in the eyes of the faithful. The new measures, as Benedict XVI himself explained, are intended further to underline liturgically the difference between beatification and canonisation, and they will also involve the local churches more visibly. Behind all this, there are large questions concerning the nature of beatification as it has come to be distinguished from canonisation.[7]

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Constitutional Conventions: A Rejoinder Rebutted

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Mr Stephen Slack maintains that, despite the clauses contained in the Act, there has been no change to the 'well-established constitutional convention (publicly recognised by ministers and the Ecclesiastical Committee of Parliament on various occasions in recent years) that the government does not legislate for the Church of England on its internal matters'.[1] This appears to be very comforting until one looks at what the Civil Partnership Act 2004 actually states and remembers that these changes were accepted by the Archbishops' Council and the House of Bishops and not debated in General Synod.[2]

The history of Church–State relationships over the centuries and some digging into the constitutional dusty corners of our legal system might remind us that it is not unknown for a sovereign or minister of the crown to decide that he knows better than the Church. Everything may well be fine at the moment but it does no harm to learn from history in order to prevent problems. Whatever Mr Slack's belief as to how matters will progress, we need to start at the beginning. According to Canon A7: 'We [The Church of England] acknowledge that the Queen's excellent Majesty, acting according to the laws of the realm, is the highest power under God in this kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil'.[3]

Most people have no problem with this concept and take the normal position of that which we consider to be our 'constitution' – of being governed by the

7 Put briefly, beatification is of lesser authority and results in a more restricted public cult than canonisation.
1 S Slack, 'Church autonomy and the Civil Partnership Act: a rejoinder', (2007) 9 Ecc LJ 206.
2 Note the Editor's comment at (2007) 9 Ecc LJ 207.
3 Canon A 7: 'Of the royal supremacy'.

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Queen in parliament, through the work of both Houses of the legislature, with the government of the day working through the normal procedures of parliamentary democracy in a constitutional monarchy – to be acceptable. These procedures encompass aspects which take from tradition, law making (both in the process of it and through case law) and convention.

In passing the Church of England Assembly (Powers) Act 1919 (better known as the Enabling Act), parliament allowed the Church of England, having gone through the accepted parliamentary type of procedure, to present measures to parliament for incorporation into English law. This is a devolved form of government and over the years it has developed. However, it does good from time to time to remember what is written in *Halsbury*, in particular the old Church Assembly edition on Ecclesiastical Law: 'Parliamentary control over church legislation remains unfettered, and Parliament may still legislate for the church without the intervention of the Assembly'.[4]

The convention evinced by Mr Slack is that the government, either alone or through parliament, would not use its legal powers to force any action on the Church of England (or other churches for that matter, one assumes). Yet there have been instances where governments have gone against convention if it suited. For example, there was the passing of the Southern Rhodesia Act 1965 and the Canada Act 1982, both breaching the convention that the United Kingdom parliament does not legislate for a dominion unless so requested.[5] When breaches of the convention have been challenged in the courts, invariably the courts have applied the statute law.[6] Of course, there have been cases where judges have referred to a convention but these occur normally with reference to their primary parliamentary authority.[7]

The Report of the Archbishop's Commission on Canon Law 1947 makes note that there have been cases where canon law has been changed through the legislative action of parliament without the concurrence of the church legislative

4 *Ecclesiastical Law*: Halsbury's Laws of England, vol 14 (Church Assembly Edition, London, 1957).

5 The Southern Rhodesia Act 1965 was in response to Ian Smith's Unilateral Declaration of Independence in Southern Rhodesia. It enacted that Rhodesia remained a British dominion and it invalidated all legislation passed by the 'illegal' regime. The Canada Act 1982 altered sections of the British North America Acts passed in the nineteenth century. Eskimos of the Canadian population objected, stating that the Acts could not be altered without the consent of all the provinces and peoples, including themselves.

6 For the Southern Rhodesia Act, see *Madzimbamuto v Lardner-Burke* [1967] AC 645, where the Privy Council decided, on a complaint about the legality of the detention of the complainant, that the Act did apply and that his detention was illegal. In the case of the Eskimos in *Manual v Attorney-General* [1983] Ch 77, the Court of Appeal was of the opinion that it was not in its remit to inquire if non-compliance with a particular convention could 'impair' something decided by the sovereign in parliament. See A Carroll, *Constitutional and Administrative Law* (London, 1998), p 49.

7 Examples of this are often found in the world of national security: for example, *R v Home Secretary, ex parte Cheblak* [1991] 2 All ER 319, when Lord Donaldson MR commented that the Home Secretary was 'fully accountable to Parliament for his decisions whether or not to deport'; see A Carroll, *Constitutional and Administrative Law*, p 50.

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procedures,[8] and there had been the possibility of a conflict between civil and canon law over the marriage of people being deemed the 'innocent party' in divorce in the pre-1937 divorce laws, which was averted by the clause in the Matrimonial Causes Act 1937.[9]

The Bishop of Winchester, in his recent Comment in this *Journal*,[10] voiced a problem concerning the business of doctrine and the law, raising the question that, if the Church of England's law of marriage is that of the state, then it might just be possible that parliament, in passing the Civil Partnership Act with all its provisions so mirrored on marriage legislation, has begun the process of changing the doctrine of the church – perhaps by stealth. The doctrine of the Church of England is to be found, according to the Worship and Doctrine Measure 1974, as being 'grounded in the Holy Scriptures, and in such teachings of the ancient Fathers and Councils of the Church as are agreeable to the said Scriptures. In particular such doctrine is to be found in the Thirty-nine Articles of Religion, the Book of Common Prayer, and the Ordinal'.[11]

According to the system of government we have in the church, therefore, canons on doctrine and worship can be made by General Synod under the Queen's Licence. Noticeably, the section of the Submission of the Clergy Act 1533, which requires that canons 'shall not be contrary to the Royal Prerogative or the customs, laws or statutes of this realm', was repealed in this Measure.[12] However, the said Articles of Religion, although agreed by the convocation of the time were printed and published with the *Book of Common Prayer*, 'by His Majesty's Commandment'[13] and the declaration that the King attached had some severe words about the royal 'displeasure' if people went against them. Although General Synod can make canon law that might indeed 'be contrary . . . to the laws, customs [etc]', the said canons still have to be promulged under the Royal Licence.

Mr Slack is convinced that no government would introduce any rule or legislation contrary to the Church of England's wishes and that the Church would not break the convention that it does not ask parliament to legislate for it. However, as noted, governments have broken conventions and, through parliament, the government still has ultimate control over all legislation including the ecclesiastical. If a government decided to place civil partnerships within the law of marriage, by changing the wording of the act or by some form of conflation between the civil partnership and marriage legislation, then there would be a

8 Lord Hardwicke's Marriage Act, which invalidated all marriages not carried out *in facie ecclesiae*, was overturned by the Marriage Act 1836 which allowed for civil marriage and 'restored the old principle of canon law that marriages are valid though contracted outside the church': *The Canon Law of the Church of England*, The Report of the Archbishops' Commission (London, 1947), p 66.

9 Carried over into the Matrimonial Causes Act 1965, s 8(2)(a).

10 M Scott-Joynt, 'The Civil Partnership Act 2004: dishonest law?', (2006) 8 Ecc LJ 91.

11 Church of England (Worship and Doctrine) Measure 1974, s 5(1).

12 Ibid s 6(1).

13 *Book of Common Prayer* (London).

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change beyond all that we know at the moment, both within the law of marriage and for the Church of England within the doctrine of marriage; and the government is perfectly free so to do.

The government has given itself, through parliament, enormous powers to change church legislation (and therefore presumably canon law) under section 259 (3)(c)[14] of the Civil Partnership Act; and under 259(3)(a) to change laws concerning people 'who are or have been parties to a marriage'. If, as argued, the Queen in parliament is sovereign, the government of the day, acting through the system, may abrogate convention and do as it wills, and, in the case of the Civil Partnership Act, could interfere with matters such as Canon B30, 'Of Marriage', and also, since the *Book of Common Prayer* is a schedule to the Act of Uniformity, change parts of that. Since the doctrine of marriage is in the main enshrined in the Marriage Service in that book, it could thus change doctrine.

If we have any doubts about the wording of the Act, then I suggest we should remember a comment by McCowan LJ, referring to the submissions of Miss Sheila Cameron QC in *R v Ecclesiastical Committee, ex parte the Church Society*,[15] and quoting from Halsbury's Laws of England: 'If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning'.[16] There is, of course, further comment in this case – which was about the Priests (Ordination of Women) legislation – since both McCowan LJ and Tuckey J pointed out that the reason for the Enabling Act setting up the Church Assembly (now the General Synod) was to allow the Church of England to have full legislative powers over its own affairs, *subject always* to a final veto by the State (the Queen in parliament) over proposals. To this veto has now been added the provision in the Civil Partnership Act, with its whiff of Henrician control over the Church, placing unprecedented powers in a minister of the crown. There is, ringing in one's memory, a comment made by the Principal of the Bernard Gilpin Society,[17] Mr RJ Hall LLB, during lectures on political and legal philosophy in the mid-1960s: 'What Parliament has given, Parliament can take away'.

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14 '[to] amend, repeal or (as the case may be) revoke any church legislation'.

15 *R v Ecclesiastical Committee, ex parte the Church Society* [1994] 6 Admin LR 670, reproduced in M Hill, *Ecclesiastical Law* (second edition, Oxford, 2001), pp 667–671.

16 Halsbury's Laws of England, vol 44, para 857.

17 This Durham-based society was set up by the old Central Advisory Council for the Training in the Ministry for men who had been in industry and who had been selected for training for the ordained ministry of the Church of England. It was a one-year course to bring them up to an academic standard in order to cope with theological college training and the General Ordination Examination. Many subjects were covered, including an introduction to criminal and family law. Durham University Extra Mural Department was involved with parts of the course. Sadly it no longer exists, but it did great work.

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