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LEGISLATING ABOUT THE MONARCHY

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I. INTRODUCTION

NO one believes that the British monarchy is perfect - certainly not the monarch herself, who said in a speech during her *annus horribilis* in 1992 that the monarchy should not be free from scrutiny, and that there should be no holding back from debate about it.[1] The monarchy, it is said, adapts itself so as to meet the requirements of a changing society.[2] Individuals and institutions suggest changes to the monarchy from time to time, an especially helpful recent critique having been offered by the Fabian Society.[3] The reforms which are urged most often concern the legal qualifications required of the monarch, particularly as to religion. But I am not concerned here with the substantive arguments about whether this or that aspect of the law on the monarchy should be reformed,[4] nor, indeed, with the fundamental question of whether there should be a monarchy at all.[5] Reforms that could be achieved by changes in practice or to constitutional convention are also outside my remit. Rather, I want to examine why, despite calls for change, comparatively little legislation has been enacted about the monarchy in modern times. Why has the monarchy - so unusually for major constitutional institutions, especially since 1997 - remained beyond the legislative zeal of Parliament to the extent that it has? If legislation *were* to be contemplated, what legislative processes and difficulties would have to be navigated? Are there any foreseeable spurs to fresh legislation? Those are the sorts of questions which this article aims to answer.

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[1] Ben Pimlott, *The Queen: A Biography of Elizabeth II* (London 1996), pp. 558–559.
[2] Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford 1995), p. 303.
[3] *The Future of the Monarchy* (London 2003).
[4] For recent contributions to those arguments see T. Bentley and J. Wilson (eds.), *Monarchies: What are Kings and Queens For?* (London 2002), and the Fabian Society, *op. cit*.
[5] See *e.g.* E. Wilson, *The Myth of the British Monarchy* (London 1989), J. Freedland, *Bring Home the Revolution: The Case for a British Republic* (London 1998), A. Taylor, *Down With the Crown: British Anti-Monarchism and Debates about Royalty since 1790* (London 1990), R. Brazier, "A British Republic" [2002] C.L.J. 351.

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II. The Reluctance of Politicians

Major British constitutional legislation will only be enacted if it is supported by the Government. No private Member's Bill affecting the central attributes of constitutional monarchy has ever been passed. Ministers control any lawmaking about the monarchy not only because they largely control Parliament's business, but also (as will be seen in the next section) because special parliamentary rules exist which tighten the ministerial grip on any legislation which touches royal matters. Accordingly, the attitude of the political parties that are likely to be in government will be crucial to the success of any statutory reform of the monarchy. It is well-known that the main political parties have eschewed such reform. The Conservative Party has continued its traditional support for the royal status quo,[6] championing the monarchy as the embodiment of the nation. The Liberal Party at least since late in Victoria's reign has broadly followed suit, although the Liberal Democrats favour both the introduction of fixed-term Parliaments and the House of Commons itself electing the Prime Minister, changes which would impact on the royal prerogative. Even the Labour Party has concentrated its attack on hereditary peers rather than the hereditary monarchy. Indeed, in office Labour Ministers, and especially Prime Ministers, have been conspicuously supportive of the monarchy, so much so that republicanism has been characterised as "the last taboo" for the Labour Party.[7] Labour Governments, it has been argued, welcome the legitimacy that the institution of monarchy gives to any Government, including radical or reforming ones.[8] Against that background it is instructive to analyse the present Government's attitude to suggested legislation which would affect the monarchy, not least because this will show just how keen Ministers are to avoid it.

New Labour has always been at pains to stress that its long and substantial shopping list of constitutional reforms would not affect the Crown. The party included one sentence on the topic in its 1997 General Election manifesto. It stated shortly that "We have no plans to replace the monarchy."[9] If it was thought by anyone that such a formulation concealed a hidden legislative agenda, such fears were to be dispelled by a succession of Ministers. On every occasion when Ministers have been asked parliamentary questions about possible royal legislation they have rejected change. For example, Lord Irvine of Lairg L.C. was asked in 2002 whether the Government would repeal

[6] Though it was under a Conservative Government that the Queen and the Prince of Wales agreed in 1992 to pay certain taxes.
[7] Paul Richards, *Long To Reign Over Us?* (London 1996), p. 4.
[8] Bogdanor, *The Monarchy and the Constitution*, p. 301.
[9] "New Labour: Because Britain Deserves Better" (London 1997), p. 35.

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the Act of Settlement 1701 because of its discriminatory provisions which bar Catholics from the throne. He responded that while the Act was discriminatory in nature it was not in impact, because there were 21 members of the royal family in the direct line of succession who were unaffected by it. More importantly for present purposes than that curiously complacent answer, however, he urged peers to consider legislation which would alter historical constitutional arrangements only if there were a clear and pressing need for change.[10] "Clear and pressing" is a high standard of proof. Lord Falconer L.C. has also said that any legislation on the succession to the throne would be complex and could not be given priority over the Government's other legislative commitments.[11] Moreover, in responding to parliamentary questions the Prime Minister has himself rejected requests to repeal the 1701 Act, the Royal Marriages Act 1772, and to remove the discrimination against females in the line of succession to the throne.[12] Tony Blair's fullest explanation of his resistance to legislation about the Crown had been set out early in the life of his Government. A parliamentary question had asked whether he would alter the law to allow members of the royal family to marry Catholics without losing their right to inherit the throne, and to allow a Catholic to inherit the throne. The Prime Minister's answer embraced the succession rules in general, and his opposition to legislation on royal matters more generally came through strongly.[13] This is what he said.

> The Government have always stood firmly against discrimination in all its forms, including against Roman Catholics, and it will continue to do so. The Government have a heavy legislative programme aimed at delivering key manifesto commitments in areas such as health, education, crime and reform of the welfare system. To bring about change to the law on succession would be a complex undertaking involving amendment or repeal of a number of items of related legislation, as well as requiring the consent of legislatures of member nations of the Commonwealth. It would raise other major constitutional issues. The Government have no plans to legislate in this area.

And in the view of the present Government it would be properly for the Government, rather than backbenchers, to sponsor constitutional measures concerning the monarchy.[14]

How can we account for this deeply conservative attitude, shared in its essence by all three main political parties, especially given that the

[10] HL Deb. vol. 637 col. 120 (2 July 2002).
[11] HL Deb. vol. 668 col. 509 (14 January 2005).
[12] HC Deb. vol. 376 col. *WA 623* (10 December 2001).
[13] HC Deb. vol. 341 *WA 57* (13 December 1999). Lord Falconer L.C. put matters similarly in a debate on a backbench peer's Bill in 2005: HL Deb. vol. 668 col. 510 (14 January 2005).
[14] Lord Williams of Mostyn, Parliamentary Under-Secretary, Home Office, HL Deb. vol. 586, col. 917 (27 February 1998).

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deficiencies in the law have been frankly acknowledged? It may be helpful to imagine that a Government were minded to bring forward a limited and simple Bill to modernise just one aspect of the monarchy. It might, for instance, be considering legislation to remove the common-law preference given to males over females in the line of succession. A case for that change could be based on grounds of sex equality, on the fact that male primogeniture in most other areas of the law has long gone, and on the fact that such a reform would have no practical consequence in the line of succession at the earliest unless and until Prince William had acceded to the throne and had a daughter followed by a son. But a Government which contemplated such a sensible little reform would undoubtedly be alerted to the risk of a domino effect. For if that change were brought forward, how could Ministers then oppose the repeal of the outdated Royal Marriages Act 1772? That statute requires the monarch's consent to the marriage of any descendant, however remote, of George II; without that consent any such marriage is void, unless Parliament, in effect, overrode any royal veto. Who can seriously support the retention of that Act today? And although the removal of the discriminatory religious tests for a monarch would be (as will be seen in a moment) a larger enterprise, resistance to change would be harder to maintain if reforms had been implemented in other areas. Moreover, if this hypothetical little Government Bill were to see the light of day, more radically-minded parliamentarians and others would undoubtedly use its passage to raise more fundamental questions, not excluding the desirability of moving towards a republic. Small wonder, then, that Governments prefer to let sleeping dogs lie.

Ministers' desire not to legislate on monarchical matters is probably strongest in relation to the religious tests required of a monarch. This part of the law is rather more complex than its critics seem to acknowledge: they appear to think that the relevant statutes aim solely at keeping Catholics away from the throne. They certainly do that, and in offensive language. The law bars Catholics, and those who marry Catholics, from the throne;[15] it also positively requires the monarch (i) to be in communion with the Church of England,[16] and (ii) to declare himself or herself to be a Protestant and to swear to uphold the enactments securing the Protestant succession to the throne.[17] Repeal of just the anti-Catholic parts of the law would merely put Catholics into the same category as, say, Methodists, or Baptists, and all other non-Anglicans (and indeed atheists), none of whom can succeed to, or retain, the throne. Ministers would be made aware that

[15] Act of Settlement 1701, s. 2; Bill of Rights 1689.
[16] Act of Settlement 1701, s. 3.
[17] Coronation Oath Act 1689; Accession Declaration Act 1910, s. 1 and Schedule.

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legislation to alter those statutory provisions would have at least two political consequences. First, it would be said that such a change would raise the much wider question of the disestablishment of the Church of England, for how could a non-Anglican be Supreme Governor of the Church of England?[18] Disestablishment would require a fundamental reconsideration of the relationship between church and state, of a kind not essayed since 1688. But too much has been made of that argument, at least if we concentrate on the monarch's position as Supreme Governor of the Church of England. The monarch is, by statute, Supreme Governor by virtue of being monarch: there is no other test.[19] The objection is made that only an Anglican monarch could be Supreme Governor of the Church of England. Yet from a purely practical point of view it is highly unlikely that a non-Anglican would come anywhere near succeeding to the throne. Everyone who is now in the line of succession is an Anglican, and so the repeal of the statutory religious tests would have a very limited effect.[20] Any foreseeable future Supreme Governor is likely to be an Anglican: the earliest exception would involve a successor as monarch to Prince William, as yet unborn, who might not be an Anglican, an eventuality which would seem improbable for perhaps at least half a century. And so if the religious tests were repealed the Church of England would still have its Supreme Governor, for the foreseeable future an Anglican, but all religions would be put on an equal legal and constitutional footing in the line of succession. We would only have to cross the bridge of a non-Anglican monarch and Supreme Governor if and when we might get to it a long time hence, and by then it is quite possible that the main question of disestablishment would have been settled one way or the other. The second political consideration if this legal change were seriously contemplated is rather more worrying. It would be divisive within the United Kingdom. It would cause an adverse reaction in parts of the Protestant community in Northern Ireland; the welcome given to it by some Scots would not be shared by other Scots. Ministers would quite properly have to judge the extent of such a reaction and to measure it against the benefit of the proposed legislation.

The disinclination of the Government to legislate about royal matters manifested itself once more during the engagement of the Prince of Wales and Mrs Parker Bowles, which was announced in February 2005. It will be recalled that doubts were raised about the

[18] For the arguments see Bogdanor, *The Monarchy and the Constitution*, pp. 229–239; Fabian Society, *The Future of the Monarchy*, chapter 5.

[19] Act of Supremacy 1559; see also statement by the Archbishop of York, 9 December 1992.

[20] It would restore the Earl of St Andrews and Prince Michael of Kent to the line of succession: they both lost their places on marrying Catholics. Lord Nicholas Windsor dropped out of the line on converting to Catholicism.

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validity of their planned marriage,[21] to which an obvious response would have been a short Bill to remove all doubt. Given that Mrs Parker Bowles's divorced status would have precluded a Church of England wedding under its rules the couple opted for a civil marriage. It was objected, however, that members of the royal family were expressly excluded from the legislation permitting civil marriages. Indeed, the Eden Government had accepted in 1955 that Princess Margaret could not have married Captain Peter Townsend, who was divorced, in a civil ceremony, and Ministers would not have advised the Queen to give her consent to it under the Royal Marriages Act. But Lord Falconer L.C. thought that the Human Rights Act trumped any legal doubts. For if the Prince of Wales could not be married in church, and if he could not marry civilly, he could not marry at all - but the Human Rights Act would require the law to be interpreted compatibly with the right to marry, and to enjoy that right without discrimination.[22] The marriage went ahead, without legislation. True, the Government would have been pressed for legislative time, given that an Act would have been needed to be passed within at most a couple of months, in time for the wedding and before the anticipated dissolution of Parliament. But by eschewing a short Bill Ministers were, in effect, putting the couple at risk of a legal challenge, for only a court could say authoritatively whether the Lord Chancellor's view of the consequence of the Human Rights Act was correct. The Fabian Society, in its recommendations for reform of the monarchy, tried to take account of this ministerial caution in two ways.[23] It suggests that, in general, changes to the monarchy should be made piecemeal, because that would be in keeping with the evolutionary nature of the constitution and "would also perhaps offer fewer political risks for a government keen on reform but concerned about the context of public opinion." But the Society also advocates two major statutes, one containing new rules about the succession, and the other defining the scope and exercise of the monarch's powers. While recognising that "the Government may regard [such statutes] as politically difficult" given "the extent of popular support for the monarchy and the other demands on legislative time," the report asserts that "public opinion … is open to the idea of change". In the light of my analysis of political attitudes towards change to the monarchy, however, the

[21] S. Cretney, "Royal Marriages" [2005] Family Law 317. Dr Cretney accepted the Registrar-General's subsequent formal opinion that the marriage would be valid: "The Royal Marriage" [2005] Family Law 345. See also B. Mahendra, "A Constitutional Consort" (2005) 155 N.L.J. 314.

[22] HL Deb. vol. 669 col. *WS 87* (24 February 2005).

[23] *The Future of the Monarchy*, p. 145. The quotations which follow in the text are from the same page.

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report seems overly optimistic about the prospects for legislative action, at least in the absence of some fresh motivation.

Ministers of any party tend to take refuge behind the doctrine of unripe time. If there is no compelling reason to legislate about the Crown, they will not. Even if there is a perfectly rational case for change, there are disincentives to action. As with any other potential party policy, its appeal - or otherwise - to the voters will be a powerful factor in deciding whether to embrace it. The continuing reluctance of the main political parties to take up substantive statutory reform must reflect their assessment that it would not be attractive to sufficient voters to offset the disincentives to making a change. It must also be the case that the respect for the manner in which the Queen has discharged the monarch's functions contributes to a conservative attitude among the public towards the monarchy. And yet this determination of politicians not to disturb the status quo would undoubtedly be swept aside if the politics of the thing were to alter - and one possible alteration which would have Ministers falling over themselves to rush legislation through will be suggested later.

III. The Silence of Parliament

It is Parliament - the Queen in Parliament - which alone has the power to legislate about the monarchy.[24] But Parliament has not used that power in any significant way for over 50 years, and even over the last hundred years or so Parliament's legislative action in relation to the monarchy has been limited in both amount and scope. True, from time to time a backbench MP or peer introduces a Bill to reform some aspect of monarchy.[25] In the 2004 – 2005 parliamentary session, for example, three such Bills were introduced to reform the law on the succession to the Crown. As is mostly the case with backbench attempts at legislation, they did not pass.[26] In introducing one of those measures Lord Dubs noted that there was a view that Parliament should hesitate before legislating on the monarchy, and indeed commented that "there is almost a taboo on royal reform …".[27] Plainly, this legislative inertia does not reflect an absence of public debate about royal matters. Despite that public debate Parliament has maintained a legislative silence over the monarchy throughout the Queen's long reign. Largely, as was just seen, that follows from the

[24] The role of the Commonwealth in this under the Statute of Westminster 1931 will be considered later.

[25] Tony Benn did his best to abolish the monarchy: see *e.g.* the Commonwealth of Britain Bill, HC Bill 161 (1990–1991).

[26] Succession to the Crown Bill, H.L. Bill 11 (withdrawn); Succession to the Crown (No. 2) Bill, H.C. Bill 36 (dropped); Succession to the Crown and Retirement of the Sovereign Bill (negatived) (all 2004–2005).

[27] HL Deb. vol. 668, col. 495 (14 January 2005).

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disinclination of the main political parties to engage with such matters; partly, as will be seen shortly, it is exacerbated by specific and restrictive parliamentary rules. Before looking at those rules, however, it is helpful to glance back briefly to see what sort of legislation has been passed on the monarchy in the last hundred years, and to understand the reasons for it.[28]

Purely for convenience the relevant statutes can be adumbrated by subject-matter. So, in relation to rules about succession to the throne, the Statute of Westminster 1931 made reference in its preamble to the way in which the imperial and Commonwealth family made any legislative changes to the succession or to the royal style and titles. An actual change to such law followed only five years later in His Majesty's Declaration of Abdication Act 1936, following Edward VIII's quitting of the throne; and changes to the royal style and titles were made in 1947 (on the redundancy of the title of Emperor of India[29]), and in 1953 (when the new Queen was permitted to adopt different titles in the realms of which she was head of state[30]). Rules about the succession had been altered in another respect in 1910, when the wording of the oaths required of a new monarch had been changed by the Accession Declaration Act, passed in time for George V's coronation: the statute removed aspects of the oaths which had been of particular offence to Catholic subjects. The mechanics of monarchy were improved at the start of George VI's reign to ensure continuity of government during any royal disability, with the adoption of new statutory rules about a Regency and Counsellors of State.[31] Various Civil List Acts have provided for the financing of monarchy, notably at the beginning of each new reign. Several statutory changes were made to the royal prerogative in this period, but they did not directly affect constitutional monarchy as an institution: rather, in general they were a consequence of reductions in the Crown immunities that had largely come to cloak governmental action which would otherwise be unlawful.[32]

And that is it. It is not an ambitious, nor even numerous catalogue: it does not in the main affect the main attributes of monarchy. Only in relation to three matters did the monarch take the main initiative in asking Ministers to procure legislation, namely over the abdication, the accession declaration, and over the Regency legislation. His

[28] See further R. Brazier, "The Monarchy" in Vernon Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford 2003), pp. 83–88.
[29] Indian Independence Act 1947, s. 7(2).
[30] Royal Titles Act 1953.
[31] Regency Act 1937, as amended by the Regency Acts 1943 and 1953. See generally R. Brazier, "Royal Incapacity and Constitutional Continuity" [2005] C.L.J. 352.
[32] The details can be seen in R. Brazier, "Constitutional Reform and the Crown" in M. Sunkin and S. Payne (eds.), *The Nature of the Crown* (Oxford 1999), pp. 344–349.

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Majesty's Declaration of Abdication Act 1936 was, of course, the necessary legislative product of Edward VIII's decision to quit the throne. The Accession Declaration Act 1910 - passed three months into George V's reign - owes its origins to Edward VII, who was unhappy with the rabidly anti-Catholic language which he was required to utter at his accession council in 1901.[33] There had been no time to seek to change the law at that time, but because his successor George V refused to use that language the 1910 statute was speedily enacted and incorporates more emollient sentiments drafted by Asquith and the Archbishop of Canterbury - a formula that has been used ever since at the first State Opening of Parliament of a new reign. Both George V and Edward VIII had intended to seek legislation to ensure the efficient discharge of royal functions during the monarch's illness, absence, or minority, but the spur to action was provided by George VI's accession in 1936. His heir presumptive was eleven years old, and the common-law procedure for appointing Counsellors of State was cumbersome. The new King asked the Government to change the law, and what became the Regency Act 1937 was introduced into Parliament just two weeks into the new reign.[34] Clearly, royal legislation can be enacted swiftly if the circumstances demand it.

All of the other legislative changes made in the last hundred years originated, as it were, outside the monarchy, whether through developments in imperial or Commonwealth relations, or in the continuing requirement of the state to finance the monarchy, or through changes in Government policy which had a necessary impact on the law of the royal prerogative. Leaving aside legislation about royal finances, it is noteworthy that the last Act directly affecting the monarch personally or the institution of monarchy specifically was passed over half a century ago. There have been no legal changes to the core qualities of constitutional monarchy since 1953. That is a remarkable period of parliamentary silence.

I turn, then, to the parliamentary hurdles which lie in the path of legislation about the monarchy. The well-known rule of statutory interpretation has it that legislation will not affect the Crown unless it expressly so provides, or if that result flows by necessary implication.[35] The monarchy will not, therefore, be affected by legislation by accident. But that is the least of the barriers. Of much greater importance is another rule, which endows the monarch with a peculiar

[33] Philip Magnus, *King Edward the Seventh* (London 1964), pp. 292–293; G.K.A. Bell, *Randall Davidson, Archbishop of Canterbury* (Oxford 1935), vol I, pp. 612–617.

[34] Sir John Wheeler-Bennett, *King George VI: His Life and Reign* (London 1958), pp. 810–812; R. Brazier, "Royal Incapacity and Constitutional Continuity" [2005] C.L.J. 352 at 357–358.

[35] *Lord Advocate* v. *Dumbarton District Council* [1990] 2 A.C. 580.

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attribute in relation to legislation, quite apart from the prerogative of royal assent. Uniquely among anyone who might be affected by a public general Bill, the monarch's permission is essential *before* any Bill touching the Crown may be passed by either House of Parliament. If such a Bill lacks such permission it cannot be passed:[36] if it is passed without it, it is null and void.[37] What is the impact of this rule, how does it operate in practice, why did Parliament adopt it, and to what extent is it a real obstacle to any legislation which might affect the monarchy?

Bills which attract this rule are ones which would affect either the royal prerogative (being powers exercisable by the monarch for the performance of constitutional duties), or the hereditary revenues of the Crown or the personal property of the Crown, or the interests of the Crown, or the Duchy of Lancaster, or the Duchy of Cornwall. Such Bills require signification of the Queen's consent[38] before they may be passed.[39] The Clerk of Public Bills in the House of Commons decides whether a given Bill falls within that definition, although in the event of an irreconcilable dispute the Speaker's ruling would be final.[40] If the main, or important, part of a Bill touches royal interests, the Queen's consent is sought in time for it to be signified at the beginning of the second reading debate. Usually an application is made to Buckingham Palace for Queen's consent before a Bill is introduced into Parliament. That timing was adopted to prevent parliamentary effort being expended on a Bill only to find afterwards that the Queen's consent, or indeed royal assent, was withheld. If a Bill only tangentially affects those interests, the consent may be deferred until third reading.[41] Parliament will be informed that the Queen has consented to place her prerogative or interest at the disposal of Parliament for the purposes of the Bill. This is done by a Minister in each House, who strictly should be a Privy Counsellor. If consent were to be refused, or not sought, the relevant Bill would have to be withdrawn, because the questions necessary to dispose of it (for example, that the Bill receive a particular reading) could not be proposed.[42] If, by mistake, a Bill were passed without the Queen's

[36] Thus the Military Action Against Iraq (Parliamentary Approval) Bill (HC Bill 35 (1998–1999)) had no Queen's consent and the Deputy Speaker refused to put the question on second reading: HC Deb. vol. 329 col. 541 (16 April 1999). The Bill's sponsor had declined as a matter of principle to seek such consent.

[37] See generally Erskine May, *Parliamentary Practice*, 23rd ed. (London 2004), chapter 24.

[38] Or of the Prince of Wales in relation to the Duchy of Cornwall: see *e.g.* C.J. (1994–1995) 282, 405.

[39] Erskine May, *op. cit.*, pp. 708–710.

[40] J.A.G. Griffith and M. Ryle, *Parliament: Functions, Practice and Procedures* (London 1989), p. 229.

[41] Erskine May, *op. cit.*, p. 709. That timing allows consideration of any amendments made to the Bill during its passage.

[42] *Op. cit.*, p. 708.

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consent, all the proceedings on it would be void.[43] Thus the procedure of obtaining the Queen's consent was adopted so as to avoid resort to the refusal of royal assent to a Bill affecting royal interests. That procedure prevents parliamentary time being devoted to a measure which was then vetoed.[44] That is all well and good, but such talk of royal vetoes of legislation, or of the Queen withholding her consent to it, sounds - and indeed is - antiquated, because of course the monarch in modern times has only communicated formally with Parliament on the advice of Ministers. The monarch acts in her constitutional role, according to constitutional convention, on ministerial advice. For that reason the fact of the Queen's consent being granted cannot give any inkling of a monarch's personal attitude to a given Bill, any more than royal assent to a Bill can be taken to indicate personal approval. Queen's consent is not a device through which a monarch could stop parliamentary proceedings on a personally uncongenial Bill (save in the extreme circumstances of rejection of ministerial advice). It is the element of ministerial advice which shows how the need for Queen's consent could block legislation about the monarchy. Ministers, naturally, will advise that the Queen's consent be supplied for any Government legislation attracting the need for it. Equally, they could recommend that it be withheld in relation to any Bill (in practice, a private Member's Bill) which was unacceptable to them (or perhaps to the monarch personally) and thus block it. And this has, indeed, happened. For example, the Peerage (Ireland) Bill was withdrawn from the House of Commons at second reading in 1868 because Ministers made it clear that they would advise the Queen not to grant her consent.[45] In 1964 the Titles (Abolition) Bill was killed off when the Home Secretary declined to recommend that the Queen's consent be given to it on the ground that it was unlikely that the Bill would be debated.[46] That avoided embarrassment to the newly-elected Labour Government which did not want any legislative debate about the desirability of titles. And in 1969 the Rhodesia Independence Bill was refused the Queen's consent. That Bill would have accorded the colony, which had made an unlawful declaration of independence, the very thing - independence - which the Government was determined that it should not have while it was in a state of rebellion against the Crown.[47] But such instances are unusual. Ministers now normally recommend that the Queen's consent be granted to backbench Bills even when they do not accord with Government policy, safe in the

[43] See *e.g.* C.J. (1948–1949) 323.
[44] Erskine May, *Parliamentary Practice*, 21st ed., 1989, p. 563.
[45] HC Deb. vol. 191, col. 1564 (29 April 1868).
[46] HC Deb. vol. 690 col. 619 (27 February 1964).
[47] HC Deb. vol. 801 col. 1694 (15 May 1970).

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knowledge that lack of parliamentary time should ensure that such Bills will not pass both Houses, or that the payroll vote would ensure their demise.[48] Yet as long as the requirement of Queen's consent remains - and because Parliament adopted it, Parliament could abandon it - it remains as another way in which a Government could prevent parliamentary debate about legislation which did not coincide with that Government's wishes. It is quite possible that Ministers might resort to the reason put forward for blocking the Titles (Abolition) Bill to stop proceedings on an especially inconvenient Bill touching the monarchy.

Parliament's broader role in debating, or asking questions about, the monarchy is also circumscribed by self-imposed restrictions. A reforming parliamentarian who wanted pre-legislative parliamentary debate would find in these restrictions an early obstacle which has to be negotiated before any question of the Queen's consent arises. One restriction concerns the substance of a particular kind of argument. If an MP intends to express personal criticism of, or to cast reflections on the conduct of the monarch, or the heir to the throne or other member of the royal family, then he or she can only do so on a substantive motion.[49] An MP who wanted, for instance, to assert that the heir to the throne was personally unfit to become the monarch could not deploy that argument other than on a substantive motion - and could not do so, therefore, during an adjournment debate, or during questions. (That rule is not uniquely protective of the monarchy: it applies to other office-holders as well.[50]) Inevitably in such circumstances an MP who tried to get such a motion debated would be at the mercy of Government business managers, who would be unlikely to co-operate. A further limitation is placed on parliamentarians who, in the course of debate, are prohibited from praying in aid the Queen's name in order to influence the debate. The rationale of this is said to be that the monarch cannot be supposed to have a private opinion apart from that of Ministers.[51] Any argument turning on the monarch's attitude towards public policy is therefore barred, although a Minister may make a statement of facts in which the Queen's name may be concerned.[52] The Government was criticised in 1998 in the House of Lords after a Minister said there in a debate on a backbench peer's Bill to remove male primogeniture from the line of succession that the Queen had been consulted on the proposal and that she had

[48] It would have been instructive to have seen the Government's reaction had Queen's consent been sought for the Military Action Against Iraq Bill in 1999 (see note 36).
[49] *e.g.* HC Deb. vol. 946 col. 1728 (23 March 1978).
[50] Erskine May, *Parliamentary Practice*, 23rd ed. (2004) pp. 438–439.
[51] *e.g.* HC Deb. vol. 317 col. 71 (3 November 1936).
[52] *e.g.* HC Deb. vol. 27 col. 645 (12 July 1982).

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no objection to it.[53] The House of Lords subsequently confirmed that, in general, the monarch's personal opinions should not be referred to in debate, but agreed that this might be done in exceptional circumstances.[54] Finally, parliamentary questions, in effect, cannot be put which would place the name of the monarch or the influence of the Crown directly before Parliament.[55]

Rules which circumscribe whether or how Parliament may debate and criticise the monarchy are not in place to protect that branch of government alone. Similar rules seek to safeguard judicial independence by limiting the circumstances in which judges can be criticised in Parliament, and to prevent the courts from impugning the motives of Parliament in legislating.[56] These special rules are for the benefit of the institutions of Crown, of Parliament, and of the judiciary, and exist for the common reason that they promote comity between the organs of the state. That said, Parliament's self-denying ordinances in relation to the monarchy could be changed or scrapped by Parliament at any time that Parliament wished.[57]

Parliament has a number of committees which could initiate inquiries into reform of the monarchy. In the House of Lords the Select Committee on the Constitution has very widely-drawn authority, inter alia "… to keep under review the operation of the constitution."[58] Clearly, the monarchy comes within the Committee's remit, but it has not so far looked at any royal matter since the Committee's creation in 2001. In the House of Commons the Constitutional Affairs Committee, which oversees the Department for Constitutional Affairs (DCA), is in an equally strong position to inquire into royal matters. The DCA provides advice and expertise on royal matters, including issues concerning the succession to the throne.[59] The Department is the link between government and the head of state, an institutional connection which is additional to the constitutional relationship between the Prime Minister and the monarch. Since the creation in 2003 of the Constitutional Affairs Committee, however, it has not examined any royal aspects of the DCA's work. While the terms of reference of the Public Administration Select Committee limit it primarily to oversight of the public service, in practice the Committee has taken a generous view

[53] Succession to the Crown Bill, HL Bill 31 (1997–1998); Lord Williams of Mostyn, HL Deb. vol. 586 col. 916 (27 February 1998). The Government declined to support the Bill, which lapsed.
[54] HL Deb. vol. 590 col. 877 (9 June 1998).
[55] *e.g.* HC Deb. vol. 192 col. 711 (22 May 1868); HC Deb. vol. 318 col. 1372–1374 (5 August 1887).
[56] Erskine May, *op. cit.*, pp. 436–438.
[57] The Fabian Society has recommended that they be abolished: *The Future of the Monarchy*, p. 137.
[58] "Reviewing the Constitution: Terms of Reference and Methodology of Working" (HL 11 (2001–2002)), para. 1.
[59] See the DCA website under "Constitution".

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of its remit. For example, it has inquired into the royal prerogative, at least as far as it endows Ministers with executive authority.[60] The Constitution Committee has picked up one aspect of the Public Administration Select Committee's inquiry, and has reported on Ministers' ability under the prerogative to deploy the armed forces.[61] To date, though, those parliamentary committees have followed Parliament's self-denying ordinances in relation to the monarchy, and perhaps for similar reasons.

The attitudes of most constitutional actors towards possible statutory reform of the monarchy is known well enough. But the view of the monarch herself is not public knowledge, beyond the publicly-expressed view that the monarchy is not immune to change.[62] Given that such legislation would constitute a central constitutional matter, any such opinion could only be voiced publicly by the monarch on ministerial advice. What assumptions could be made by an interested citizen about the Queen's private opinion? One possibility would be that the Queen has wanted legislative changes to be made, but has been persuaded by Ministers that this would not be wise. Monarchs have taken such initiatives: it is known that her great-grandfather, her uncle and her father procured legislation in 1910, 1936, and in 1937. It is more likely, perhaps, that the Queen accepts the risks and difficulties inherent in legislating on monarchical matters, and is content to let sleeping dogs lie unless and until her Government chose to rouse them. What is highly unlikely is that Buckingham Palace has in fact resisted the reforming zeal of Ministers, who have been keen to modernise the monarchy, only to have been dissuaded from doing so by the Queen and her closest advisers. Had that been the case we would have heard about such royal obscurantism, at least in recent times, through the customary processes of briefing. The constitutional conservatism both of the two main political parties and of Buckingham Palace in relation to legislative changes to the monarchy seems, in the absence of any other evidence, by far the most likely reason for the broad preservation of the status quo.

IV. Legislative Methodology

Legislation about the monarchy could raise two particular issues of legislative technique, depending on the precise subject-matter of that legislation. One flows from the antiquity of some important existing statutes, and the other from the Statute of Westminster 1931.

[60] Fourth Report from the Public Administration Select Committee, *Taming the Prerogative* (HC 422 (2003–2004)).
[61] 15th Report of the Select Committee on the Constitution, *Waging War* (HL 236 (2005–2006).
[62] See note 1 and associated text.

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Ministers in the present Government have stressed the difficulty which would face parliamentary drafters and Parliament itself in enacting fresh legislation.[63] The trickiest example of this concerns the religious tests. As has been noted, one of the Prime Minister's reasons for refusing to legislate to remove the discriminatory rules against Catholics was that this would be a complex undertaking which would involve amendment or repeal of a number of items of related legislation.[64] Changes to the religious tests would require amendment or partial repeal of a number of statutes, including the Bill of Rights 1689, the Coronation Oath Act 1689, the Act of Settlement 1701, the Union with Scotland Act 1706, Princess Sophia's Precedence Act 1711, the Union with Ireland Act 1800, the Accession Declaration Act 1910, and the Regency Act 1937.[65] The legislative techniques used in the earlier Acts would certainly make amendment difficult. The Bill of Rights, for example, establishes the anti-Catholic and pro-Protestant rules in a sentence of over 200 words containing no punctuation. Too much can, however, be made of this difficulty. Fresh legislation could achieve the desired result in one of two ways. One has been demonstrated by Lord Dubs. His Succession to the Crown Bill[66] would have altered the rules on the succession by making detailed amendments and repeals to existing legislation, and it would have repealed the Royal Marriages Act 1772. But there is another, simpler method. A provision could be enacted to the effect that no-one is to be excluded from the line of succession on the ground that he is, or becomes, a Catholic, or that he is married to, or marries, a Catholic; and that any rule of law to the contrary is abrogated. (Such a provision could, of course, be widened if no religious test at all was to be retained for the monarch.) Changes to affected statutes would take place by implication. This is admittedly not a tidy solution, but it obviates the need to tiptoe carefully through archaic and verbose language to root out outmoded sentences and phrases. There is, moreover, a relevant precedent for this technique. The Accession Declaration Act 1910, s. 1, provides that the oath to be taken by the Sovereign under the Bill of Rights, s. 1 and the Act of Settlement, s. 2 is to be that set out in the schedule to the 1910 Act "instead of that referred to in the said sections." That schedule sets out a new style of oath, and the contrary requirements of the old statutes are impliedly repealed. That methodology could be used in relation to other old constitutional statutes to which reforms were wanted. The

[63] See notes 10 – 14 and associated text.
[64] See note 13 and associated text.
[65] Lord Falconer L.C. at HL Deb. vol. 668 col. 510 (14 January 2005).
[66] HL Bill 11 (2004–2005).

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Government's nervousness about finding a way through this old legislation is, therefore, somewhat exaggerated.

The second issue of legislative methodology would arise as a consequence of the Statute of Westminster 1931.[67] In essence, if a Government were minded to sponsor a Bill to reform the law touching the monarchy then, again depending on the precise subject-matter, it would be bound by constitutional convention to include a number of Commonwealth states in the process. To that extent such legislation would be more complex than other sorts of legislation that require only the approval of the Westminster Parliament. The preamble to the Statute of Westminster[68] recites that

> … it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another 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.

That statement was taken to represent the conventional position as it was in 1931. As a convention it could be ignored without breaking the law, but it has been applied as routinely as if it represented a rule of law. Commonwealth assents have been sought by the British Government on three occasions according to that convention, once in relation to the succession, and twice over changes to the royal titles. The first was in 1936 as part of Stanley Baldwin's negotiations with Edward VIII, and which paved the way for the enactment of the Abdication Act.[69] That was followed in 1947 on the removal of the title of Emperor of India from George VI's royal titles on India becoming a republic,[70] and then in 1953 so that Elizabeth II might adopt separate titles for those Commonwealth countries in which she was head of state, so as to emphasise the divisibility of the Crown.[71] In each case only those independent Commonwealth countries of which the British monarch was head of state were consulted and their approval obtained.[72] The complexity of the effects of the preamble between the various realms means that there is no uniform rule which requires either local primary legislation to express the necessary consent, or a simple parliamentary resolution. Thus, for example, effect was given in

[67] The classic work on the Statute remains Sir Kenneth Wheare, *The Statute of Westminster and Dominion Status* (Oxford 1938).

[68] On which see Wheare, *op. cit.*, chapter VI; G. Marshall, *Constitutional Conventions* (Oxford 1984), pp. 177–179; Sir William Dale, *The Modern Commonwealth* (London 1984), pp. 35–39.

[69] Wheare, *op. cit.*, pp. 284–290.

[70] Indian Independence Act 1947, s. 7(2).

[71] Royal Titles Act 1953.

[72] For doubt as to whether the convention still applies over changes to the royal style and titles see O. Hood Phillips and P. Jackson, *Constitutional and Administrative Law* 8th ed. (London 2001) by Jackson and P. Leopold, pp. 801–802.

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the Dominions to their consent to the Abdication Act 1936 by local legislation in some of them (as in Canada and South Africa), or by parliamentary resolution in others (as in Australia and New Zealand). Consequently, if the Government were minded to bring forward legislation affecting either of the matters referred to in the preamble to the Statute it would have in contemplation a bigger enterprise than is normally the case with legislation.

But what is it, precisely, that worries Ministers about this requirement of Commonwealth consents? It is unlikely that a Commonwealth country would object (say) to the removal of any discriminatory rules from the law on the succession to the British throne. But there could, of course, be wider political consequences as part of the Commonwealth processes which would be unwelcome to British, and perhaps some Commonwealth, Ministers, and perhaps to the monarch. Parliamentary consents in Commonwealth states would provide opportunities for wider debates about, for example, whether a given Commonwealth state wanted a monarch as head of state rather than an elected president. Republicans would be unlikely to miss any opportunity which local parliamentary rules allowed either to debate such issues, or possibly to tack on to local legislation, if permissible, other changes touching the monarchy in that state. In other words, it is doubtful whether a Bill designed, for instance, to achieve equality of the sexes in the line of succession could be debated in Commonwealth states only within that Bill's import, excluding any wider public and parliamentary debates and even legislative amendments about the future of the monarchy.

V. Legislative Imperatives

The suggestions, and occasional demands, for reform of the monarchy have thus far fallen on stony legislative ground. But are there any particular reasons why legislation might be forthcoming in the foreseeable future? One fruitful line of inquiry can be prompted by anticipating the accession of the Prince of Wales.

The start of every reign in the twentieth century saw the enactment of a Civil List Act. Such an Act will have to be passed early in the next reign, a requirement which represents a definite occasion on which legislation touching the monarchy must be enacted. But the enactment of such a statute has not provided an occasion for altering any non-financial rules about the monarch or the royal family. The Civil List Acts passed in 1901, 1910, 1936, 1937, and 1952 dealt exclusively with financial matters.[73] Indeed, the need for such an Act within a relatively

[73] The same is true of the Civil List Acts 1972 and 1975.

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short time of a demise of the Crown would effectively rule out even any significant change to the methods of financing the monarchy, unless they had been planned for some time before that. A fresh Civil List Act will be needed within six months of the next accession: routinely the Civil List Acts have provided for the payments of sums for the monarch's Civil List "… during the present reign and a period of six months afterwards", and that, indeed, is the present law.[74] There would be no opportunity for tacking on other measures, because parliamentary procedure would not allow it.[75] And so that necessary legislative opportunity early in the next reign will not itself provide a platform for wider legislation about the monarchy.

When the Prince of Wales becomes King the Duchess of Cornwall will become Queen. A Prince of Wales and his wife occupy the same legal status as private citizens, with limited exceptions.[76] On marriage, a wife assumes her husband's surname; if he is a peer she assumes his title and rank.[77] But that change of name comes about only by custom. The law allows any person to use any name, provided it is not used for fraudulent purposes. It is for that reason that a woman who wishes to keep her existing surname on marriage may do so. So on her marriage to the Prince of Wales Mrs Parker Bowles could have adopted the style and title of Princess of Wales, but for well-known reasons chose instead to be known as the Duchess of Cornwall. It is planned that on the Prince of Wales's succession she will be known as the Princess Consort, not as Queen. If it was wanted at that time to remove the *legal* status of Queen, legislation would be necessary.[78] Public opinion, which is very important for Ministers, can be very fickle, and if the demand existed then for the law to be changed in line with the actual title used the pressure for legislation could be irresistible. And another matter of title - this time one explicitly created by statute - might be that of Defender of the Faith. The ability of the monarch to use that title stems from the Act of Supremacy 1559. It was reported in the semi-authorised biography of the Prince of Wales[79] that he would wish to seen as Defender of Faith, not of the Faith. A formal change of that title would require legislation, and so if the idea were pursued a Royal Titles Bill would be necessary, which might also deal with the title of the new King's wife.[80]

[74] Civil List Act 1972, s. 1(1), repeating the phrase from earlier statutes.
[75] Erskine May, *op. cit.*, p. 924.
[76] His wife, for example, is protected by the law of treason.
[77] *Cowley* v. *Cowley* [1901] A.C. 450.
[78] The Royal Titles Act 1953 governs only changes to the style and titles of the monarch.
[79] J. Dimbleby, *The Prince of Wales: A Biography* (London 1994), pp. 528–534.
[80] It is arguable that the Queen's successor could proclaim such style and titles as he thought fit under the Royal Titles Act 1953. But that statute was passed following a Commonwealth Prime Ministers' Conference specific agreement that the Queen should be able to use different titles in her various realms, thus reflecting the divisibility of the Crown. Would a provision with that

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I have argued elsewhere that the Regency Acts 1937 to 1953 should be revised, not least to take account of the demands on an elderly monarch who cannot, save before going on an overseas trip, divest herself of legal and constitutional functions.[81] The case for some such changes will not disappear on the next demise of the Crown, because the Prince of Wales might well be an old man before he succeeds to the throne.

Such legislative initiatives could be undertaken at a considered pace. But the accidents of litigation might require swifter legislative action. Political pressure could be felt acutely by the Government if a declaration of incompatibility were to be made under s. 4 of the Human Rights Act 1998 against a provision of the law relating to the monarchy. These questions cannot be argued fully here, but obvious candidates for such a declaration include the statutory religious tests for the Crown (which discriminate against all non-Anglicans), the common-law rule that males are preferred to females in the line of succession (which discriminates against women), and the requirement of the monarch's consent for marriages to which the Royal Marriages Act 1772 applies (which restricts the right to marry). The Government has asserted that the Human Rights Act has no effect on the rules that govern the succession to the Crown.[82] Given a complainant who maintains that he or she is a victim of the law a court might disagree. Prudence dictates that waiting on a computer somewhere in government are the texts of various amending Bills, ready for such an eventuality. Moreover, Ministers would trip over themselves to change the law in one possible event - if Prince William or Prince Harry wished to marry a Catholic.

VI. The Future

A reader looking through the statute book covering the twentieth century and beyond will, of course, come across numerous Acts of major constitutional significance. Those measures affect all the institutions of the state. But in relation to the headship of that state the statutes are fewer, and indeed those which there are might be said to be of only marginal significance since the passing of the last important statute, the Regency Act 1937. This article has shown why that state of affairs has come to pass. Now, perhaps more and important legislation about the monarchy is not needed, but such a conclusion should be based on an assessment that the law is

background be unambiguously wide enough to permit alteration of the title of Defender of the Faith, itself confirmed by another specific statute?

[81] Brazier, "Royal Incapacity and Constitutional Continuity", note 31 above, at 361–365, 383–387.

[82] Baroness Ashton of Upholland, Parliamentary Under-Secretary of State for Constitutional Affairs, HL Deb. vol. 671 col. 237 (23 March 2005).

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appropriate to the contemporary requirements of the United Kingdom and the Commonwealth, rather than any nervousness among front bench parliamentarians, or technical parliamentary rules, or what might be false assumptions about possible resistance to reform in the Commonwealth.[83] There is little enthusiasm among the parliamentary and governmental elite to contemplate significant changes which would affect the Queen, given her popularity and the punctilious way in which she has discharged her duty. But the next accession, albeit probably many years ahead, inexorably draws nearer. Should not Parliament take advantage of that period to consider the legal framework of the monarchy in a formal, structured, and measured way? Parliamentary committees exist which could contemplate at least part of the picture, but given the significance of the monarchy in the constitutional hierarchy it would be apt for work to be done by a joint select committee of both Houses. After all, such a committee has been considering the future of one part of the Queen in Parliament, the House of Lords. Such a parliamentary initiative would not, of course, commit any Government to legislate, but it would be permitted by an opportunity which necessarily arises infrequently in the context of constitutional monarchy.

[83] Even John Howard, the pro-monarchist Australian Prime Minister, refused in an interview in 2006 to rule out the possibility of his country even becoming a republic after the Queen's reign.

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