pupils alike. Note also that under Article 1 of the First Protocol, no person is to be denied the right to education and the state is to respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. This may require a revisiting of parts of the Education Acts.<sup>60</sup>

### *Privacy*

A topical jurisprudential question is whether Article 8 of the Convention, which asserts that everyone has the right to respect for his private life, will lead to a right to privacy in English law.<sup>61</sup> As a contracting state, the United Kingdom must 'respect' the right, thereby importing an obligation to ensure its effective protection.<sup>62</sup> The refusal of the European Commission to entertain Earl Spencer's complaint<sup>63</sup> on the basis of the failure to exhaust domestic remedies would suggest that an effective restraint on press invasion is available within the United Kingdom. This nascent tort may have an effect upon priest/penitent communications beyond that which already exists in relation the sacrament of penance. It may well extend to all private communications in the field of counselling, spiritual direction and psychotherapy.

<sup>58</sup> Priests (Ordination of Woman) Measure 1993 (No 2), s 1(2).

<sup>59</sup> *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) Times, 30th March, noted in Recent Ecclesiastical Cases at p 494 of this issue.

<sup>60</sup> See generally D. Harte, 'Religious Education and Worship in State Schools' in N. Doe, M. Hill and R. Ombres (eds), *English Canon Law* (Cardiff, 1998), pp 115–128.

<sup>61</sup> As to confidentiality, see *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804. Note also *R v Brent London Borough Council, ex parte Peck* (1997) Times, 18th December. The European Court of Human Rights has already ruled on gender re-alignment: see *Sheffield and Horsham v United Kingdom* (judgment 30th July 1998).

<sup>62</sup> See the telephone-tapping cases of *Malone v United Kingdom* (1985) 7 EHRR 14, E Ct HR (public phones), and *Halford v United Kingdom* (1997) 24 EHRR 523, E Ct HR (internal office phones).

<sup>63</sup> Applications Nos 28851/95 and 28852/95, decision of 16th January 1998. This may be seen as an example of the horizontal effect of the Convention.



*Employment of clergy*

A re-examination of the *Coker* judgment<sup>64</sup> may be necessary to secure compliance with Article 6 of the Convention, namely a right to a fair trial in matters concerning pecuniary rights. The draft Clergy Discipline Measure, which has now passed the Revision Committee stage in General Synod,<sup>65</sup> would deal with this matter by treating all clergy alike, whether licensed or freehold.

*Baptism*

There is already Strasbourg jurisprudence concerning baptism. In *X v Denmark*<sup>66</sup> a minister of the Danish state church had made it a condition for baptism that the parents attend five periods of religious instruction. The church authorities said he had no right to demand this and the minister refused to comply. The Commission decided that Article 9 of the Convention does not include the right of a clergyman as state civil servant to set up conditions for baptising which are contrary to the directives of the highest church authorities. Equally, in *Prussner v Germany*<sup>67</sup> the Commission upheld the compulsory retirement of a clergyman for his refusal to baptise minors.<sup>68</sup> The status of the Church of England Canon B 22, para 4, may be the subject of court proceedings.<sup>69</sup>

*Employment of laity*

Restrictions on the employment of non-practising Christians in institutions such as church schools, hospitals and charities may fall foul of Article 9 of the Convention (freedom of thought, conscience and religion) or Article 10 (freedom of expression).

*Freedom of expression*

The provisions of the Ecclesiastical Courts Jurisdiction Act 1860, pursuant to which Peter Tatchell was arrested in Canterbury Cathedral on Easter Day 1998, may fall for reconsideration in the light of Article 10 (freedom of expression).

These matters, briefly discussed, merely illustrate where the Human Rights Act 1998 might have an impact upon the Church of England. It is difficult to predict with precision where and how the effects of the new legislation will first be felt.<sup>70</sup> One can merely await, with trepidation or expectation, a litany of unintended consequences.<sup>71</sup>

<sup>64</sup> *Coker v Diocese of Southwark* [1998] ICR 140 CA, 5 Ecc LJ 68, CA, where the court decided that an assistant curate was not an employed person. For the decision of the industrial tribunal, see *Coker v Diocese of Southwark* [1995] ICR 563, and of the Employment Appeal Tribunal, see *Diocese of Southwark v Coker* [1996] ICR 896.

<sup>65</sup> There was insufficient time for General Synod to debate the emergent Clergy Discipline Measure at its February 2000 Sessions, so it will return to the subject at York in July 2000.

<sup>66</sup> *X v Denmark* (7374/76) DR 5, 157.

<sup>67</sup> *Prussner v Germany* (1986) 8 EHRR 79.

<sup>68</sup> For a discussion of these principles in an ecumenical context, see R Ombres, *Infant Baptism: The 1983 Code of Canon Law and Church of England Law* (Rome, 1999), pp 126–127.

<sup>69</sup> In relation to children and their religious heritage more generally, the Court of Appeal has recently considered the placing of a child of an orthodox Jewish family with Christian foster parents (*Re P (Section 91 (14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573, (1999) Times, 11th May, CA); and the High Court has addressed whether a father could insist upon the circumcision of a child in the absence of agreement from the child's mother (*Re J (Specific Issue Orders: Muslim Upbringing and Circumcision)* [1999] 2 FLR 678, (1999) Times, 1st June).

<sup>70</sup> For an illustration of the ingenuity of the legal profession, see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* (2000) Times, 30th March, discussed above.

<sup>71</sup> The author wishes to put himself in the expectation category and avoid the fate of Lord McCluskey who, writing extra-judicially, remarked *inter alia* that the incorporation of the European Convention on Human Rights would provide 'a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers'. His impartiality was considered to be compromised under Article 6, and a case on which he had sat was remitted for rehearing by a differently constituted court: *Hoekstra v HM Advocate* (2000) Times, 14th April.