

Queen Elizabeth II and the Evolution of the Monarchy

ROBERT BLACKBURN

FOR THE GREAT majority of the population, Queen Elizabeth II is the only monarch on the throne they have ever known. She became Queen on 6 February 1952, with her coronation taking place the following year on 2 June 1953. Throughout 2012, her Diamond Jubilee year, national celebrations took place, with glowing tributes expressed by all for her dedicated service to the UK and Commonwealth.¹ This extraordinary achievement, a 60-year tenure of public office as the UK Head of State, exceeded only by Queen Victoria, has been of great importance to how the monarchy as an institution is now perceived in public opinion, and indeed within the thinking of the political elite. For the personality and character of the monarch, and how he or she interprets and self-defines his or her role in the areas of public and constitutional life in which he or she has a part to play, are pivotal to the working and evolution of the institution itself.

The Queen has stood above politics, and faultlessly has maintained an impartiality and discretion on sensitive matters in her dealings with the 12 Prime Ministers who have served during her reign. In terms of popular support for the monarchy, Queen Elizabeth's reign has been remarkably successful. Polling taken around the time of the Diamond Jubilee weekend in June 2012 showed endorsement for the UK remaining a monarchy, rather than becoming a republic, at 80 per cent. An even higher proportion, 90 per cent, express approval for Queen Elizabeth personally. The reigns of Edward VII (1901–10), George V (1910–36), and George VI (1936–52) are also regarded as having been popular, though this could not be verified and measured in the same way as the professional public opinion polling used today. This level of public support has been a considerable achievement of the House of Windsor when one reflects upon attitudes towards the monarchy in the late nineteenth century, when republican

¹ For Addresses to the Queen made in both Houses of Parliament, see *Hansard*, HC 7 March 2012, cols 849–78, and HL15 March 2012, cols 377–84; and for details of the Jubilee celebrations and events, see <<http://www.thediamondjubilee.org>>.

sentiments were high and William Gladstone doubted the monarchy would survive much longer.²

However, a deeper analysis of public opinion discloses a different and more shallow type of support for royalty compared with that of 60 years ago. In the midst of the post-War national spirit of unity and pride in one's country, the monarchy was a central and profound part of British culture. A poll taken shortly after the Queen's accession disclosed that as many as 35 per cent of the population even believed that Elizabeth had been personally chosen by God to serve as monarch.³ Such quasi-religious attitudes towards the monarchy have certainly been transformed since then; and so too has the pervasive deference to social hierarchy in Britain as the class structure has gone into decline, which is perhaps the most striking sociological change over the past 60 years. In 2008 the British Social Attitudes poll and its regular trend question, asking 'How important or unimportant do you think it is for Britain to continue to have a monarchy?' showed that that only 32.7 per cent of people thought the monarchy very important and 29.6 per cent quite important,⁴ with perceived importance being distinctly lower among younger age groups. Polling research of Ipsos-Mori in 2012 points in the same direction, showing, for example, that the royal family comes only fourth as a source of national pride, behind the armed forces and the National Health Service,⁵ and that more than half those polled think the royal family should get less money.⁶ The early 1990s were a low point of public support for the monarchy and royal family, due to the matrimonial difficulties of the Queen's children and a series of embarrassing books and critical press accounts of their personal lives.⁷ It is significant that the pre-existing virtual taboo on public criticism of the monarchy began to evaporate from that time onwards, and recently there have been a number of politicians, journalists and sections of the media who have even openly advocated abolition of the monarchy or radical reform of the royal prerogative.⁸

Two significant features emerge. First, the Queen as a person attracts almost universal affection and support for the way in which she personally has conducted herself and performed her royal duties. Secondly, the monarchy as an institution is now more fragile than is commonly supposed, and is less embedded in the national psyche and collective sense of national identity. It is therefore all the

² Letter to Earl Granville, 3 December 1870, extracted in HJ Hanham, *The Nineteenth Century Constitution* (Cambridge, Cambridge University Press, 1969) 33–34; and see V Bogdanor, *Monarchy and the Constitution* (Oxford, Oxford University Press, 1995) 28–30.

³ V Bogdanor, *Power and the People* (London, Victor Gollancz, 1997) 172.

⁴ <<http://www.natcen.ac.uk/media/329262/bsa%2026th%20questionnaire.pdf>>.

⁵ <<http://www.ipsos-mori.com/researchpublications/researcharchive/2939/Britons-are-more-proud-of-their-history-NHS-and-army-than-the-Royal-Family.aspx>>.

⁶ <<http://www.ipsos-mori.com/researchpublications/researcharchive/3080/Almost-all-Britons-satisfied-with-the-Queen-as-Monarch-but-Prince-William-is-the-most-popular-Royal.aspx>>.

⁷ Among them, A Morton, *Diana: Her True Story* (New York, Pocket, 1992).

⁸ Among them, Tony Benn ('the Crown is a totally insupportable basis for a constitution': see *Hansard*, HC 17 May 1991, cols 549–56); J Freedland, *Bring Home the Revolution: The Case for a British Republic* (London, Fourth Estate, 1998); and the *Guardian* newspaper in a series of articles since 2000.

more important that the monarchy continues to evolve and adapt itself to new conditions, as indeed it has done throughout the Queen's reign.

This chapter considers some topical issues in UK constitutional law and politics that illustrate the ways in which the monarchy has evolved during the reign of Queen Elizabeth, the successful manner in which she has adapted her customary roles to promote the political neutrality essential to the survival of a modern monarchy, and the difficulties and challenges involved in achieving reform today, particularly with respect to the Government's current changes to the rules on royal succession.

* * *

The legal context within which the monarch reigns but does not rule remains a mystery to most people. Operating in an unwritten and uncodified system of government, even the very concept of the Crown as a legal entity is open to uncertainty and ambiguity.⁹ The UK's executive administration is conducted in the name of the Crown as Her Majesty's Government, but is led by a Head of Government, the Prime Minister, whose existence and mode of appointment is not derived from or regulated by law.¹⁰ The Crown as executive and Crown as monarch are distinguishable concepts in law for certain purposes, but the common law theory of the Crown prerogative powers remains ultimately vested in the person of the monarch, subject to their exercise in most cases by ministers on the Queen's behalf, and subject always to modification or repeal by an Act of the Queen-in-Parliament.¹¹

So too the principles governing royal conduct remain uncodified, and rely on the good judgement of the monarch and her private secretary as to the conventions that apply in any given situation. The basic tenets of our constitutional monarchy, as they have remained during the Queen's 60 years in office, are that ministers are responsible for the government of the country, not the monarch; the monarch exercises her prerogative powers and duties in accordance with the advice of her ministers; the monarch will not make public speeches or utterances on matters of a politically controversial or party nature independent of ministerial advice; the monarch should not be personally criticised in Parliament for her Acts of State, and if she is, she will not reply; and it is for ministers to answer questions and criticisms of the public acts of the monarch.¹²

⁹ Generally see M Sunkin and S Payne (eds), *The Nature of the Crown* (Oxford, Oxford University Press, 1999).

¹⁰ For discussion, see the evidence given to an inquiry into the role and powers of the Prime Minister currently taking place of the House of Commons Political and Constitutional Reform Committee, 2012–13; also Graham Allen, *The Last Prime Minister* (London, G Allen, 2001).

¹¹ For the legal situation, see R Blackburn, *Halsbury's Laws of England: The Crown and Royal Family*, 4th edn (London, Butterworths, 1998) vol 12(1), 3–5; and for commentary, R Blackburn and R Plant, 'Monarchy and the Royal Prerogative' in Blackburn and Plant (eds), *Constitutional Reform* (London, Longmans, 1999).

¹² For a constitutional analysis of political criticisms made of the Queen's televised Christmas broadcast in 1984, see R Blackburn, 'The Queen and Ministerial Responsibility' [1985] *Public Law* 361. For

An issue that has been the subject of academic debate among professors of constitutional law has been whether the monarch possessed any residual discretionary powers, where moments of constitutional crisis or political difficulties have arisen with respect to the passage of legislation (royal assent), the timing of a general election (royal power of dissolution of Parliament) and prime ministerial appointment (where a single party fails to obtain an overall majority at an election, or a Prime Minister leaves office mid-term).¹³ The better view is that any such personal involvement has now become obsolete, and that continued theorising about the existence and circumstances in which such powers might be utilised poses considerable dangers to the monarchy.¹⁴ For as I have written elsewhere,¹⁵ if the monarchy were ever to intervene and block prime ministerial advice, the institution would run the serious risk of meeting hostility from the political party then in government. Such royal intervention would necessarily embroil the monarch in party political controversy and throw the continued existence of the monarchy into doubt.

To her great credit, Queen Elizabeth and her private secretaries have understood this political truism, certainly in practice if not always in the flummery of royal communications.¹⁶ For example, when doubts were expressed over Harold Wilson's request for the Queen to dissolve Parliament and hold a fresh general election in 1966 (two years after the previous election) and again in October 1974 (following another election earlier the same year), simply to try to achieve more Labour seats in both cases, there was no attempt to block prime ministerial advice on the matter or seek alternative advice.¹⁷ A welcome and important development, under the 2010 Coalition Government, has been that any possibility of the monarchy now being drawn into controversy over general election timing has been terminated once and for all by the Fixed-term Parliament Act 2011, abolishing the prerogative of dissolution altogether and replacing it with a framework of five-yearly elections, subject to earlier election in specified statutory circumstances.¹⁸

So too, the Queen has not sought to involve herself in questions of prime ministerial appointment, leaving resolution to the parties themselves and the convention that the majority party leader will be Prime Minister; or in hung Parliament

an historical perspective on the principles and practice of constitutional monarchy generally, see Bogdanor, above n 2, esp ch 3.

¹³ See especially I Jennings, *Cabinet Government* (Cambridge, Cambridge University Press, 1936) ch 13; R Brazier, *Constitutional Practice* (Oxford, Oxford University Press, 1988) ch 8; R Blackburn, 'Monarchy and the Personal Prerogatives' [2004] *Public Law* 546; R Brazier, 'Monarchy and the Personal Prerogatives: A Personal Response to Professor Blackburn' [2005] *Public Law* 45; and R Blackburn, *King and Country* (London, Politico's, 2006) ch 3.

¹⁴ See Blackburn, *King and Country*, above n 13, ch 3, esp at 101–02; also Lord Hailsham, *The Dilemma of Democracy* (London, Collins, 1978) 193.

¹⁵ R Blackburn, *The Electoral System in Britain* (London, Macmillan, 1995) 58.

¹⁶ Thus modern etiquette requires a Prime Minister to entreat, not demand or recommend, an exercise of the prerogative: see B Pimlott, *The Queen: A Biography of Elizabeth II* (London, HarperCollins, 1996) 341.

¹⁷ See *ibid.*, 419–22.

¹⁸ The constitutional advantages of a fixed-term Parliament are set out in Blackburn, above n 15, ch 2.

situations that the incumbent Prime Minister has first claim on attempting to form an administration, but if he fails to do so or is defeated on a confidence motion in the House of Commons at the start of the new Parliament, the leader of the next largest party will be invited to take office. The issue of royal involvement was more problematic with respect to the resignation of a Conservative Prime Minister until the party adopted party leadership rules of its own in 1965.¹⁹ There are still debates to be had about the wisdom and neutrality of the retiring Prime Minister Harold Macmillan's advice to the Queen in 1963 to appoint Sir Alec Douglas-Home as his successor in preference to RA Butler,²⁰ but in the constitutional vacuum created by the Conservatives lacking any standing leadership rules, the Queen's only sure path of royal non-involvement was to follow her Prime Minister's advice.

The five days of uncertainty following the inconclusive general election of 2010 was another test for the Queen's constitutional role in prime ministerial appointment.²¹ Once again, she showed restraint in the heat and excitement of disputed claims and confusion about what the outcome would be, with the convention for resolution of such situations not widely or fully appreciated. With the Conservatives gaining 306 seats to Labour's 258, it was easy for commentators and the public to view the situation as being that David Cameron as Conservative leader had 'won' the election and should immediately take office. However strong such a moral claim, and it was one that the Liberal Democrat leader Nick Clegg took into account in his negotiation with both parties, the constitutional convention clearly permitted the incumbent Prime Minister, Gordon Brown, to remain in office to see if he could form an administration as a minority government, or in a parliamentary pact or formal coalition with other parties. Others had earlier suggested that the Queen might be the mechanism for determining the outcome.²² Largely to head off such speculation, the Cabinet Office had produced a draft chapter on government formation for a manual it was preparing, setting out its understanding of the laws, conventions and rules on the operation of government; and in this document it set out the convention as stated above, adding that 'the Monarch would not expect to become involved' in the inter-party discussions, 'although the parties and the Cabinet Secretary would have a role in ensuring that the Palace is informed of progress'.²³

¹⁹ On party leadership rules and elections, see R Blackburn and A Kennon, *Griffith & Ryle's Parliament: Functions, Practice and Procedures*, 2nd edn (London, Sweet & Maxwell, 2003) 155–60.

²⁰ For a narrative, see Pimlott, above n 16, 256–61. The situation was different from that in 1955 when an earlier Conservative Prime Minister (Winston Churchill) resigned from office mid-term, as the person whom he advised to be his successor (Sir Anthony Eden) had been universally regarded as Conservative Party leader-in-waiting for many years.

²¹ See R Blackburn, 'The 2010 General Election Outcome and Formation of the Conservative–Liberal Democrat Coalition Government' [2011] *Public Law* 30.

²² See in *The Times*, eg, D Finkelstein, 'How to stop the Queen picking the next Prime Minister', 24 November 2009; and Mark Owen MP, 'We must head off the possible constitutional crisis if the result of the next election is close', 27 November 2009.

²³ February 2010 draft, 'Chapter 6: Elections and Government Formation', para 16; current version, *The Cabinet Manual* (Cabinet Office, October 2011) 2.13. The nature and purpose of the *Cabinet*

The consolidation of this convention of royal non-involvement over prime ministerial appointment in 2010, combined with the enactment of the Fixed-term Parliament Act the following year, represents an important stage in the evolution of the monarchy under Queen Elizabeth. In historical terms, it has halted any continuation of the constitutional theorising of Sir Ivor Jennings and others about ‘personal’ prerogatives and ‘reserve’ powers of the monarch. It has also, it is hoped, removed any suggestions that the monarchy might have a ‘mediation’ and ‘conciliation’ role in times of political crisis. Prince Charles, our future monarch, has let it be known, through his biographer and friend Jonathan Dimbleby, that he might be prepared to use his ‘convening power’ in times of national difficulty or public policy controversy, to try to seek general agreement around the issue in dispute.²⁴ Some clarification about such a role is important. There are historical precedents in the early part of the twentieth century for a monarch hosting inter-party conferences, such as the Buckingham Palace conference on the Home Rule Bill in 1914, but this had been proposed by the Prime Minister, Herbert Asquith, as a means of facilitating discussion, not to provide a platform for the monarch to play a proactive role in determining the outcome.²⁵ As Asquith had rightly stated to the King earlier in January 1910 during the storm over the Parliament Bill and future of the House of Lords, ‘it is not the function of a Constitutional Sovereign to act as arbiter or mediator between rival parties and policies; still less, to take advice from the leaders of both sides, with a view to forming a conclusion of his own’.²⁶

Nonetheless, it remains the case that in theory and practice, the monarch, as enunciated by Walter Bagehot in 1867, ‘has, under a constitutional monarchy as ours, three rights – the right to be consulted, the right to encourage, and the right to warn,’ adding, ‘and a king of great sense and sagacity would want no others’.²⁷ We have glimpses of the Queen’s use of these rights in very general terms from the memoirs or utterances of her Prime Ministers²⁸ and a few leaks, including of her disagreement with Margaret Thatcher’s style of diplomacy in Commonwealth relations in 1986.²⁹ A full account, however, must await access to her papers and diaries by the author of her future official biography, such as that of George V by Harold Nicolson and of George VI by John Wheeler-Bennett,³⁰ supplemented by

Manual is multi-faceted: ostensibly an internal booklet of guidance for officials, it also represents an agreed statement between the Cabinet Office and Secretary, and Buckingham Palace and Queen’s Private Secretary, intended for the media and public consumption.

²⁴ J Dimbleby, ‘Prince Charles: Ready for Active Service’, *The Sunday Times*, 16 November 2008.

²⁵ See H Nicolson, *King George V: His Life and Reign* (London, Constable, 1952) 242–43.

²⁶ Quoted in R Jenkins, *Mr Balfour’s Poodle* (London, Heinemann, 1954) 133.

²⁷ W Bagehot, *The English Constitution* (1867; London, Fontana edn, 1963) 111.

²⁸ See, eg, J Major, *Autobiography* (London, HarperCollins, 1999) 509, where he refers to the Queen’s ‘encyclopaedic knowledge’ on Commonwealth matters, and that he found her advice ‘invaluable on many occasions’; and Tony Blair, at his speech at her golden wedding anniversary banquet on 20 November 1997, saying, ‘she is an extraordinarily shrewd and perceptive observer of the world. Hers is advice worth having.’

²⁹ *The Sunday Times*, 8 June and 20 July 1986; on which see Pimlott, above n 16, 504–15.

³⁰ J Wheeler-Bennett, *King George VI: His Life and Reign* (London, Macmillan, 1958).

any diaries or memoirs of her private secretaries, such as those of Sir Alan Lascelles who served under the three monarchs immediately preceding the Queen.³¹ There is considerable evidence of our future monarch, Prince Charles, giving numerous and passionate representations and views to ministers, but the quantity and force of these encouragements or warnings may be tempered once he becomes King.³²

Meanwhile, the Queen's role as Head of the Church of England has in a de facto way mutated into one of being defender of religious freedom and faith generally across British society. Her first Jubilee engagement of 2012 was at a multi-faith reception held at Lambeth Palace, where she said her role and duty, and that of the Anglican Church generally, 'is not to defend Anglicanism to the exclusion of all other religions' but 'to protect the free practice of all faiths in this country'. In recent times, senior members of the Church have sought to emphasise this broader role as a means of promoting the relevance of the Anglican Church to the whole of society. Thus Richard Chartres, Bishop of London, told the BBC that 'minimal Anglican establishment is a way of serving the whole constituency and keeping the voice of faith in the public square'.³³ Prince Charles has long been in the vanguard of this development, in terms of promoting inter-faith dialogue and cooperation. His publicly-stated preference for being regarded as 'Defender of Faith' rather than 'Defender of The Faith',³⁴ when he becomes King, was greeted with controversy 20 years ago but is now almost universally supported.

The Queen performs a host of complex interrelated roles. These are derived not only from her position as UK Head of State, but from her position as Head of State of 15 other countries, as well as being Head of the Commonwealth of 54 independent States. There were just eight members of the Commonwealth at the time of her accession in 1952, and her personal dedication, social diplomacy and ability to foster goodwill across its growing membership has been incalculable to maintaining its unity and permanence. As the Prime Minister said in his Diamond Jubilee tribute in the House of Commons, the Queen has done more to promote this unique family of nations, comprising all the main religions and nearly a third of the world's population, than any other person alive.³⁵

* * *

If much of the legal and administrative structure in which the monarchy operates has remained inert for most of the Queen's reign, recent years have witnessed a progressive modernisation in several important areas. Substitution of the royal power of dissolution by fixed-term Parliaments has already been mentioned. Royal finances have been placed on a more intelligible footing, avoiding the need

³¹ *King's Counsellor, Abdication and War: The Diaries of Sir Alan Lascelles*, ed D Hart-Davis (London, Weidenfeld & Nicolson, 2006).

³² See J Dimbleby, *The Prince of Wales: A Biography* (London, Little, Brown, 1994); Blackburn, *King and Country*, above n 13.

³³ BBC, *The Andrew Marr Show*, 3 June 2012.

³⁴ BBC, 'Charles: The Private Man, the Public Role', interview with Jonathan Dimbleby, 29 June 1994.

³⁵ *Hansard*, HC 7 March 2012, col 850.

for recurrent embarrassing debates in Parliament and the media about the Civil List, through the Sovereign Grant Act 2011. This new provision is not reign-specific and is designed to be more permanent, linking the Queen's income to that of the Crown estates.³⁶ The honours system, which operates on the basis of the royal prerogative, the Queen being regarded as 'the fountain of honours', has been the subject of several reviews and been made more transparent and rational, even if it still has its critics, with nominations encouraged from members of the public.³⁷ There has been codification of a number of royal prerogatives exercised by the Government, notably, treaty making and Civil Service regulation through the Constitutional Reform and Governance Act 2010.

The most topical legal change taking place around the time of the Jubilee reflected the evolution of human rights values in British society, as in other countries in the West, over the course of the last 60 years. This concerned the royal succession rules, which the Coalition announced it would amend by legislation in 2013 to remove the male preference in line to the throne and the disqualification applicable to a monarch or person in line to the throne if he or she marries a Roman Catholic. The rule of male primogeniture is a product of ancient common law; and the anti-Catholic provisions are set down in the 1688 Bill of Rights and 1701 Act of Settlement, designed after the Glorious Revolution to secure the Protestant succession against the claims of the Catholic Jacobites.³⁸

This reform, which some imagined was straightforward, proved in fact complex both politically and legally, and illustrates the difficulties that can arise in modernising an ancient institution. Because the Queen is not only monarch of the UK, but also monarch of 15 other countries, each with its own constitution, the change in succession law needed to be implemented by way of legislation introduced in each State, simultaneously taking effect so as to avoid any possibility of divergent succession rules amongst all the States involved. This, then, required prior international diplomacy to reach agreement on the reform, which took a considerable time to negotiate, culminating in a joint statement of all the Prime Ministers of the Commonwealth realms on Friday, 28 October 2011, announcing their common intention to make the changes and work within their respective administrations to bring forward the necessary measures. Such common agreement is doubly necessary because, so far as UK legislation is concerned, any alteration in the law touching the succession to the throne also requires the assent of the Parliaments of the Commonwealth realms, under a binding convention set out in the preamble to the Statute of Westminster 1931.

In popular and political opinion, the existence and effects of the Human Rights Act 1998 and Equality Act 2010 had made the existing provisions on royal succes-

³⁶ See the Lord Chancellor's statement and debate on the Civil List prior to First Reading of the Bill: HC Deb 30 June 2011, cols 1144–78.

³⁷ Cabinet Office, *Review of the Honours System* (2004); *Three Years of Operation of the Reformed Honours System* (2008), *Second Report on the Operation of the Reformed Honours System* (2011). For criticisms, see House of Commons Public Administration Committee, *Propriety and Peerages* (2007–08) HC 153, and *Propriety and Honours* (2007–08) HC 1119.

³⁸ Generally see Bogdanor, above n 2, ch 2.

sion look particularly anomalous. Most of the other European monarchies had already amended their constitutional law to implement gender equality in their royal succession, including Sweden in 1980, The Netherlands in 1983, Norway in 1990, Belgium in 1991 and Denmark in 2006 after a referendum on the matter.³⁹ In the UK Parliament, there had been several Private Member's Bills and debates building up pressure for reform, such as those by Lord Dubs⁴⁰ and Keith Vaz.⁴¹ Of special interest is that on one such occasion, where a Bill on the matter was being debated, the minister responding on behalf of the Government, Lord Williams, made it known that the Queen had personally approved of the reform. He told the House,⁴²

I should make it clear straight away that before reaching a view the government of course consulted the Queen. Her Majesty had no objection to the government's view that in determining the line of succession to the throne daughters and sons should be treated in the same way. There can be no real reason for not giving equal treatment to men and women in this respect.

When challenged by a peer that it was constitutionally improper for the views of the monarch to be made public on legislation before the House, Lord William replied that the text of his speech 'has been specifically cleared with those to whom reference has been made'.

Opinion and pressure for change to the anti-Catholic provisions regarding the royal succession had developed steadily in recent decades. Many leading politicians remarked on the offensiveness of the discrimination, such as on the Conservative side Michael Howard ('it is an anachronism that Catholicism should be singled out') and Michael Forsyth ('the British constitution's grubby secret and nobody wants to tackle it'); and on the Labour side Tony Blair (who converted to Roman Catholicism shortly after resigning as Prime Minister in 2007) and John Reid ('as a Roman Catholic myself, I am only too well aware of the very deep feelings and passions which surround this issue'). Some attempted Private Members' Bills have been presented to Parliament to repeal the anti-Catholic provisions as a whole, including their application to the monarch, such as Kevin McNamara's Treason Felony, Act of Settlement and Parliamentary Oath Bill in 2001.⁴³ The Scottish Parliament has passed resolutions calling for such complete repeal, for example in 1999, resolving that it

believes that the discrimination contained in the Act of Settlement has no place in our modern society, expresses its wish that those discriminatory aspects of the Act be repealed, and affirms its view that Scottish society must not disbar participation in any aspect of our national life on the grounds of religion . . .⁴⁴

³⁹ Similar reform for the Spanish monarchy has the support in principle of the main political parties but awaits implementation.

⁴⁰ Succession to the Crown Bill, 2004–05, HL11.

⁴¹ Succession to the Crown Bill, 2010–12, HC133.

⁴² HL Deb 27 February 1998, cols 916–17.

⁴³ HC Deb 19 December 2001, col 377.

⁴⁴ *Journal of the Scottish Parliament*, No 41, 16 December 1999.

In response to the Commonwealth statement on reform in October 2011, the Scottish First Minister Alex Salmond welcomed the news, but added it was ‘deeply disappointing’ that Catholics were still barred from the throne. He said:

It surely would have been possible to find a mechanism which would have protected the status of the Church of England without keeping in place an unjustifiable barrier on the grounds of religion in terms of the monarchy . . . It is a missed opportunity not to ensure equality of all faiths when it comes to the issue of who can be Head of State.⁴⁵

Naturally, senior members of the Catholic Church in the UK have often protested publicly on the subject too.⁴⁶

However, there are complexities in this reform that explain the Government limiting its repeal of the anti-Catholic provisions to the spouse of the monarch only, and not to the monarch himself or herself. The reason for not undertaking a complete repeal of the anti-Catholic provisions is the Established Church of England and the formal role of the monarch as its Head and Supreme Governor. Under a tranche of other historic statutes, including the Bill of Rights 1689, Act of Settlement 1701 and Coronation Oath Act 1689, the monarch on or shortly after his or her accession makes a royal declaration of Protestant faith, is under a duty to participate and be in communion with the Church of England, and must swear an oath to uphold the established English and Scottish Churches. The Queen is a devoted Anglican, and clearly views the oaths she took on her accession with a deep commitment. Evolutionary change has been, and is, taking place in the links of Establishment, with the Prime Minister no longer personally involved in the selection of Bishops and Archbishops,⁴⁷ and the position of the Lords Spiritual in the House of Lords under threat,⁴⁸ but the prospect of a Roman Catholic acting as Head of the Church of England would pose grave difficulties for the future of establishment.

There is a high correlation between those who advocate full repeal of the anti-Catholic provisions in the Bill of Rights and Act of Settlement, and those who favour disestablishment of the Church of England. Some political quarters have openly advocated disestablishment, and this has been a Liberal Democrat general election manifesto commitment for some time.⁴⁹ At present, the Government has expressly emphasised its commitment to the Established Church⁵⁰ with the Sovereign as its Supreme Governor, as did the Labour administration immedi-

⁴⁵ BBC, 28 October 2011.

⁴⁶ These are discussed in Blackburn, *King and Country*, above n 13, 121–22.

⁴⁷ Since 2007 the agreed convention has been that the Prime Minister will automatically forward the recommendations of the Crown Nomination Commission to the Queen for formal appointment.

⁴⁸ On House of Lords reform proposals see C Ballinger, *The House of Lords 1911–2011: A Century of Non-Reform* (Oxford, Hart Publishing, 2012), together the latest government proposals albeit withdrawn in the House of Lords Reform Bill, HC 52 and House of Lords Draft Bill, Cm 8077, 2011.

⁴⁹ Their 2001 manifesto said that under their proposals, ‘the Head of State will be able to be a member of any faith or none’. For arguments about disestablishing the Church of England see Blackburn, *King and Country*, above n 13, 129–36.

⁵⁰ Government Response, House of Commons Political and Constitutional Reform Committee, Rules of Royal Succession, 2012–13, HC 586.

ately before it.⁵¹ The depth of this commitment, however, is unclear, and the value-driven claims for religious freedom and non-discrimination on grounds of faith in British society today are strong, particularly now that the proportion of practising Anglicans in comparison with other faith groups is in decline.⁵²

It is foreseeable that the current Government's limited reform of the anti-Catholic provisions in the Act of Settlement will only serve to add further pressure behind claims for full equality of treatment and repeal of the anti-Catholic disqualifications on the statute book altogether. After all, it is only Roman Catholics who are singled out in this way, not other faiths including Muslims and Buddhists. Furthermore, removing references to persons who "profess the popish religion" in the succession laws will essentially change nothing. Such a reform would neither address nor reconcile the fundamental issue, being the combination of the monarch's secular and religious roles and the possible future problem of a monarch being unable on grounds of faith or conscience to join in communion with the Church of England and swear to maintain the Churches of England and Scotland.

For two generations at least no such conflict will arise, for both prospective monarchs, Prince Charles and Prince William, are Anglican. If and when a future situation should arise, however, where the heir apparent belonged to a non-Anglican faith, the government of the day will be forced to choose between establishment and monarch. In other words, either the monarch's role of Head of the Church would need to be removed prior to or on accession, or the individual concerned would be deemed unfit to fulfil the role of monarch and required to abdicate in favour of the person next in line of succession who was Anglican.

* * *

The regulation of royal marriages is another example of the UK's idiosyncratic mix of past and present, law and convention, and evolution in response to social change. The UK Government announced, shortly after the Perth Statement in October 2010, that at the same time as changing the royal succession laws it would also amend the Royal Marriages Act 1772. This statute strengthened and provided a procedure for the pre-existing common law rights of the Crown to determine the upbringing and domestic affairs of the royal family, and required all descendants of King George II to obtain the formal consent of the monarch before they might legally be married.⁵³ This included the heirs to the throne, and both Prince Charles and Prince William went through the process of obtaining the Queen's permissions to their marriages in this way. The veto of a monarch is not absolute under the 1772 Act, and persons aged 25 years or more may appeal from

⁵¹ *The Governance of Britain*, Cm 7170 (2007), para 57.

⁵² See *Citizenship Survey* (2011), showing a 10% fall since 2005.

⁵³ For a detailed account of the Act's provisions and effects, see Robert Blackburn, written evidence, House of Commons Political and Constitutional Reform Committee, *Rules of Royal Succession*, 2010–12, HC 1615, Ev 16–17. The 1772 Act was prompted by George III's outrage at the choice of wives of two of his brothers.

a monarch's refusal by way of giving notice to the Privy Council then, after 12 months have elapsed, proceed to a wedding ceremony, unless both Houses of Parliament pass a motion expressing their disapproval of the marriage. Under the Government's Bill, the list of persons requiring the monarch's consent to marry will be limited to the first six in the line of succession, and the effect of non-compliance will no longer be to invalidate the marriage but to lose place in the line of succession.

Over the period since the 1772 Act, the number of persons covered by the Act's provisions had become a veritable multitude, and the situation was generally regarded as having become ridiculous.⁵⁴ It also laid itself open to legal challenge under the Human Rights Act 1998, for being a disproportionate restriction upon the right to marry, as protected by Article 12 of the European Convention on Human Rights. However, it is a mistake to think that this Act rankled with the great majority of royal descendants of George II. On the contrary, the whole process of correspondence with Buckingham Palace and Privy Council had usually been a source of great excitement, culminating in a grand and beautiful certificate issued to the happy couple, signed by the Queen herself, adding glamour and enjoyment to proceedings. In terms of statutory causation, if it was the marriage of Prince William and Kate Middleton in 2011 and prospect of the new Duchess's pregnancy that provided the catalyst for government action on removing the male primogeniture rule in royal succession, and if removing the Catholic disqualification applicable to a monarch's spouse was to help assuage Catholic resentment in the corridors of power and end any unjustifiable speculation about the implications of the Duchess of Cornwall having been formerly married to a Roman Catholic,⁵⁵ the main and rather more mundane reasoning behind reform of the Royal Marriages Act 1772 was to remove the cost and time in processing so many applications from George II's royal descendants.

There was nothing in the Royal Marriages Act 1772 to regulate the marriage of the monarch himself or herself. This is a quite separate matter, and the controversy over Edward VIII's choice of Wallis Simpson as his wife, a twice-divorced American, and his resulting abdication in 1936, was an enormous ruction in the history of the modern monarchy, casting its shadow over royal marital affairs ever since.⁵⁶ The romantic quality and conspiratorial politics of this episode remain topical in the popular imagination today, as evidenced just recently by a new Hollywood film being made on the subject,⁵⁷ and yet another biography of Wallis Simpson entering the best-seller booklist.⁵⁸

The idea that there should be some form of political control over who becomes the spouse of the monarch might seem an unjustifiable personal intrusion today,

⁵⁴ See Bogdanor, above n 2, 44–46, 55–60.

⁵⁵ See Robert Blackburn, written evidence, House of Commons Political and Constitutional Reform Committee, *Rules of Royal Succession*, 2010–12, HC 1615, Ev 15–16.

⁵⁶ See P Ziegler, *King Edward VIII: The Official Biography* (London, Collins, 1990).

⁵⁷ *W.E.* (2011, directed by Madonna).

⁵⁸ A Sebba, *That Woman: The Life of Wallis Simpson, Duchess of Windsor* (London, George Weidenfeld & Nicholson, 2011).

but is clearly still a prevalent one in terms of popular and political acceptance of who is our monarch. The partnership of the individual who is Head of State is a matter of public interest to the well-being of the Government and the country. The monarch's consort is inter-woven into this public interest, for he or she will be supporting the monarch and be expected to participate in ceremonial and social diplomatic functions of the monarch. The constitutional laws of some other European countries have formal procedures governing the monarch's choice of spouse, such as in Spain and Sweden, where individuals must vacate the throne if they proceed with a royal marriage that is not approved by the government.

Political and religious objections drove Edward VIII from the throne and into exile in 1936, and it effectively prohibited Princess Margaret from marrying the divorced Captain Peter Townsend in the mid-1950s. More recently, the same notion was the underlying assumption driving the extensive public debate and controversy over whether Prince Charles should marry Camilla Parker Bowles, now Duchess of Cornwall, which was eventually resolved with support from the Prime Minister and Archbishop of Canterbury, enabling the Queen to give her consent under the Royal Marriages Act. What has evolved over the last 60 years is not the constitutional machinery for controlling the marital actions of the monarch: this remains the non-legal principle that ultimately the monarch must accept the advice of the Cabinet, and if needs be, abdicate, as in 1936. What have evolved are the criteria and social values upon which the Cabinet will make up its mind on the matter. Divorce is commonplace today, whereas at the start of the Queen's reign it was still a source of social stigma. While the Government was unwilling to condone a monarch or future monarch marrying a divorcee in the past, by the time that Prince Charles expressed his desire to marry Mrs Parker Bowles in 2005, it no longer viewed divorce as an obstacle.⁵⁹

* * *

Monarchy is the most enigmatic of our political institutions, and many of the rules governing its processes are nebulous in nature, poised between law and politics, myth and reality. Queen Elizabeth has brought great stability to the institution by masterfully working within this complex constitutional structure, blending traditions that chime with the present and echo those parts of British history and ceremony most people enjoy, with practical changes in her role, and supporting changes in the law and convention where shifting social values and morals have required evolutionary modernisation and reform. The Queen has set the gold standard for how a royal Head of State should perform his or her role in modern times. As the Prime Minister said in his tribute in the debate on the House of Commons' Address to the Queen on her Diamond Jubilee, 'it has been said that the art of progress is to preserve order amid change and change amid order, and in this the Queen is unparalleled'.

⁵⁹ See Blackburn, *King and Country*, above n 13, ch 2.

