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A BRITISH REPUBLIC

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I. MOTIVES, PEOPLE AND PURPOSES

A. Why Consider a Republic?

A suggestion that the United Kingdom should be converted into a republic invites a dismissive response especially, perhaps, in the Queen's Golden Jubilee year. The adoption of a republican system of government would require a rupture in a centuries-old constitutional system. Even if the principle of such a change were to be agreed, a major recasting of the law would be needed, and the actual adoption of a new constitutional order would divert energies from other, more pressing, objectives of public policy-making. Any official consideration of a possible British republic might be characterised as pointless, simply because the United Kingdom is likely to remain a monarchy in foreseeable circumstances. Even commentators who are deeply critical of the monarchy have held back from arguing for a republic. For example, it has been said that "[a]s a political reality, it is quite impractical in present circumstances to give serious consideration to abolishing the monarchy altogether".[1] But that is exactly what I am going to do. Why?

The monarchy should not be immune from reconsideration: it should not be beyond the bounds of proper debate. Indeed, the Queen herself made that very point in her "annus horribilis" speech in 1992, when she said that criticism should be used as an effective engine for change.[2] Since the Labour Party came to power in 1997 significant changes have been made to most parts of the British constitution, but not to the monarchy.[3] True, adjustments have

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[1] Robert Blackburn and Raymond Plant, "Monarchy and the Royal Prerogative" in Blackburn and Plant (eds.), *Constitutional Reform: The Labour Government's Reform Agenda* (1999), p. 152.

[2] *The Times*, 25 November 1992.

[3] "[H]ardly an institution or procedure has escaped modernisation [since 1997]. ... The only institution which has not been modernised is the Crown, though the monarchy has been the subject of much discussion and criticism especially since the death of Princess Diana": Gabriele Ganz, *Understanding Public Law* (3rd ed., 2001), p. 1.

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been made, including the decision of the Queen and the Prince of Wales to pay tax on their private income and wealth, and further changes are on the cards, including the possible removal of sex and religious discrimination in the line of succession to the throne.[4] But none of those adjustments has touched the fundamentals of hereditary monarchy. The monarch, and the royal family, are constantly in the public eye, and they are subject to constant appraisal: but that is far removed from the kind of analysis I have in mind here. Every royal story, however remote its subject-matter may be from the Queen herself or her constitutional position, puts the monarchy in the gaze of the media and the public. When a legitimate criticism is made of a member of the royal family following some misjudgment or indiscretion, arguments are generated in an *ad hoc* way about the monarchy itself, sometimes along the lines that the monarchy cannot survive, at least after the Queen's death. Such media-led arguments are no substitute for a rational analysis of constitutional issues, although of course public opinion has an important part to play in the future of any constitutional institution. At present there is not even a basic framework against which any such reasoned analysis could begin. While a case against the British monarchy has been constructed by several people,[5] the silence of constitutional lawyers on the central issue of monarchy or republic is surprising,[6] for what is that issue if not one concerning a central part of the constitution, and, indeed, a very pervasive one? What follows, therefore, is a consideration by a constitutional lawyer—who is a monarchist—of the constitutional arguments about the alternatives of monarchy or republic in the United Kingdom. Even so it can only be a map of the principal features of the terrain, drawn to make clear which matters would require decision if the United Kingdom were to opt for republicanism.

B. Monarchy and Monarchs

At the root of this exercise lies the manner of choosing the British head of state. Put simply, the question is whether a hereditary monarchy is preferable to an elected presidency. But there is a risk, in the British context, of beginning the investigation on a slightly

[4] The Government has said that the Queen has no objection to the removal of the rule that favours males over females in the line of succession, and that the matter was under review: 586 H.L. Deb. 916 (27 February 1998). During the 2001 General Election campaign the Prime Minister described the statutory bar against Catholics succeeding to the throne as "plainly discriminatory", and promised a review of it, although he added that a change would be fraught with constitutional problems: *Daily Telegraph*, 4 June 2001.

[5] See notes 62–65 below.

[6] An exception is R.A. Edwards, "Republican Britain: The Constitutional Implications" [2000] Cambrian Law Review 1.

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misleading premise. It would be wrong to assume that those two systems of government are stark alternatives, with the British monarchy being based wholly and exclusively on an automatic and hereditary succession which excludes democracy. The succession to and holding of the British Crown has not been automatic and unchallengeable. Of course, the legal rules which govern the descent of the Crown in the United Kingdom are well known. A demise of the Crown occurs on the death of the monarch or on the passage of legislation giving effect to abdication. On either event the Crown passes immediately to the person next in line who is qualified to receive it, the line itself being fixed by common-law rules.[7] They ordain that the Crown shall pass by heredity in accordance with primogeniture, but with preference being given to sons before daughters. There is no interregnum: the king never dies.[8] Thus far, so automatic, with no room for any choice to be made between possible successors. It seems that no sharper contrast could be drawn between such royal succession and an elected presidency, in which the head of state is elected from declared candidates, directly by voters or indirectly through some other means. But the situation in relation to the British monarchy is not quite so straightforward.

In the Anglo-Saxon period the king was elected from the members of the royal family by the witan, a supreme council of wise men, which chose the most competent member of the family on the death of the king. It usually elected the late king's eldest son if he was otherwise acceptable. The witan could also depose the king for misgovernment. Only by the time of the accession of Edward II in 1307 can it be said that hereditary succession, without an explicit vote, had become the established rule.[9] Echoes of the old elective method remain even today in ceremonies at the start of a new monarch's reign. The Accession Council, made up of Privy Counsellors and other leading citizens,[10] proclaims the new sovereign, and the subsequent meeting of the Privy Council confirms the proclamation made by the Accession Council. And at the coronation ceremony the new monarch, among other things, is presented for acceptance by, and the allegiance of, those present. Although those events are purely formal, they have their origins in

[7] The sources of those rules are detailed in R. Brazier, "The Constitutional Position of the Prince of Wales" [1995] P.L. 401.

[8] *Calvin's Case* (1608) 7 Co. Rep. 1a at 10a: "... the King is esteemed to be immortal, invisible, not subject to death ...".

[9] See, *e.g.*, T.F.T. Plucknett (ed.), Taswell-Langmead's *English Constitutional History* (11th edn., 1960), chapters 1, 17. At King John's coronation in 1199 Archbishop Hubert, according to one account, declared that the Crown was absolutely elective, with no preference being given to members of the royal family unless founded on their personal merit: Plucknett, *op. cit.*, pp. 483–484.

[10] In 1952 Commonwealth High Commissioners in London were also present.

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times when a new king could not take his succession for granted, but had to await the approbation of notables, clergy, and people. Tenure of the Crown has not been unconditional; the line of succession is not unchangeable. Kings have always been susceptible to violent usurpation, just as any constitution is susceptible to a *coup d'etat*; and English kings have been subjected to the will of Parliament. The pages of constitutional history need be turned back no further than to the English civil war to recall the triumph of Parliament and republicanism over the divine right of kings, followed by the restoration of the monarchy, after an eleven-year interlude, when the monarchy came to depend on the acquiescence of Parliament. Within thirty years of the restoration, another king was effectively deposed by Parliament and others, with his joint successors being accepted and confirmed by parliamentary legislation.[11] At the same time, Roman Catholics were barred by that legislation from succeeding to or holding the Crown,[12] and Parliament laid out the line which the succession to the throne would take after the death of William and Mary.[13] Now those events are very remote from a debate in twenty-first century Britain about whether the Labour Government's constitutional reform programme should be extended at some stage to embrace an elected presidency. Not so remote, however, are the events of 1936, in which the issue of the suitability of the King's proposed consort was resolved against him by the Government.[14] The question has been raised of the constitutional effects of Prince Charles's relationship with Mrs. Camilla Parker Bowles, and it is possible, though very unlikely, that it could affect his succession to the throne.[15]

Thus while there is a presumption that succession to and tenure of the Crown will be automatic and based on the hereditary rules, Parliament has disrupted that process. In the contemporary British constitution the monarch has the tacit approval of Parliament, but approval nonetheless. That does not turn on the formal but legally insignificant accession and coronation ceremonies, but on the assumed continuing acceptability of monarchy and the monarch to Parliament and the people. Parliament can require the abdication of a monarch,[16] and can alter the statutory rules about the line of

[11] Crown and Parliament Act 1689.
[12] Bill of Rights 1689, supplemented later by the Act of Settlement 1701, s. 2.
[13] Bill of Rights 1689, supplemented later by the Act of Settlement 1701, s. 1.
[14] And by the Dominions. For the role of the Commonwealth realms in relation to any proposed change to a republic see below section III.A.
[15] See Brazier, "The Constitutional Position of the Prince of Wales", [1995] P.L. 401, at pp. 414–415.
[16] The monarch's consent to the abdication legislation would be necessary in order to give legal effect to it, as with His Majesty's Declaration of Abdication Act 1936. James II, of course,

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succession. It could (although it never has) remove an individual from the line of succession if it thought that he or she would prove to be an unacceptable monarch. And Parliament, of course, funds the monarchy at the request of the Government. The existence of such a conditional monarchy is very relevant to a debate about republicanism. It makes the divide between an elected president and an hereditary monarch rather less dramatic. There is more popular choice to be exercised in connection with the monarchy than might be assumed, for the qualities of the monarch have been relevant to the tenure of the throne for at least the last 350 years. This was recognised by Walter Bagehot who, in remarking that the monarch depends on parliamentary acquiescence, went so far as to say that a republic "has insinuated itself beneath the folds of a Monarchy".[17] It was, he thought, "quite impossible to say" that the English owed allegiance to the House of Hanover after the Act of Settlement "upon any principles which do not concede the right of the people to choose their rulers ...".[18] His view is strongly fortified by the Abdication. Might the notion of conditional monarchy be extended to occupy a new middle way between monarchy and republic? Could the United Kingdom have not just two models for the choice of head of state from which to choose, monarchy or republic, but three, the third being slightly obscured in the interstices of constitutional history? For the time being I will leave that possibility to one side.

A debate about the comparative merits of monarchical and republican systems cannot take place in wholly abstract, or wholly constitutional, terms. Indeed, parliamentary intervention in the right of monarchs to possess the English and later British thrones testifies to the importance and relevance of royal qualities and behaviour. A core value of any republic is the ability of electors to choose at regular intervals between rival candidates for the headship of state, a choice in which assessments of how well individuals might perform, or have performed, in the office are made. Equally, the fact that the present Queen has been acknowledged generally as being an exemplary monarch cannot be a complete rebuttal of a republican case; the doubts about the Prince of Wales that have been expressed from time to time cannot be ignored by monarchists; the present popularity of Prince William will be a factor in any debate about republic or monarchy. The strength of republican movements has quite understandably

did not consent to his enforced abdication, but the situation was regularised through the recognition of a legal revolution by the Convention Parliament and by the courts, which deemed him to have abdicated.

[17] Walter Bagehot, *The English Constitution* (1867), p. 94.

[18] *Ibid.*, p. 88.

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reflected the popularity of the monarch for the time being. Republicanism gained substantially, for example, during Victoria's withdrawal from public life following Prince Albert's death, to fall back dramatically by the time of her Diamond Jubilee in 1897.[19] Republicanism strengthened, without doubt, during the royal vicissitudes of the 1990s, including the immediate reaction of the royal family to the death of Diana Princess of Wales in 1997, although the Queen's personal popularity had recovered by the turn of the century.[20] Moreover, the republican cause has to be argued against the antiquity of a line which can be traced back to the tenth century. Monarchy is part of the history of the British Islands; it has been part of great events; monarchy arouses loyalties that are no less tangible for being emotional. The case for and against constitutional monarchy, therefore, cannot be reduced to the equivalent of a bloodless accountant's exercise, in which a profit and loss account based on impersonal constitutional assertions is drawn up. But in what follows personalties and their strengths and foibles will be kept out of the reckoning as much as possible.

C. What is a Head of State For?

There is a logically prior question to one which asks whether the United Kingdom should become a republic. It is, what does the United Kingdom require of a head of state? The answer to that vital question should help to shape a judgment about the preferable type of head of state for this country. As with any institution, we should ask in the first instance what it is for and how it is to perform its functions, before thinking about who its personnel are or might be.[21] In finding an answer to that question it is helpful to see whether the office of head of state is likely to remain separate from that of head of government in the United Kingdom. In some republics the head of state also functions as the state's chief executive officer: there is an executive presidency in which the head of state and of government is the same person.[22] The United States system, which is the best known example, has been copied widely, especially in Latin and South America; there are also executive presidents in Africa and in Europe, although not within the European Union.[23] Similarly, there remain a few

[19] Frank Prochaska, *The Republic of Britain* (2000), chapter 4.
[20] Prochaska, *op. cit.*, pp. 220–221.
[21] This was the approach taken by the Royal Commission on the Reform of the House of Lords: *A House for the Future*, Cm. 4534 (2000).
[22] Some executive presidents are also members of their national legislatures, but that is unusual. The United States model is more typical.
[23] Of the 15 member states, seven (including the Grand Duchy of Luxembourg) are constitutional monarchies, and the remainder are republics.

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monarchies in which the monarch is head of government as well as head of state.[24] In other republics, such as Ireland and Germany and many others, the head of state is separate from, and hierarchically superior in the constitutional order to, the chief of government. In such countries the head of state can be described loosely as a non-executive president,[25] with the head of government often styled Prime Minister.[26] In Bagehot's language, such a president is more a dignified rather than an efficient part of a constitution. Clearly, a state requires much more of an executive president than of a non-executive president, because he or she will be in daily charge of the government and will have much political power.

Since at least the reign of Ethelstan, who is usually acknowledged as the first King of England,[27] one person—the king—was the whole executive, within whose hands resided all central authority. Simple societies such as England in the first millennium wanted a leader, a king, and in return received protection from him.[28] Power in England—and later in Britain and in the United Kingdom—emanated from the Crown,[29] and was diffused very slowly to other officers and institutions, especially to Ministers, and later still to the Prime Minister. The development of parliamentary government and parliamentary democracy was to be a continuing but slow passing across of real power from the Crown to Parliament and Ministers. In Britain the distinction between the head of state and the head of government can be seen beyond question at the latest by the period in office as First Lord of the Treasury, and *de facto* Prime Minister, of Sir Robert Walpole.[30] Such a process, of course, has not been unique to Britain: what is unique, however, is that so much legal authority remains as a matter of strict law in the Crown, albeit that that authority is exercised almost entirely on the advice of Ministers.[31] (That situation, incidentally, is the main reason why analysis of the

[24] As in, *e.g.*, Saudi Arabia and Oman.

[25] The phrase is not entirely satisfactory because some executive functions will be vested in him or her, although most will be in the head of government.

[26] The French presidency is *sui generis*. The President of the Republic is dominant in the Constitution of the Fifth French Republic (1958), but specified constitutional powers are shared with the Prime Minister.

[27] He reigned from about 924 to 939 over Wessex and Mercia, and established direct rule over Northumbria in 927.

[28] S. Reynolds, "Law and Community in Western Christendom" [1981] American Journal of Legal History 206.

[29] This was the power inherent in what was to become known as the royal prerogative.

[30] For the development of the office of Prime Minister and of the great offices of state, see F.W. Maitland, *The Constitutional History of England* (1908), pp. 387–400; Sir William Anson, *The Law and Custom of the Constitution* (4th ed., 1935 by A.B. Keith), vol. II, chapter III; Rodney Brazier, *Ministers of the Crown* (1997), chapter 1.

[31] See R. Brazier, "The Crown and Constitutional Reform" in M. Sunkin and S. Payne (eds.), *The Nature of the Crown* (1999), chapter 13.

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concept of the state in English law is so difficult.[32]) The parliamentary system is deeply embedded in the British constitutional system. Not even the most radical constitutional reformer suggests that that system, with the Government indirectly elected at General Elections, and with Ministers as an integral part of Parliament, be overturned. Indeed, no one argues that the power of the Prime Minister should be *increased*: rather, a common concern since the 1960s has been that the powers of that office, to appropriate Dunning's words, have increased, are increasing, and ought to be diminished.[33] The notion that the office of Prime Minister might be combined with that of head of state, in an executive presidency, is untenable. In any likely constitutional future for the United Kingdom, then, the office of head of state, whether held by a monarch or a president, will remain separate from that of Prime Minister, and the United Kingdom will require either a monarch or a non-executive president.

For ease of analysis the functions of a modern head of state may be divided into two groups. Duties, powers, and rights (and sometimes immunities) will be conferred on him or her by the national constitution. These are constitutional functions, legal in character, although conventional authority or limitations may exist alongside them. And a head of state will have ceremonial and representative responsibilities. They are unlikely to be mentioned in the national constitution at all. Purely for convenience they can be termed symbolic functions. Because constitutional functions are easier to analyse than symbolic ones, they will be considered first.

A typical national constitution will describe the constitutional position of the head of state and, in particular, will make reference to the method of selection, the formalities required on assuming office, the powers enjoyed and duties to be discharged, the legal relationships with other institutions in the state, and the procedures governing resignation or removal. So, for example, the Constitution of the Russian Federation (1993) runs to 137 articles, and follows its Soviet predecessors in setting out in detail over thirteen long articles the constitutional position of the President.[34] From them a clear understanding is obtained of the President's duties: so far as it is ever safe to say of any constitution that nothing appears to be missing, that phrase applies to those articles. The Constitution of the Fifth French Republic (1958)—which Charles de Gaulle in effect called into existence in order to establish a strong central

[32] See Martin Loughlin, "The State, The Crown and The Law" in Sunkin and Payne, *op. cit.*, chapter 3.
[33] Plucknett, *op. cit.*, p. 570.
[34] Arts. 80–93.

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executive in reaction to weak government in the Fourth Republic—establishes a powerful presidency over fifteen articles[35] in language deliberately elastic enough to allow holders of the office to wield considerable power.[36] Other republican constitutions, it is true, explain the president's position more succinctly. Even the very detailed, 146-article, Constitution of the Federal Republic of Germany (1949), for instance, devotes only eight articles to the Federal President,[37] but such a difference may be attributable to whether the head of state is an executive president (as in Russia) or a non-executive president (as in Germany). The Constitution of the Kingdom of Denmark Act 1953, which ranges over only 89 terse articles, devotes thirteen of them to the position of the King, albeit in very brief terms, whereas the Constitution of the Kingdom of the Netherlands (revised to 1995) has only four articles about the monarch's substantive powers.

Clearly, provisions about any given head of state reflect the particular requirements of a state. But—again typically—a head of state's constitutional functions can themselves be further divided into two (or perhaps three) areas of responsibility, namely, facilitating the machinery of government,[38] acting as a constitutional umpire, and perhaps, as circumstances demand, acting as a guardian of the constitution.

A head of state assists the routine functioning of government in all three of its branches. For instance (in relation to the legislature) the head of state's assent may be required to legislation, and to the dissolution of the legislature in order that elections may be held.[39] Again (in relation to the government) he or she may appoint Ministers formally to office, and (in relation to the judiciary) may have certain powers to make judicial appointments. In addition to such legal powers the head of state may have conventional powers to enable government to run smoothly. In some Commonwealth states, for instance, the head of state enjoys the British trilogy of rights to advise, encourage, and warn Ministers.[40] Any constitutional system must also provide for the resolution of

[35] Arts. 5–19.

[36] In the French Constitution the President of the Republic is, indeed, "the man in charge": John Bell, *French Constitutional Law* (1992), p. 15.

[37] Arts. 54–61.

[38] An executive president, by contrast, does not facilitate the government, because he or she *is* the government.

[39] This will not apply, of course, in states with fixed-term legislatures, except where the constitution permits the legislature to be dissolved in order to break a political deadlock, which may require the head of state's consent.

[40] In Barbados the duty of the Prime Minister to keep the Governor-General fully informed concerning the general conduct of the government is enshrined in Art. 71 of the Constitution; against that legal background the Governor-General is able to exercise his or her conventional rights.

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political impasses. In a parliamentary democracy these will include the need to find a government from a legislature in which no party or combination of parties has an overall majority, or to identify a new head of government on the resignation of the sitting head, or to break a legislative deadlock between two chambers of the legislature. Here, a head of state may be seen as an umpire. Of course, a constitution may provide rules which supply solutions in such cases: for example, in the United Kingdom the Parliament Acts 1911 and 1949 provide legal rules which govern legislative disagreements between the two Houses.[41] But a head of state may have a discretion to act in constitutional crises, or may have to act in the absence of constitutional guidance on the problem. This may follow from the head of state's duty, enshrined in the constitution, to appoint the head of government, whether using his or her own judgment[42] or after having taken prescribed advice.[43]

Constitutions may provide explicit authority for the head of state to act in a grave emergency in order to secure the continuance of the constitutional system. The French Constitution, for instance, has two provisions which straddle both the umpiring role which has just been mentioned but which also accord the President of the Republic the guardianship of the constitution itself. Article 5 states:

> The President of the Republic is the guardian of the Constitution. By the exercise of his judgment he shall ensure the regular functioning of the public authorities, and the continuity of the State. He is guarantor of national independence, territorial integrity, and of respect for Community agreements and for treaties.[44]

Article 16 goes on to vest the exercise of emergency powers in the President, so that he or she may "take the measures required by the circumstances" in the face of specified threats, such as any to the independence of the nation or to territorial integrity. The German Constitution, too, gives powers to the Federal President which allow him or her to place the country in a state of defence if it is attacked or if such an attack is imminent.[45] The Russian Constitution contains similar provisions.[46] In a major constitutional crisis a head of state may not be confined to the use of purely constitutional powers, because the symbolism of the office may be just as important (to which full attention will be turned shortly). Thus King Juan Carlos

[41] Parliament Act 1911, ss. 1, 2 as amended by the Parliament Act 1949, s. 1.
[42] As in, *e.g.*, Belgium, Italy, or the Netherlands.
[43] As in, *e.g.*, Norway, where the King is required first to consult the Council of State.
[44] For commentary on Art. 5 see Bell, *op. cit.*, pp. 14–15.
[45] Constitution of the Federal Republic of Germany, Art. 115a.
[46] Constitution of the Russian Federation, Art. 87(2). Other emergencies are also provided for: see Art. 88.

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helped to end an abortive military coup in 1981 when he appeared on national television in full military uniform to appeal for loyalty to the Spanish Constitution. The extent of the British monarch's emergency constitutional powers of the kind just indicated is a matter for debate, but it is common ground that the monarch still has prerogative powers which could be used in a grave constitutional crisis: the difficulty, however, lies in imagining circumstances in which they might have to be used.[47] National constitutions require heads of state, therefore, to take part in the routine operation of the constitution, to act as an umpire of disputes, and may also give the head of state powers to help to maintain the constitution of the state during any challenge to its existence.

But the focus of this article is the United Kingdom and on what is required of its head of state. In addition to the general constitutional functions just adumbrated the British monarch has functions peculiar to the United Kingdom, and which have emerged through the accidents of history or through design to meet particular events. Within that list must be included the royal prerogative, which provides the legal source for vast executive powers—albeit that, by constitutional convention, most of them are exercised on ministerial advice. They embrace the grand themes of peace and war, the use of the armed forces, and treaty-making, down to more mundane matters such as the regulation of the civil service, the pardoning of individual offenders, and oddities such as royal ownership of swans.[48] Then again, the monarch is the temporal head of the national church as Supreme Governor of the Church of England[49] and has a legal duty to preserve the Church of Scotland.[50] The monarch, too, is head of state in fifteen Commonwealth realms, and is also Head of the Commonwealth.[51] Most recently of all, the Queen as head of state of the whole United Kingdom has been given extra duties within the devolution settlement in part so as to continue to bind together Scotland and Northern Ireland with England and Wales, duties which require her to perform both statutory and symbolic functions.[52]

[47] For a consideration of those powers see Rodney Brazier, *Constitutional Practice* (3rd ed., 1999), pp. 189–197. See also Geoffrey Marshall, "The Crown and Bagehot's Dubious Death Warrant" [2002] P.L. 4.

[48] These prerogative powers and rights are considered further below in section II.B.

[49] Act of Supremacy 1559, supplementing the original Act of Supremacy in 1534. The monarch is also Defender of the Faith, a title recognised in statute in England in 1554. The Royal Titles Act 1953 authorises the Queen to adopt such style and titles as she thinks fit.

[50] Union with Scotland Act 1706, Art. XIX.

[51] The title was accepted by a meeting of Commonwealth Prime Ministers so that India, as a republic, could continue as a member of the Commonwealth, on the understanding that all members would recognise George VI as its Head.

[52] They include (in relation to Scotland and Northern Ireland) the power to assent to Bills, and (in relation to Scotland) the power to appoint the First Minister. See further R. Brazier, "The Constitution of the United Kingdom" (1999) 58 C.L.J. 96 at pp. 117–123.

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Those, then, are the main constitutional functions of heads of state in general and of the British head of state in particular. Beyond the constitutional, a head of state will enjoy symbolic functions, embracing ceremonial and representative duties. Historically, a king was a potent symbol of his domain. Whether his authority was based on force or on a compact such as the feudal system or, later, on the consent of the people to his rule, the king represented his realm to his people and to those outside it. He had to be seen to enjoy the trappings of his power. Coronations and crown jewels, military displays—and, indeed, military engagements—ceremonies and progresses, all helped to do this. Even though in most monarchies personal royal power has been much reduced, and even though many monarchies have disappeared to be replaced by elected presidents with circumscribed powers, modern heads of state have succeeded to some of the outward show of the sovereignty enjoyed by kings of old. At their most visible, modern heads of state have ceremonial functions to carry out, but constitutions are not the place to find statements about them because they will have been developed (or invented) informally.[53] All this is part of the symbolism associated with a head of state, a concept which is harder to quantify and to assess than more formal responsibilities. But in broad terms it is clear that a head of state symbolises several notions. He or she may personify the state, and in the case of an old monarchy may personify the state's history and continuity. The head of state can represent the nation, both at home and overseas. He or she may be a focal point for national loyalty, and as such transcends party politics because in that role he or she is or strives to be above and outside partisan political rivalry.[54] And a head of state may be expected to exemplify the values which it is assumed citizens may wish to see in themselves, whether as an exemplar of family life or in other ways. Such exemplification may be underscored by such things as an honours system, which provides an outward and visible acknowledgment of individual merit or success. In a monarchy, members of the royal family may support worthwhile causes through their patronage.[55] Many of those symbolic functions can only be appreciated through public ceremonial, seen for instance at the splendid pageantry of a British State Opening of Parliament or a French Bastille Day parade, or during state visits abroad. Constitutional symbolism may be seen in a typical monarchy

[53] Though it is noticeable that the Russian Constitution requires the presidential oath of office to be administered "in a ceremonial atmosphere": Art. 82(2).

[54] It is clearly harder for an elected president than for a monarch to be seen in that way, because he or she may have a political past: see below section II.C.

[55] Prochaska, *op. cit.*, p. 223.

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through the portrayal of the monarch's image or insignia on banknotes, coins, postage stamps, and on public buildings; government may be carried out and justice dispensed in the monarch's name; and so on. The use of a president's person in that way is less convincing. For one thing, an elected president is likely to be in office for a shorter period than most monarchs[56] (partly because monarchs can succeed to the throne at a much younger age than anyone who is likely to be elected president[57]). For another thing an individual is unlikely to represent a republic for as long as a monarch will represent a kingdom, and will as a result have less time to acquire the persona of the state. Again, a president is faced with a difficult trick at one and the same time of having to represent the whole nation, while he or she is the elected choice of only part of it—a difficulty which will be compounded if the president has a party-political past. The transition from presidential candidate wrapped in a party's colours to head of the whole nation calls for subtlety and sensitivity.

Simply because these symbolic attributes continue to exist they must have social value. But they will not be considered further here because this assessment is primarily constitutional rather than sociological in character. What is clear, though, is that any model for a head of state will require the office-holder to perform non-constitutional and non-legal functions.

II. Republic or Monarchy

A. What is a Republic?

> What is called a *republic*, is not any *particular form* of government. It is wholly characteristical of the purport, matter, or object for which government ought to be instituted, and on which it is to be employed, res-publica, the public affairs, the public good; or literally translated, the *public thing*.[58]

A move to a British republic will not come about only through appeals to the shades of great republican thinkers like Paine or Jefferson or Plato. I do not intend to review theories of republicanism,[59] but rather to concentrate on the main symbol of any republic, its presidential head. In such a republic that head is

[56] The seven-year term of office enjoyed by Presidents of the Fifth French Republic was one of the longest permitted in contemporary democratic republics, and it was reduced to a five-year term as from the presidential elections in 2002. Only Francois Mitterand will have served two full seven-year terms.

[57] Indeed, some constitutions prescribe a minimum qualifying age for presidential candidacy—35 years, for example, in the United States Constitution, Art. II, section 1. Victoria was only 18 when she succeeded; the present Queen was 25.

[58] Tom Paine, *Rights of Man* (ed. H. Collins, 1971), p. 200.

[59] For an excellent recent analysis see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997). See also Biancamaria Fontane, *The Invention of the Modern Republic*

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chosen by democratic elections held at fixed intervals which are open to all who meet the minimum qualifications required by law, such as citizenship and residence. Broadly speaking, a state without a monarch is a republic. In a republic power is held by its citizens or, more usually in modern states, is exercised on their behalf by elected representatives, just as it is in a constitutional monarchy.

B. A Republican Case

The cause of republicanism was argued in England, and has been argued in Britain,[60] since at least the seventeenth century. At times the mainspring of the case has been that a monarch has broken the contract with his people, as with Charles I and James II. At others the main argument has rested on the personal unpopularity of a particular monarch, such as George IV, or Victoria in her secluded widowhood. On other occasions still the republican case has been based on principle, whether that a republic represents democracy as a hereditary system cannot, or that equality is undermined by the divisive class system in a monarchy. Much more recently, objections to monarchy have been based on the reaction to things done or not done by the Queen and her advisors at Buckingham Palace following the death of Diana, Princess of Wales. Republicanism has been championed in Britain in the last twenty years or so[61] by politicians,[62] journalists and polemicists,[63] a national broadsheet newspaper,[64] and others.[65] The elements of the republican case are diverse, but its contemporary edifice rests on three pillars.

The symbolic functions of a head of state, outlined earlier, necessarily require that a monarch or president represent a nation as an exemplar of its values. The first pillar of the republican case is that only by choosing an individual periodically in an election can a nation be satisfied that successive heads of state will be best placed to exemplify those values. An election which is open to all citizens will by definition produce the person who is an acceptable

(1994), and P.P. Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990), chapter 10.

[60] I am deliberately leaving out of account republicanism in Ireland.

[61] Prochaska, *op. cit.*, pp. 211–228 gives a summary of the main republican arguments as they were advanced in the late twentieth century.

[62] Tony Benn and Andrew Hood, *Common Sense: A New Constitution for Britain* (1993); see also Mr. Benn's Commonwealth of Britain Bill, Bill 161 (1990–1991).

[63] Piers Brendon, *Our Dear Queen* (1986); Edgar Wilson, *The Myth of the British Monarchy* (1989); Jonathan Freedland, *Bring Home the Revolution: The Case for a British Republic* (1999).

[64] *The Guardian*, in a series of articles which started in 2001. It also supported a number of court cases designed to challenge under the Human Rights Act 1998 the validity of various laws concerning the Crown.

[65] Anthony Barnett (ed.), *Power and the Throne: The Monarchy Debate* (1994); Tom Nairn, *The Enchanted Glass* (1988); Stephen Haseler, *Britain's Ancien Regime* (1991), *The End of the House of Windsor* (1993).

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representative of a majority in the state: he or she will have been elected, among other things, for that very purpose. Republicans fairly concede that the present Queen has been able to encapsulate the country's values, just as her father and grandfather did, but they note that Edward VIII could not (at least not to the satisfaction of the British and imperial establishments[66]). Because heredity is based on the accidents of birth, republicans say that it is only by accident that the Queen has been able to fulfil adequately this representative function.[67] The same hereditary process will in due course produce Charles III, and it cannot be known how well he might fulfil the symbolic requirements of monarchy. What is certain is that if he or any monarch were to do poorly, there would be no efficient removal mechanism to hand to compare to the republican simplicity of regular democratic elections, or indeed with impeachment. But that is not the whole thrust of republican objections to a monarch as a nation's representative, because a British monarch can reflect the undesirable features of society seen in its class system. Any such system must have points of reference and comparison: some people must be at the bottom, with others higher up, reaching the pinnacle with the king or queen. The monarch is the gold standard in a class system, marking out all other denominations as inferior. It is not necessary to go so far as to claim[68] that a contemporary monarch enshrines the worst values of a semi-feudal class society in order to argue that a society that aspires to equality of opportunity, or to be a meritocracy, should not give succour to a divisive class system which can give unfair advantages to those in the higher reaches at the expense of those below them. The monarch is surrounded by members of a household which includes the aristocratic and the privileged—not exclusively or even predominantly, but in significant numbers—in a way that would be unthinkable in a president's office or house. Serious attempts to blur or undermine a class system could never succeed fully, therefore, unless a country were to abandon the gold standard. Republicans were pleased by the blow to heredity and aristocracy delivered by the House of Lords Act 1999, which rejected the validity of the hereditary principle.[69] For if Parliament

[66] Because of the official censorship surrounding Edward VIII's relationship with Mrs. Simpson—connived at by newspaper editors and the BBC—the public had no direct knowledge of it until it would have been too late to affect the decision to abdicate.

[67] Blackburn and Plant, *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (1999), p. 142.

[68] As does Freedland, *op. cit.*, p. 192.

[69] All but 92 hereditary peers were ejected, and the Government remains committed to removing them in the next and final stage of reform legislation. See *House of Lords: Completing the Reform*, Cm. 5291 (2001), para. [2]. An earlier small wound had been inflicted on the hereditary principle by the Peerage Act 1963, which enables hereditary peers to disclaim their

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itself—indeed, the Queen in Parliament—so recently rejected heredity as an unacceptable method through which to find members of the legislature,[70] what can be the justification for heredity to find the head of state?[71]

As the possessor of important constitutional functions the position of a head of state must rightly be assessed in constitutional terms.[72] In such terms republicans find monarchs crucially lacking, a constitutional shortcoming which is a second republican pillar. Modern republics are based on modern constitutions: there is no contemporary instance of a republic founded in a customary constitution.[73] Monarchies by contrast often have their origins in and have developed from those pre-constitutional times before written constitutions became the norm.[74] Historically English monarchs were the source of all power, derived from God.[75] Such a dispensation was unalterable, save by revolution, until the divine right of kings gave way to parliamentary approbation in the late seventeenth century shifts of power. Written constitutions, whether republican or monarchical, were a late eighteenth century invention, notably in the United States of America and in France, and they make explicit where power in the state comes from, whether the people themselves,[76] or a constituent assembly,[77] or the constitution itself. The United Kingdom remains odd in two interrelated constitutional respects: its lack of a written constitution is aggravated by the largely unlimited legal power of the Crown in Parliament.[78] Legally an unquantifiable amount of power remains in the Crown (as part of the Crown in Parliament), together with all the authority that remains legally vested personally in the monarch by the royal prerogative. True, a British monarch is constrained in ordinary circumstances by the democratising effects of

peerages, thus overruling the strict principle which had been upheld in *Re Bristol South East Parliamentary Election* [1961] 3 All E.R. 354.

[70] Even the Conservative Opposition ceased defending the hereditary principle during the debates on the House of Lords Bill 1988–1999, despite the party's stout defence of it as late as the 1997 General Election.

[71] There is a justification, which will be examined later: see below section II.C.

[72] Many, perhaps most, of the criticisms of "the monarchy" in the last decade or so were in fact criticisms of members of the royal family other than the Queen. There would be no room for such criticism of an extended official family in a republic because a president would not have one.

[73] Switzerland was a republic long before it adopted its modern constitution.

[74] R. Brazier, "How Near is a Written Constitution?" (2001) 52 Northern Ireland Legal Quarterly 1 at pp. 7–8.

[75] J.N. Figgis, *The Divine Right of Kings* (1896).

[76] As in the United States, the opening words of whose Constitution must be some of best-known constitutional words: "We the People ...". The Constitution of the Russian Federation also states in its preamble that the people have adopted it.

[77] As in Germany: see the Preamble to the Basic Law of the Federal Republic of Germany (1949).

[78] Subject to European Community law. But the ultimate legal power of the Queen in Parliament is not restricted by the Human Rights Act 1998.

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constitutional convention.[79] But the republican objection is that a modern constitutional settlement should not admit of so much power being in one person or institution at the constitutional apex, rather than being in the constitution itself, or the organs specified in it, or ultimately the people, in every case clearly subject to democratic principles. Hereditary monarchy, in other words, is the antithesis of the democratic ideal, however much it is circumscribed in normal circumstances by the control of Ministers who are accountable to Parliament (the actual practical effect of which can in any case be doubted[80]).[81] In other states that have hereditary monarchies, such as six other members of the European Union, the monarch has powers explicitly conferred by the constitution, which itself was adopted by the people of the state in a democratic manner. In the United Kingdom, by contrast, power is in law concentrated in the Crown, some of which is shared with Parliament, but at no time has that situation been sanctioned unambiguously by the people. Citizens have never had the opportunity to express a view on it. Republicans assert that citizens have the right to accept or (preferably) reject the Crown, its prerogative powers, and its position in Parliament in favour of a better democracy.

The third republican pillar stands on the related assertion that by electing a head of state a number of specific and desirable constitutional attributes are achieved which cannot be matched in a hereditary system. First, the election of a president (either directly by voters or indirectly by some other body[82]) ensures that the principle of democratic legitimacy applies at the pinnacle of the state. There is nothing democratic about the succession of a monarch based on the privilege of birth into a particular family. However well democracy flourishes elsewhere within a monarchical system there is a lacuna at its very summit. Such a state of affairs should concern all democrats. By obvious contrast an elected chief of state enjoys a legitimacy based on an expression of popular will. Secondly, the possession of constitutional powers by an elected president rests on and is justified by (among other things) the consent of citizens, sanctioned both by the terms of the constitution

[79] But even that process has been criticised as amounting to no more than the shifting of effective power from one source of power at the apex of the constitution, the monarch, to the next place down, the Government: according to this view the original source of "top-down" power has been replaced by another: Freedland, *op. cit.*, pp. 19–22, 183–185, 192.

[80] The substantial doubt arises from the existence of elective dictatorship (which ensures that through the exercise of party discipline the Government has great political power, largely unrestrained by either House of Parliament), and from the absence of effective accountability for the use of the royal prerogative (on which see below).

[81] In wholly exceptional circumstances the monarch could use her personal discretion without ministerial advice.

[82] These alternative methods will be considered later.

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and the selection of a given person at the ballot box. A presidency passes the test that political power ought to depend on the consent of the governed. In the United Kingdom a less convincing defence has to be deployed, namely that hereditary monarchy enjoys the implicit consent of citizens, who are assumed through their inaction to have acquiesced in it. Conditional monarchy of the British kind is vulnerable, according to this argument, to the charge that its roots are in pre-democratic times, that it flourished through deferential times, and that it has continued its privileged position by subjecting itself much later to parliamentary democracy. The British monarchy has never been subjected to rigorous parliamentary evaluation,[83] let alone the positive approval of the people. Thirdly, every elected president, but especially one who is more than a mere figurehead, exercises power subject to ultimate democratic control. Any president who contemplates the abuse of power knows that his or her actions will be judged by the people who put him or her into office, and that that which they have bestowed they can take away, through an election or even impeachment.[84] Even an unwise use of authority, or unpopular decisions made in good faith, will be taken into account by the voters at the following presidential election. The purely personal behaviour of a president, too, will be a factor at that election: in order for a president to represent a nation appropriately, it may take the view that he or she should represent the highest standards of personal conduct, and that a serious falling short of it may not be acceptable.[85] Fear of penalty is not the reason why elected presidents try to do their best (with notorious exceptions), but that penalty exists as a default mechanism. By obvious contrast monarchs are subject to no such electoral controls. It is the exercise of power the legitimacy of which republicans challenge.[86]

If a republican constitution were to be adopted in the United Kingdom two further substantial advantages of a constitutional character might follow, depending on the methodology which was used to create the office of president. Although it would be possible simply to endow a president with all the powers, rights, and duties of the monarch, constitution-makers would miss a golden opportunity both to introduce greater certainty into the office of head of state, and also to recast the old law of the royal

[83] The nearest thing to such an inquiry was the Select Committee investigation which resulted in the Report of the Select Committee on the Civil List (H.C. 91 (1971–1972)).

[84] For example, the United States Constitution, Art. II, section 4 (impeachment). Prescribed maximum presidential terms ensure that presidents spend only a limited time in office.

[85] President Clinton's sexual antics did not prevent his re-election in 1996, and indeed an impeachment attempt based on them failed subsequently.

[86] Freedland, *op. cit.*, p. 191.

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prerogative into a modern shape. Such gains as those, it is true, could be achieved within a continuing context of monarchy, but thus far the motivation has been entirely lacking. A new president would have to be given a statutory framework within which to function, and which would specify, for example, the method of election, the formalities for taking office, powers, duties, privileges, emoluments,[87] and the procedures for resignation and removal. It is difficult to arrive at a wholly satisfactory statement of a British monarch's rights and powers.[88] Some are clear enough (such as the conventional rights to advise, encourage, and warn Ministers); others are rather opaque (such as the monarch's government-making powers in a hung Parliament); yet others (such as the right to dismiss a Government) have lain unused for so long that it has been argued (wrongly) that they no longer exist;[89] most (but not all) rights and powers are subject to the constraints of convention.[90] No one setting out to create a monarchy today would endow it with so much constitutional uncertainty. As a result it is impossible to believe that the current collection of uncertainties would simply be passed over to an elected president. It is also doubtful whether it would be acceptable for a president to be given wide discretionary powers, even if they were to be constrained by conventions yet to be worked out. It is unlikely that British citizens, accustomed to most political powers being in the hands of Ministers who are responsible to Parliament, would wish significant political authority to be wielded by the head of state. Naturally, difficult questions would have to be addressed, in particular about a president's role in government-formation and in the dissolution of Parliament. The monarch's present discretionary powers in relation to them could be transferred over to the president, or they might be redirected as some have suggested to the Speaker of the House of Commons, or to the House itself.[91] Decisions about how much of the monarch's

[87] At a stroke, republicans argue, the controversy over royal finances would end. A president would be provided with necessary offices, an official residence, appropriate official support, and an annual salary, but no more.

[88] For attempts to do so see, *e.g.*, A.W. Bradley and K.D. Ewing, *Constitutional and Administrative Law* (12th ed., 1997), chapter 12; de Smith and Brazier, *Constitutional and Administrative Law* (8th ed., 1998), chapters 6, 7, 8; Rodney Brazier, *Constitutional Practice* (3rd ed., 1999), chapters 2, 3, 9; Vernon Bogdanor, *The Monarchy and the Constitution* (1995), chapters 2–6; Sir Ivor Jennings, *Cabinet Government* (3rd ed., 1959), chapters XII, XIII.

[89] That view has usually been advanced as a political proposition rather than as one of law. It is said that as a matter of political reality a constitutional monarch just would not use such powers in a contemporary setting.

[90] The monarch's reserve powers, by definition, would not be exercised on advice. Those powers include insistence on, or refusal, of a dissolution, refusal of assent to legislation, dismissal of a Government, and the appointment of a Prime Minister in the monarch's personal discretion without following convention.

[91] See below, section III.A.

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powers to transfer to a president or elsewhere would have to be taken, and a clearer reformulation of the powers of the head of state would have to be made in doing so. And so a reasonably clear statutory statement of presidential authority would be a prerequisite to the adoption of a republic and, if it is right that discretionary powers would be limited, then the relevant parts of the constitutional statute might be akin in style to models such as the German Constitution—direct, exhaustive, and permitting only limited discretion.

A second constitutional advantage in creating a British republic would be closely linked to the first. The unsatisfactory state of the general law of the royal prerogative is fairly well known and need not be rehearsed here.[92] The principal defects are that it gives the Crown so much power; that it endows Ministers with vast executive authority which they would otherwise have to take through primary legislation; that its use is subject to hardly any effective parliamentary controls;[93] that the judicial role in relation to it remains unclear; and that the royal prerogative is, in parts, imprecise.[94] It would be inconceivable that a whole branch of English law of that type would be replicated in a republican constitution, carried over and unimproved. It is not too cynical to say that the two main political parties in Britain have been content to leave the royal prerogative well alone because it gives them in office the benefit of so much executive authority. The necessity for reforming that prerogative is one reason why—thus far—they have remained monarchists.[95] In any move towards a republic that law could not be left undisturbed, and the most objectionable features would be removed.[96]

C. A Reply

It is apt that republicans should bear the burden of proof to show that the British monarchy should be abolished and replaced with a presidential system. In seeking to discharge that burden they will be met with the traditional conservative argument that constitutional monarchy "works", and that therefore it should be left alone. This was the main defence offered by the Conservative Party in the 1990s to

[92] See Sir William Wade, *Constitutional Fundamentals* (revised ed., 1989), chapter 4; Sunkin and Payne, *op. cit.*, especially chapters 4, 7, 9, 11, 13.

[93] In a series of parliamentary questions in 2001 individual Ministers were asked how many of their decisions within the previous month had been made using royal prerogative powers. All replied that records were not kept of such decisions, nor would it be practicable to do so. See, *e.g.*, 373 H.C. Deb. *207* (written answers 23 October 2001). Those replies testify to the pervasive nature of the prerogative in ministerial power.

[94] Brazier, "Constitutional Reform and the Crown", pp. 354–361.

[95] See further section III.A below on the attitudes of the political parties in this debate.

[96] This is considered below, section III.B.

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most of the Labour Party's constitutional reforms. But that defence was countered then with the retort that, while the current arrangements undoubtedly work, there is an alternative which would work better. Republicans will also be told that people simply are not interested in their cause, because they are overwhelmingly concerned with matters of daily importance to them, principally the delivery of better public services. The idea that citizens will not engage with constitutional questions is patronising and should be resisted in this context as in others. Politicians and others should feel obliged to explain why these questions matter. Indeed, politicians are only too happy to consult the public on constitutional questions when it suits them, especially in referendum campaigns.[97] In seeking to discharge the burden of proof the proponents of radical change to the headship of state cannot avoid the irrationality of sentiment. For better or worse the British constitution is not based on logic alone. The association of the monarchy with so much of English and British history, as already noted, has built up a store of support for an institution simply because it has been with the nation through good times and bad. Those sentiments will make a republican case harder to press successfully, at least while such a popular monarch as the Queen is on the throne—and one who will be more popular still after the Golden Jubilee.

Some differences between monarchists and republicans are matters of judgment that cannot be proved forensically. For instance, it cannot be proved whether a president or a monarch would be the better symbolic or representational head of state of the United Kingdom short of actually electing a president and seeing what happened. Certainly, *election* proves beyond doubt that a president represents the majority which elected him or her, but how, once elected, a British president would be perceived by citizens as their exemplar is unpredictable. It must be remembered that elections throw up unsatisfactory presidents,[98] just as heredity throws up inadequate monarchs. Again, it cannot be shown as a matter of argument that an elected president would use the constitutional powers of the office better than recent monarchs. Reasoned guesses could be made, but little more.

How, then, can the main bricks be laid in establishing a contemporary case for monarchy? Let me return to the argument based on democracy which is at the heart of many republicans' credo.[99]

[97] For example, it can be argued that while the Government held referendums on devolution in order to ensure that it was actually wanted by the people affected, Ministers also wanted to enhance their political authority for the consequent legislation.

[98] Several individuals could be listed from United States and European history. President Leone of Italy, for instance, had to resign in 1978 amid allegations of fiscal misconduct.

[99] Though not all: for Stephen Haseler, it is the argument that monarchy sustains the class system which is paramount.

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It is unexceptionable that a hereditary system is not democratic. Elections have no part in choosing monarchs. In the United Kingdom the monarchy does not rest on a constitution that has been adopted formally through a means which would be said to be democratic in a modern sense, such as through a constituent assembly or referendum or parliamentary vote. But the British monarchy is constitutional monarchy. It rests on, and can only continue with, parliamentary approval. Parliament abolished the monarchy 350 years ago; it has changed the incumbent monarch twice in the last three hundred years, the last time only 65 years ago; it has altered the line of descent, and may possibly change it again by readmitting non-Anglicans to that line and by introducing equality between the sexes in it; Parliament has modernised the law about the monarchy in other ways, with the full consent of the monarch.[100] Through its approval of a Civil List Bill at the beginning of each reign Parliament gives its approval to the new monarch. While there has been no explicit popular vote about the principle of monarchy in the United Kingdom in a plebiscite or parliamentary vote,[101] can any other conclusion be drawn except that people are content with the continuation of monarchy, modified by legislation from time to time, until and unless the incumbent or, indeed, the system itself, are changed by popular decision? That is the attitude struck by the Queen in relation to those realms which contemplate the adoption of a republic.[102] In any case, if there were any real question about a democratic deficit in the monarch's right to be head of state the answer could be obtained well short of a full-blown campaign for republicanism. A parliamentary vote on the issue, or legislation, or a referendum, could be used in order to resolve the matter, possibilities which will be considered later.[103] The monarch's powers, too, are at the ultimate disposal of Parliament. As and when Parliament, whether at the behest of Ministers or otherwise, wishes to alter those powers it can do so, and moreover has done so.[104] Moreover, within the important constitutional area of government-formation and prime-ministerial succession, the present Queen has embraced democratic solutions in place of her predecessors' use of their personal discretion. In George V's reign Buckingham Palace

[100] A number of statutes fit within that category, ranging in time from the Accession Declaration Act 1910 to the Regency Acts 1937–1953.

[101] The parliamentary vote in the aftermath of the Abdication is the only exception in the twentieth century.

[102] It was made clear on her behalf during the Australian referendum on the monarchy in 1999 that the Queen would only wish to remain head of state for as long as that was the wish of individual realms.

[103] See below section IV.

[104] See Brazier, "Constitutional Reform and the Crown", pp. 346–347.

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conferences were held from time to time to resolve particular crises,[105] and the King, sometimes through his Private Secretary, intervened to find a Prime Minister in uncertain political circumstances. By contrast, there was no royal intervention following the election of the hung Parliament of 1974, and a political solution emerged at the hands of the politicians.[106] And on the last two occasions when a Prime Minister resigned on personal grounds leaving the Government to continue under a successor, in 1976 and 1990, the Queen departed from precedent and waited until the political parties' own leadership rules had produced a new leader before appointing him Prime Minister. In doing so a new precedent was established for the modern political environment.[107] To that extent the monarch has voluntarily placed the prerogative second to parliamentary democracy.

But responses such as those concede that democracy, however defined, must occupy the whole constitutional field, or more precisely that it is only through elections that constitutional actors are legitimised. This is clearly not so. Judges, for example, are not elected, but are appointed on terms dictated by Parliament, and their constitutional authority is not doubted.[108] In a monarchy, a constitution seeks to establish as head of state someone in an office outside the ebb and flow of elections, and of public opinion that may be transient. This is why the analogy between the rejection of hereditary peers and any rejection of hereditary monarchy is false. Many states with fully or largely elected legislatures have a hereditary monarchy, in recognition of that difference, and are no less democratic for it. Proponents of that analogy do not compare like with like: of course there is a presumption that a legislature should be elected (if a model can be agreed, which it has not in the United Kingdom in relation to the House of Lords). But the principles on which a head of state is selected are not the same.

A second brick in the royalist case fits closely to the one just laid, and is probably the keystone of the whole structure. A hereditary monarchy fills the office of chief of state with a person

[105] Notably in relation to the Home Rule crisis in 1914 and the formation of the National Government in 1931.

[106] As Prime Minister, Edward Heath merely reported on the political situation personally to the Queen on the day after the February 1974 poll and explained that he was trying to form a coalition, and then he formally resigned on the following Monday having failed to do so.

[107] The Conservative Party only adopted formal balloting for its leader in 1965. Before then the Queen relied on the party's own soundings to produce a new leader as required. Such an informal system was always open to conflicts of evidence, notably in 1963 when Harold Macmillan's conclusion that Lord Home was the predominant choice of the party to succeed him was, and has remained, controversial. But Macmillan's soundings were apparently so methodical that it is difficult to see how the Queen would have been justified in launching her own inquiries. See Lord Blake, "Constitutional Monarchy" in D. Butler *et al.* (eds.), *The Law, Politics and the Constitution* (1999).

[108] Civil servants, of course, are not elected either, and no one suggests that they should be.

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who takes the office outside political ambitions, and who should be and is above and beyond party politics.[109] A republican system can be envisaged in which the most able people put themselves forward for the presidency, and in which the best of them is elected. That, of course, was the dream of the founding fathers in the United States.[110] But party politics have sullied that vision wherever it has been dreamt: no modern republic elects its president without political parties putting up candidates and from whom the winner usually comes. Independent candidates are sometimes elected, but usually one political party sees its candidate, or at least a candidate who has held public office in that party's interests or who is known to empathise with it, elected as head of state. Occasionally an individual, like Charles de Gaulle in 1958 or Nelson Mandela in 1994, is virtually assured of the presidency in spite of party politics because of particular national circumstances, but that, too, is rare. In an executive presidency, naturally enough, the parties will fight with greater vigour, for the prize is greater, and the winner will inevitably be more clearly identified with one party. Even where the elected head of state is more of a figurehead, his or her political past will be known. Once in office a president will, of course, try to represent the whole nation, and will try to exercise constitutional judgments in a non-partisan fashion, but those against whom those judgments go will at least muse on whether partisanship played any part. In a monarchy, politicians must fight for their causes in the hurly-burly of legislative elections and in the legislature itself, with which the head of state has no immediate concern. Of course, this is not to say that a monarch has no political opinions. Everyone near the centre of political life is bound to have political views. Indeed, criticisms have been made of monarchs for allowing their politics to colour some of their decisions. It is argued, for instance, that in 1931 George V engineered the creation of the Conservative-dominated National Government, rather than merely assisting its birth, or that George VI in 1938 was overtly partisan in the support which he gave from the balcony of Buckingham Palace to Neville Chamberlain after the Munich Agreement when that pact divided the political parties. Such specific charges can be defended, but the monarchists' case, surely, can be that if those are the gravest political charges that can be laid against the monarchy in

[109] As Bogdanor puts it, "A constitutional monarchy settles beyond argument the crucial question of who is to be the head of state, and it places the position of head of state beyond political competition": Bogdanor, *op. cit.*, p. 301. He adds (more controversially in my opinion): "In doing so, it alone can represent the whole nation in an emotionally satisfying way; it alone is in a position to interpret the nation to itself. That is its central function, its essential justification and rationale; everything else is but embellishment and detail.".

[110] Hence the creation of the electoral college, to which voters would send the wise and the good to choose the best candidate for president and the second best candidate for vice-president.

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the whole of the last hundred years, then even if met by a guilty plea the sentence should be trivial. The non-political character of a hereditary monarchy is probably one reason why it is retained in about half the states of the European Union and approaching a third of the countries in the Commonwealth.

If the best form of defence is attack, the next brick for monarchists to deploy amounts to a challenge to republicans to suggest a presidential system that would meet the particular requirements of the United Kingdom. Monarchists assert that there is no republican model awaiting adoption which could both satisfy monarchists and around which most republicans would rally. While arguments which advance the cause of republicanism can be marshalled, if no construct really stands a chance of acceptance then the status quo will continue by default. What, then, are the problems involved in any likely British republican model?

As explained earlier, a British presidency would almost certainly be non-executive in nature. Even within such a presidency the balance needs to be articulated between the symbolic functions and the actual authority of the president. The question would turn on whether the president was to be more of a figurehead than a constitutional authority, or the other way round. Republicans face objections whichever way the balance is tilted. Take, first, a plan which would make a president largely powerless in a mainly ceremonial office. Such a model would be vulnerable to the question whether the creation of a presidency of that kind would be worth the effort which would be required, and be worth the full panoply of election. If what is wanted in the United Kingdom's head of state is a ceremonial officer, then it is the monarchy which already provides splendid ceremonial and pomp largely unmatched in republics,[111] and it is hard to see such trappings fitting at all easily on a president's shoulders. If, alternatively, the republican model proposed would retain the equivalent of the monarch's constitutional powers, more or less, then the political philosophy of the president would be sought out, and his or her objectivity would be scrutinised minutely. And the greater the president's powers the less likely that the plan would be attractive to the political parties. Creating a perfect balance between those two alternatives would be the ideal, if it could be achieved.

British republicans must be sensitive in their constitution-making to the problem presented by the precise method of election which might be proposed. The Australian republican enterprise provided a warning to republicans within an existing monarchy that they must

[111] Though republican France notably provides magnificent military ceremonial for state and other occasions.

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be united over a model in order to succeed, and that it must be one which citizens can be persuaded to support. It will be recalled that in Australia the model put before the voters in 1999 at a referendum (which is an essential prerequisite to any change in the Australian constitution[112]) was that the President of Australia would be elected by both Houses of the Federal Parliament on the nomination of the Prime Minister, provided that a candidate obtained at least two-thirds of the votes in each House of the Federal Parliament. That model was rejected by the electorate by a vote of 55 per cent. to 45 per cent., a result that has been ascribed partly to innate Australian conservatism but mainly to a distrust of politicians who would have elected the president.[113] The model divided republicans themselves, an alternative camp having championed a directly-elected president.[114] The essential choice, then, would be between a British president elected directly by voters, or one elected indirectly by Parliament or an electoral college. In the light of the Australian experience it would be a fairly safe bet that only a directly-elected president would be acceptable in the United Kingdom. For it is democratically the purer of the two models, allowing all voters an equal say in the choice of head of state; it imbues the president with an unambiguous mandate attested to by the support of over 50 per cent. of the votes cast;[115] most importantly, it denies the choice to a body interposed between candidates and citizens. Such interposition can only be justified on the ground that citizens do not know best—or who would be the best—and that their elected representatives do. An indirect election method certainly has the advantage that the potential candidates are in the hands of those who may know them best; it is also attractive for parliamentarians—who, of course, would have to approve the legislation providing for a republic—in that the choice of person to be vested with constitutional power over them would be in their hands, rather than in the gift of citizens. Although direct election might be the better method in any British contest, convincing the political parties of that might be no mean feat. Here the issues of elective method and of presidential power meet: the more powerful

[112] Commonwealth of Australia Constitution Act 1900, s. 128.

[113] C. Munro, "More Daylight, Less Magic: the Australian Referendum on the Monarchy" [2000] P.L. 3. For a defence of the Crown in Commonwealth parliamentary systems see Nigel Greenwood, *For the Sovereignty of the People* (1999). On the referendum from the British perspective see Ben Pimlott, *The Queen: Elizabeth II and the Monarchy* (2001 ed.), pp. 671–679.

[114] See Republic Advisory Committee, *An Australian Republic: The Options* (Commonwealth of Australia, 1993).

[115] Assuming that a preferential voting system was used, or that the final choice was between only two candidates.

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the president was to be, the less attractive the whole project might be for politicians if they were not to choose the head of state. An elected president, whose authority stemmed from a fresh statute, would not be constrained by the constitutional reticence of his or her hereditary predecessors. Politicians who might be irked by a monarch can always gently remind the incumbent that *they* are elected: no such argument could be used in a republican future. Just as the post-hereditary House of Lords considers itself more legitimate than its predecessor, so an elected head of state might be readier than a monarch to use the authority of the office.

Monarchists cannot deny that monarchy has a significant role in the class system. It is a charge that cannot be defended, and it weakens any royalist case. All that monarchists may do is to tease republicans with a few gentle questions. For example, is there not social climbing in republics? There was, notably, in the Third French Republic.[116] Cannot the republican ideal of equality be exaggerated? For is republican Portugal more egalitarian than royalist Spain, or Italy more egalitarian or modern than Norway?[117]

III. Making the Change

At the beginning of the twentieth century hereditary monarchy or empire was the typical system of government in Europe from Norway in the north to Italy in the south, and from Spain in the west to Russia in the east.[118] France, Portugal, and Switzerland alone were republics. But in the calamities of the First World War and its immediate aftermath republicanism followed " ... the disappearance of five Emperors, eight Kings and eighteen more dynasties."[119] It has been argued in the light of that twentieth-century experience that, with a few exceptions, republicanism does not generally take hold because of the attractions of its ideology, but because it is considered less bad than monarchies that have been defeated in war or overthrown in revolutions.[120] That analysis, however, does not fit with the democratic and more recent changes in Commonwealth states which have abandoned the British monarch as head of state in favour of a locally-elected president. In making a judgment between constitutional monarchy and republicanism in the United Kingdom, the practicalities of making a change must be taken into account. How, then, would such a radical reform be brought about in the United Kingdom? The answer to that question may be offered in two

[116] Prochaska, *op. cit.*, p. 218.
[117] Bogdanor, *op. cit.*, p. 200.
[118] The Emperors of China and Japan reigned over empires even further east.
[119] Sir Harold Nicolson, *King George V: His Life and Reign* (1952), p. 106.
[120] Bogdanor, *op. cit.*, p. 299.

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parts, the first considering how a decision to adopt an elected presidency might be arrived at, and then the second looking at the mechanics of the change. These nuts-and-bolts issues have been largely ignored up to now.[121]

A. Deciding the Issue

Politicians are the handmaidens of constitutional change. They hold the key which would unlock the door to a republican future. Without the support for a republic of a major political party, monarchy will continue by default. How do the parties stand on this issue?

Whatever may divide the Conservative Party, respect and affection for the monarchy undoubtedly unites it. That firm belief in the benefits of monarchy predates the creation of the modern Conservative Party in the nineteenth century. It is inconceivable that, even though the party is searching for fresh ideas that might put it back within sight of power, it would entertain breaking a link with monarchy that is as old as the party itself. The Labour Party, by contrast, is in a different, and more ambiguous, position. Labour Prime Ministers have held in great respect the monarchs with whom they have dealt, from Ramsay MacDonald to Tony Blair;[122] republicanism has not been debated at a Labour Party conference since 1923, when a motion went down to a very heavy defeat;[123] a republican motion following the Abdication could only muster five MPs in support.[124] At the 1997 General Election new Labour thought it wise to include in its manifesto the caveat "We have no plans to replace the monarchy."[125] But that was scarcely a ringing endorsement of the institution, and does not of itself rule out the future adoption of such a plan. And, more importantly, the House of Commons which was elected in 1997 and re-elected in 2001 with huge Labour majorities has been characterised as the most republican in modern times given the number of Labour MPs

[121] "The Crown's enemies have always been more absorbed in tearing down than building up, better at theory than the practicalities of what would fill the void left by the departed sovereign": Prochaska, *op. cit.*, p. 217.

[122] Tony Blair's remark of the Queen in a public speech on 20 November 1997 marking her Golden Wedding that "You are simply the best of British" was typical of the respect which Prime Ministers have had for her.

[123] In round figures it was lost by 3,694,000 to 386,000.

[124] 318 H.C. Deb. 2203–2233 at col. 2220 (11 December 1936) (republican amendment to the Abdication Bill).

[125] *New Labour: New Life for Britain* (Labour Party, 1997). It has been said that this was included in order to prevent the risk of disproportionate attention being attracted to the issue: Blackburn and Plant, *op. cit.*, p. 139.

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sympathetic to the cause,[126] and given the senior members of the Government who in opposition had spoken publicly in favour of radical change.[127] In government, the Prime Minister has afforded continued public support to the head of state, as has the Lord Chancellor.[128] But monarchists cannot rely on unqualified and indefinite support from the Labour Party, not least because its preference for relying on focus groups makes it particularly receptive to changes in public opinion. Labour's allies in constitutional reform, the Liberal Democrats, already have plans to reduce the constitutional role of the monarch. As part of their radical goal of working towards a new, and written, constitution the formal power to appoint the Prime Minister would be transferred to the Speaker of the House of Commons, who would be guided by the House itself.[129] Because all democratic systems of government depend at least in the last resort on the consent of the governed, the attitude of the public is critical to the future of the monarchy. The public has become much less deferential through the latter part of the twentieth century to those set in authority over them. As was shown by the public reaction to events following the death of Diana, Princess of Wales, support for monarchy is certainly not unconditional, and that is appreciated at Buckingham Palace. At the time of writing, however, there appears to be no enthusiasm among the public for radical change to the monarchy, at least while the Queen reigns. Equally, however, if and when the public turned against constitutional monarchy and seemed ready to embrace radical change, the political parties (apart from the Conservatives) would probably take their cue from that and seek to give the public what they wanted.

Given the importance of the issues involved and the detailed changes which would be required in translating the United Kingdom into a republic, any Government minded to take the matter further would probably wish to establish an independent inquiry about it. The obvious vehicle to use for the purpose would be a royal commission: despite the irony of the title, only such a

[126] Even before those elections there was little enthusiasm among Labour MPs for the monarchy. In a poll of Labour MPs in 1996, only 11 supported the monarchy "without serious reservation": *The Independent*, 18 February 1996.

[127] Blackburn and Plant, *op. cit.*, p. 140.

[128] Lord Irvine of Lairg LC, in declining to support a referendum on the abolition of the monarchy, said that the Government believed that the national interest and desire was for the country to continue as a constitutional monarchy. He added that the Queen personified national cohesion, Commonwealth unity and political stability, and that support for the monarchy was "rock solid": 628 H.L. Debs. 1126 (21 November 2001).

[129] See, *e.g.*, *Here We Stand: Proposals for Modernizing Britain's Democracy* (Liberal Democrat Federal White Paper No. 6, 1993); see also *Reforming Governance in the UK* (Liberal Democrat Policy Paper No. 40, 2000) in which radical reform of prerogative powers is envisaged.

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body would have the necessary status for the task.[130] Matters for consideration would clearly include the core arguments about how the head of state should be chosen, what that officer's powers and duties should be, and the legal and other changes which would be required if the United Kingdom were to cease to be a monarchy. An inquiry would face the crucial question of whether a president should be elected by the people or by Parliament. In the British constitutional order Parliament is supreme, and it would have to decide what action, if any,[131] to take on the report of any official investigation into republicanism. The Government could, of course, accept its recommendations or rewrite them according to ministerial preferences. Despite that parliamentary supremacy, it would be inconceivable that any Government would introduce legislation providing for a republic without having the political authority of a manifesto commitment behind it.[132] Even then, any republican majority in the House of Commons would be likely to face a royalist majority in the House of Lords as at present constituted. But a republic Bill trailed in a manifesto would attract the protection of the Salisbury convention,[133] assuming that it still exists,[134] and so the House of Lords should not seek to reject the Bill, just as, for instance, that House did not seek to reject the instrument of its own transformation, the House of Lords Bill, in 1998–1999. In any case, the measure could be passed under the Parliament Acts. Despite the argument that constitutional Bills should not be sent through that route because major constitutional changes should require the approval of both Houses, there is no convention to that effect. The Parliament Act 1949 itself was so passed, and the present Government had said in its 1997 manifesto that the House of Lords Bill would be passed that way if necessary. A republic Bill, like any other, would also require royal assent.

Thus a Government that wished to legislate for a republic is likely to obtain an independent analysis of the issues and obtain the support of voters at a General Election. Such a Government would want to proceed with as much agreement as possible, or (to

[130] For a similar exercise in a realm reconsidering its whole constitutional system, see Report of the Barbados Constitution Review Commission (1998).

[131] Even assuming that an official inquiry recommended fundamental change the Government might, of course, decide to do nothing with the report.

[132] This was done, for example, by the present Government, which outlined its constitutional reforms in its 1997 General Election manifesto, following the precedents of the Conservatives in 1970 with their commitment to try to obtain membership of the European Communities, and of the 1974 Labour Government with its devolution plans.

[133] R. Brazier, "Defending the Hereditaries: the Salisbury Convention" [1998] P.L. 371.

[134] The Conservative Opposition in the House of Lords has asserted that because the original reason for the adoption of the Salisbury convention—the hereditary nature of the second chamber—has disappeared with the House of Lords Act 1999, the basis for the convention has gone with it.

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put it rather differently) with as much political authority as possible. One way to achieve the latter objective would be to resort to a referendum. There are well-known problems in the use of referendums,[135] and in this context may be added to them the divisiveness of a poll in Northern Ireland, where the vote would be for the monarchy regardless of the rest of the national vote. But because devolution questions were committed to voters in Scotland, Wales, Northern Ireland,[136] and London, the pressure for a national vote on the future of the monarchy if a Government were seriously intending a change would be irresistible. While there is no constitutional convention requiring a referendum to be held before any major constitutional change,[137] at least there now exists a statutory framework to ensure that any referendum is conducted fairly.[138] Of course, the inclusion of a referendum in the decision-making process, whether before or after legislation was passed, would add to the complexity of the whole operation, in part because legislation would be required under which a referendum could be held.[139] A further complication in the legislative process would lie in the requirement of obtaining Commonwealth assents to legislation designed to abolish the monarchy. This arises from the preamble to the Statute of Westminster 1931, which restates the convention that "... any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom."[140] Obviously, a change which by convention required not just legislation at Westminster but also the assent of fifteen other realms would be a bigger enterprise than one which required Westminster to act alone. Commonwealth assents have been sought under the Statute of Westminster on three occasions, in 1936 (on the Abdication), in 1948 (to remove the title of Emperor of India), and in 1953 (on the Queen's adoption of separate titles for her several

[135] See, *e.g.*, Committee on Standards of Conduct in Public Life, *The Funding of Political Parties*, Cm. 4057 (1998), chapter 12; Geoffrey Marshall, "The Referendum: What? When? How?" (1997) 50 Parliamentary Affairs 307.

[136] Admittedly, in the last case, against the background of the previous use of border polls in Northern Ireland.

[137] Certainly the present Government—more liberal in the use of such votes than any of its predecessors—does not think so. It did not use referendums in relation to the "incorporation" of the European Convention on Human Rights, or over House of Lords reform.

[138] Political Parties, Elections and Referendums Act 2000, Part VII.

[139] The 2000 Act is not a comprehensive referendum code, in particular lacking any guidance about the circumstances in which a referendum should be held.

[140] The convention relating to the royal style and titles has partly lapsed. Commonwealth realms which have adopted a separate title for the Queen as head of state have not sought the assent for that of the other realms. But the convention relating to the succession remains: indeed, that was the legal advice given recently to the Government: see the Prime Minister at HC Deb., vol. 341, col. *WA 57* (13 December 1999).

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realms). The manner of obtaining the Commonwealth assents varies. As a result of the complexity of the effects of the preamble to the Statute between the various realms, there is no uniform rule governing all the realms which requires either local primary legislation to express the necessary assent, or a simple parliamentary resolution. Thus, for example, effect was given in the Dominions to their assent to the Abdication Act 1936 by local legislation in some Dominions (as in Canada and South Africa), or by parliamentary resolution in others (as in Australia and New Zealand).

B. Related Decisions: A Sketch

While the issue whether the head of state in the United Kingdom should continue to be a hereditary monarch could be expressed as a simple question on a referendum ballot paper, several other matters, of varying complexity, would have to be resolved if a republic were to come about. What follows is no more than an outline of those matters.[141]

Even if the monarch ceased to be head of state in the United Kingdom, the British monarch would remain, without more, head of state in the fourteen other Commonwealth realms where today she is head of state. The Queen would remain Queen of Australia,[142] New Zealand, Canada, Grenada, Jamaica, and so on, by virtue of their national constitutions. It would be for each of those realms to decide whether to make any change in their relationship with the British monarch. The future of the monarch's titles within the United Kingdom, however, would consume some energy and time. By statute, the monarch is Supreme Governor of the Church of England[143] and Defender of the Faith.[144] Even if an elected president were not an Anglican, he or she could hold those titles by a simple change in the law which substituted the president for the monarch, because the titles are held automatically by whoever is the monarch: there is no other test. But there would be, of course, a more fundamental point at stake, namely, whether the Church of England should be disestablished. It seems to be common ground that that question is primarily one for the Church itself to take. No doubt the separate laws which require the monarch to be in communion with the Church of England and to

[141] I do not intend to deal with the nature of the financial settlement which would be required.
[142] And, indeed, separately Queen of each of the individual states which make up the Commonwealth of Australia. It was possible, had the 1999 Australian referendum gone the other way, that some Australian states would have wished to keep the Queen as their head of state.
[143] See above note 49.
[144] Act of Supremacy 1559.

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take oaths to uphold it would simply be repealed as part of the republican legislation, because those laws are even criticised within a monarchical context as being discriminatory against non-Anglicans.[145] The other title enjoyed by the monarch, Head of the Commonwealth,[146] is again one to which a president could succeed, but the consent of the Commonwealth would be needed.[147] It is not obvious that a British president should inherit that title, given that it was invented in 1947 on India becoming a republic and was accorded to the British monarch because of the place of the British Crown in imperial and Commonwealth history. A further minor question would be that of the title to be given to the former monarch.

The creation of a British republic, as mentioned earlier, would call into question the appropriate new form of what may be termed Crown law, that is, of the purely legal aspects of the royal prerogative. Of course, the Queen's constitutional prerogatives (to appoint a Prime Minister for instance) would be reallocated within a new republic. Within Crown law, however, also exists those aspects of the royal prerogative which give Ministers executive authority. These powers are "royal" in little more than name, and a serious democratic deficit exists in relation to them. The greatest contemporary significance of the royal prerogative in British constitutional law and practice lies in the authority which it gives to Ministers. Decisions on war and peace; the deployment of the armed forces within the United Kingdom and overseas; the conclusion of treaties; the Prime Minister's ability to appoint and sack Ministers, and to call a General Election; the regulation of the civil service; and the granting of passports and pardons—all this and much more is achieved by Ministers acting under the prerogative. It has been said by one political party that the royal prerogative is no more than a reservoir of unaccountable power for Ministers who, shielding behind the prerogative, can do by administrative fiat anything which is not explicitly prohibited by statute.[148] Even allowing for political hyperbole, that is a substantially accurate statement. The Labour Party too—in opposition—expressed concerns about the prerogative powers.[149]

[145] See the Prime Minister's comment above, note 4.
[146] The title Head of the Commonwealth was included in the proclamation referred to above in note 49.
[147] Member nations of the Commonwealth agreed at the time of the Queen's accession to recognise her as Head of the Commonwealth, although the title is not vested in the British Crown.
[148] Liberal Democrats, *Here We Stand: Proposals for Modernizing Britain's Democracy* (1993), p. 25.
[149] The party said in a policy paper that "[m]assive power is exercised by executive decree without accountability to Parliament": *A New Agenda for Democracy* (Labour Party, 1993).

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Ministers have the benefit of the royal prerogative powers (other than the monarch's constitutional prerogatives) because the Queen must use the royal prerogative as she is advised to by Ministers. What is certain is that the whole future of such powers would have to be considered in the republican context and their basis articulated.

As the embodiment of the Crown, the Queen is the legal owner of many prerogatives which are legal in character. A host of them are miscellaneous and relatively minor prerogatives which no doubt could, as appropriate, be abolished or converted into statute. Two of those prerogatives, however, are significant, namely, the principles that the Crown can do no wrong, and that the Crown is not bound by statute save by express words or necessary implication. The real problem with the prerogative of perfection is that it has been used down the centuries to deny remedies to citizens for wrongs committed by emanations of the Crown, or the state, whether breach of contract, or tort, or Ministers' misdeeds. The slow process of reform which has taken place would necessarily be accelerated if the legal basis of the whole royal prerogative were to be altered radically. The rebuttable presumption that the Crown is immune from statute—which historically has benefited all manifestations of the Crown—would probably have to be abolished by the legislation which established a republic, to the general improvement of the law. The legal settlement of Crown property, too, together with the Crown Estate, would also fall to be considered.

Finally, numerous miscellaneous matters would have to be decided before a republic came into existence. For instance, the name of the republican state would have to be proclaimed, for it could scarcely remain the United Kingdom of Great Britain and Northern Ireland. Again, allegiance to the new disposition would need resolution, through a new oath of allegiance and oath of office. And adjustments would be necessary to the honours system, at least if it was decided to rationalise titles and decorations.[150]

IV. Conclusions

The British monarchy has a remarkable record of survival, achieved at least partly through its determination since Victoria's reign to adapt itself to changes in society. It is impossible to know whether a British republic will ever come about. But if this paper serves any purpose it is to demonstrate that a change to a British republic

[150] The Order of the British Empire, which was created in 1917, has survived the demise of that empire.

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would require the resolution of many interrelated issues. Even the answer to the apparently simple question of principle of whether a monarchy or a republic is preferred may turn on the type of republic which was on offer. Conversion to a republic would involve wide and deep changes to much of the constitution because of the legal peculiarities of the ancient British monarchy. These are not insoluble difficulties, but they do mean that the abolition of the monarchy would be an intellectually challenging exercise.

Against that background it may be for consideration whether there is another choice in addition to maintaining the status quo or changing to a republic. Might it be possible to return to the essence of elective monarchy, and in doing so blending together expressions of popular will within a hereditary system? Obviously, a national referendum could be held on the continuance of the monarchy, as it was in Australia. If the vote were in favour of a republic, that would settle the issue. But if voters opted to retain the monarchy we would be back where we started. What may be said to be needed is a means, or series of means, to make monarchy explicitly the choice of citizens and to ensure that the occupant of the throne for the time being retained their confidence. One way of doing that would be to provide for periodic votes in Parliament, but it could be objected that this would amount to an indirect method of decision-making that almost certainly would not itself be an acceptable system to elect a British president. Another method would be through referendums on the principle of monarchy, or on whether citizens had confidence in the monarch, or on both. Such votes could be held perhaps no more frequently than every ten years,[151] or might be activated as required through a trigger mechanism, such as the collection of the prescribed minimum number of signatures in a petition organised for the purpose. That would echo the sort of recall mechanism that exists for elected officials in some United States jurisdictions. But more subtlety would be needed than that. Because we are dealing with hereditary monarchy, an elective system would have to embrace the heir to the throne. The heir succeeds through the operation of law on the monarch's death: it is too late then to hold a vote on whether the new monarch is acceptable to the people. Having a vote about the heir if the monarch were young would probably be pointless. And so there would be tricky, though again not insoluble, questions about mechanisms and timings in a renewed elective monarchy, but might it not constitute a compromise around which a consensus could emerge?

[151] Referendums on the status of Northern Ireland, for example, cannot be held more frequently than every seven years: Northern Ireland Act 1998, s. 1(1), and Sched. 1, para. [3].

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