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## The Constitutional Role and Working of the Monarchy in the United Kingdom

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### Monarchy and UK Public Law

The Monarchy, or more precisely the concept of the Crown, is fundamental to the law and working of government in the UK. The country does not possess a modern written constitution as the ultimate legal and moral authority in the state, and instead has a historic and traditional structure of government that has evolved over many centuries in response to changing political and social circumstances. The historical progression has been that in medieval times the primary source of all legislative, executive, and judicial power was the person of the Monarch, and then in the 17th century parliamentary supremacy over the Crown was established in law, enshrined in the Bill of Rights 1688. In the following century Cabinet government emerged under the chairmanship of a Prime Minister instead of the Monarch<sup>1</sup>, assuming responsibility for the executive direction of policy and administration of the country. Today we distinguish the offices of Monarch and Prime Minister with the former serving as our ceremonial Head of State and the latter as our executive Head of Government.

Monarchy today as an institution, and Queen Elizabeth II personally, performs a public role that is essentially ceremonial, providing a symbol for the British state itself. Accordingly, the legal formalities and ceremonies of all aspects of government operate in the name of the Monarch. We speak of "Her Majesty's Government", "Her Majesty's Loyal Opposition", and the "Royal Courts of Justice". Parliament, constituted by ancient common law as the three components of Monarch, House of Lords and House of Commons, is shorthand for the "Queen-in-Parliament". Oaths of Loyalty are taken by public office holders to Queen Elizabeth II personally rather than to any documentary constitution or to the abstraction of the State. In the same vein, our National Anthem is "God Save the Queen".

Formally the Monarch is still referred to as the Sovereign and British citizens as their subjects. This is all part of the wide-ranging panoply of British historical rituals and ceremonies of an ancient state. As has been recognised in academic literature for over 150 years, the UK is in reality a "disguised republic".<sup>2</sup> No one today denies that the country is a political democracy where Parliament and the electorate are sovereign. The Monarchy is a ceremonial figurehead, a national emblem, promoting unity across the divisions of party politics and geographically across the four nations of the UK: England, Scotland, Wales, and Northern Ireland.

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<sup>1</sup> See J. P. Mackintosh, *The British Cabinet* (London: Stevens & Sons, 3rd ed. 1977).

<sup>2</sup> For example Walter Bagehot, *The English Constitution* (1867; Oxford ed., 2001), p.193.

To understand the role and working of the Monarchy as Head of State from a public law perspective, one needs firstly to appreciate the nature of the law relating to the Crown.<sup>3</sup> This is a complex area that remains a mystery to most people, especially those abroad with a written republican constitution and a firm legal concept of the state, such as in Germany and France. In UK public law, the legal concept of the Crown carries a number of different though associated meanings. It is, firstly, necessary to draw a clear distinction between the "Crown as executive" referring to the powers of ministers of state and the collective structure of central government, and the "Crown as Monarch" referring to the role, functions and powers of the Monarch as an individual.

Secondly, the Crown provides the legal basis of the unwritten constitution. The legal powers of the Crown, existing since time immemorial and collectively known as the royal prerogative, provide the authority for the basic functions of government. These include for example national defence, declarations of war and peace, creating or changing government departments, and negotiating treaties with foreign countries. Other more modern powers of government for administering the interventionist and welfare state, by contrast, have arisen out of Acts of Parliament.<sup>4</sup> Most Crown prerogative powers are in practice exercised by ministers or officials in the name of the Monarch, including for example the issue of passports, the prerogative of mercy, and deployment of armed forces overseas.

Some prerogative powers however may only be exercised and take effect in law by the Monarch personally, meaning that the Monarch's personal involvement cannot be circumvented, and take effect in various form of ceremony. These powers are best described as the direct prerogatives of the Crown as Monarch, and include powers over the life of Parliament (the summoning and dissolution of Parliament, and the opening and prorogation of parliamentary annual sessions), the Royal Assent to legislation and approving Orders in Council, the appointment of a Prime Minister, and the award of state honours and titles.

Thirdly, the conduct of the Crown as Monarch is regulated by political understandings commonly termed constitutional conventions. They may be defined as rules, principles, and procedures that are not to be found in the formal sources of law, but which are nevertheless habitually obeyed and generally regarded as binding as a matter of tradition, custom or common practice.<sup>5</sup> They were ably described as follows in the Victorian era by Edward Freeman,<sup>6</sup> an Oxford history professor:

"We now have a whole system of political morality, a whole code of precepts for the guidance of public men, which will not be found in any page of either the statute or the common law, but which are in practice held hardly less sacred than any principle embodied in the Great Charter or in the Petition of Right. In short, by the side of our written Law, there has grown up an unwritten or conventional constitution. When an Englishman speaks of the conduct of a public man being constitutional or unconstitutional, he means something different from what he means by conduct being legal or illegal."

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<sup>3</sup> Generally see M. Sunkin and S. Payne (ed), *The Nature of the Crown* (Oxford University Press, 1999).

<sup>4</sup> The royal prerogative being part of the common law is subordinate to an Act of Parliament, and elements of the prerogative may be abolished, regulated, or codified by Act of Parliament. For example, the Constitutional Reform and Governance Act 2010 laid down parliamentary procedures regulating prerogative treaty making.

<sup>5</sup> Halsbury's Laws of England, *Constitutional and Administrative Law* (London: Butterworths, 5th ed., vol. 20, 2014), para. 20.

<sup>6</sup> *The Growth of the English Constitution* (London: Macmillan, 1872), pp.109-110.

Conventions are extremely important to the working and understanding of the British constitution, and some of its most fundamental institutions and processes are established or regulated by convention rather than law. For example, the very existence of the office of Prime Minister is not the product of any law or Act of Parliament, but simply a creature of convention and de facto political practice. Another basic convention is that ministers must have a seat in Parliament (and in the case of the Prime Minister and Chancellor of the Exchequer specifically in the House of Commons). All this is explicable in terms of the UK not having a written constitution, and our need to harmonise our ancient law with modern political principles and practice. Only conventions make sense of some of the UK's archaic public laws, especially so on matters affecting the Monarchy.

The principles of constitutional Monarchy revolve around the basic political fact that it is the Prime Minister and his ministerial colleagues who carry out and are responsible to Parliament and the electorate for the executive government and public administration of the country, not the Monarch. The most fundamental political convention of all is that a Monarch performs their role and functions only upon ministerial "advice", a polite and respectful form of terminology for direction and instruction. How this principle operates in practice and in conjunction with other conventions regulating the Monarchy is elaborated on further below.

The conventions of Monarchy both justify and explain the hereditary principle of succession to the position of Head of State, since the occupant of the throne has no democratic basis for exercising political power or influence. Furthermore, the regulatory structure of the political and constitutional system into which the Monarchy fits must be capable of accommodating whatever accidents of birth produce and therefore all types of persons and calibre of intellect and judgement of the person who is born into the position of Monarch.

### **Formal position and titles**

The Queen's formal title in the UK under the Royal Titles Act 1953 is "Elizabeth the Second, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith". Since time immemorial and by common law judicial recognition, the Monarchy provides the hereditary Head of State for the UK, with the succession subject to certain conditions imposed by statute, notably in the Act of Settlement 1701 and the Succession to the Crown Act 2013.

The British Monarch also serves as Monarch and Head of State in fourteen countries in addition to the UK, arising from their position as former colonies and dominions of the British Empire. These are Antigua and Barbuda, Australia, the Bahamas, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Saint Lucia, St Christopher and Nevis, St Vincent and the Grenadines, the Solomon Islands, and Tuvalu. These countries are known as the Commonwealth Realms. For each of these countries, the UK Monarch appoints a Governor General on the advice of its government who performs the role of Head of State in her place under the terms of the country's constitutional law.

The Queen is Head of the Commonwealth, a voluntary association of 53 independent states, almost all of which were former colonies and dominions of the British Empire or are

overseas territories today.<sup>7</sup> It is essentially an informal body, lacking formal terms of membership or a constitution, and was founded in 1926 as a means of maintaining links and promoting common interests, despite the developing independence of its member states. Agreements are made through biennial meetings of the Heads of Government, including the British Prime Minister, and its administration is conducted through a Secretariat based at Marlborough House, London.

The title of Head of the Commonwealth was created in 1949 as a result of India's desire on independence to become a self-governing republic (removing the British Monarchy as its Head of State, unlike most other Commonwealth countries including Australia and Canada) but to retain its historic association within the Commonwealth. However, the Queen's position as Head is not *ex officio* as British Monarch, even though by common consent on her accession in 1952 she assumed the title that had been originally conferred on her father, King George VI. In the case of the next reign, it was agreed at the Commonwealth Heads of Government meeting in 2018 that the heir to the British throne, Prince Charles, would succeed Queen Elizabeth as Head of the Commonwealth.

At common law and by statute the Monarch is the supreme head of the Church of England, established as part of the Reformation during the reign of King Henry VIII in the sixteenth century.<sup>8</sup> The Queen has a ceremonial position in religious affairs, analogous to her ceremonial position in political affairs: in other words, the Monarchy no longer performs any policy-making or administrative work in the governance and operation of the Church of England. Today senior church office holders are formally appointed by the Monarch on the advice of the Prime Minister, who in turn relies on the advice of a Crown Appointments Committee. Ecclesiastical laws (measures and canons) are initiated and prepared by the General Synod of the Church of England under the terms of the Church of England Assembly (Powers) 1919, which then require parliamentary approval and the automatic Assent of the Monarch.

The Monarch holds the symbolic position of Head of the Armed Forces, with the supreme command of the forces (Royal Navy, Army, and Royal Air Force) vested at common law and by statute in the Crown.<sup>9</sup> Oaths of Allegiance are sworn to the Monarch, who holds a number of honorary military positions as Colonel-in-Chief and Air Commodore. In support of this role, it is common for the children of the Monarch and other members of the Royal Family to spend a period of time in one of the three services. The Monarch performs no role in the direction and administration of the armed forces, and the command and governance of the three forces lies with the Chief of Staff in each, with government policy generally (including armed conflict) being the responsibility of the Secretary of State for Defence.

A British Monarch's military role as Head of State is that of attending ceremonies, the most high profile of which is the annual Trooping the Colour pageant at Whitehall. This ceremony perfectly illustrates the Monarchy's symbolic role as head of the nation, as is ostensibly to celebrate the Monarch's birthday (which in reality is on another date) but in

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<sup>7</sup> The Commonwealth formally describes itself as, "a voluntary association of independent sovereign states, each responsible for its own policies, consulting and co-operating in the common interests of their peoples and in the promotion of international understanding and world peace" (Commonwealth Declaration, Singapore, 22 January 1971).

<sup>8</sup> Act of Supremacy 1534, 26 Hen. 8 c. 1.

<sup>9</sup> Personal involvement of the Monarch in strategic leadership for the army ceased in 1793, when an office of Commander-in-Chief was established.

substance it is a celebration of the work of the armed forces. It takes place at Horse Guards Parade in central London, with processions between there and Buckingham Palace, followed by a fly-past by Royal Air Force aeroplanes. This grand spectacle epitomises the way Britain celebrates its armed forces, along with its annual Remembrance Sunday for commemorating all those who served in the two World Wars and other military conflicts, which is quite different to some other countries' expansive displays of military might.<sup>10</sup>

## Monarch and Parliament

Originally a Parliament was the personal creature of the Monarch, to be summoned and terminated at will in the manner of a great council of state.<sup>11</sup> These ancient powers form part of the royal prerogative and have been partially limited by Acts of Parliament. One of these is the summoning of a new Parliament which under the Meeting of Parliament Act 1694 must take place within three years of its predecessor, though this is an anachronism and in practice the termination of one Parliament and summoning of another are simultaneous events, maintaining Parliament in virtual continuous existence. Another statute is the Parliament Act 1911 which provides a maximum term of five years for the existence of a Parliament.

Between 2011 and 2022, the Fixed-term Parliaments Act operated to replace the royal power of dissolution of Parliament, so that Parliament automatically dissolved by operation of law at the end of each five-year term. However, at the time of writing,<sup>12</sup> the government has presented a Dissolution and Calling of Parliament Bill,<sup>13</sup> which looks set to become law during 2022, that repeals the Fixed-term Parliament Act and revives the royal power of dissolution.

This means that a Prime Minister will again have the power to set the date of a general election at a time most politically convenient to themselves by advising the Monarch to exercise their power of dissolution. It will also revive debates on whether any limitations exist upon the right of a Prime Minister to control the timing of dissolution. There is no consensus on the matter, and there are academic commentators who claim this is a constitutional area where a personal element still exists for the Monarch to refuse a dissolution request, sometimes misleadingly drawing on precedents from other Commonwealth countries.<sup>14</sup>

In this writer's view however, the long reign of Queen Elizabeth has established a clear constitutional pattern to guide the role of the Monarchy in future cases of crisis or difficulty, obviating any need or desirability for the exercise of any independent royal judgement and intervention. The position is that the Queen will automatically follow a Prime

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<sup>10</sup> This event illustrates the physically demanding nature of much of a Monarch's ceremonial work. Until 1986 the Queen attended on horseback and an account of the 1957 ceremony reads, "Not many modern Heads of State are required to ride a horse as part of their functions... For weeks beforehand, as well as careful weight-watching to ensure that the right uniform would fit, the Queen would ride four times a week to adapt her muscles for the lengthy event" (from interview with Sir John Miller, Crown Equerry 1961-87, in Ben Pimlott, *The Queen* (London: HarperCollins, 1996), p.266.).

<sup>11</sup> Generally see Robert Blackburn, *The Meeting of Parliament* (Aldershot: Dartmouth, 1990).

<sup>12</sup> 1 January 2022.

<sup>13</sup> (2021-22) HC 8.

<sup>14</sup> See Ivor Jennings, *Cabinet Government* (Cambridge University Press, 3rd ed. 1961) who referred to this discretion as a "personal prerogative"; Rodney Brazier, *Constitutional Practice: The Foundations of British Government* (3rd ed., Oxford University Press, 3rd ed. 1999); Anne Twomey, *The Veiled Sceptre: Reserved Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018); who prefer the terminology of "reserve powers"; and for a critique Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law* (2004) 546-563.

Minister's advice on dissolution, as proved the case in early elections called by the Prime Minister in 1951 (after one year, seven months), 1966 (after one year, four months), and February 1974 (after six months<sup>15</sup>).

This is subject to one proviso, arising where the Prime Minister has lost the authority to govern and is constitutionally obliged to resign. This would arise, for example, where the Prime Minister has lost a general election, being situations where (a) the opposition party achieves an overall majority at the election and is ready to take office, and/or (b) under a hung Parliament<sup>16</sup> the government remains in office but is defeated on an amendment to the Address<sup>17</sup> (in reply to the Queen's Speech) expressing no confidence in the government at the first meeting of the newly elected House of Commons.

Such situations are hypothetical and have never arisen in practice. If they ever did so however, and a Prime Minister asked for a second general election in such circumstances, the Monarch would be duty-bound to refuse the request. There would be no element of personal discretion involved in this rejection; it would be the Monarch's duty to reject such wholly unconstitutional advice. This is so because there is simply no other legal mechanism to block this request from the Prime Minister in the absence of a Written Constitution providing judicially enforceable rules on the tenure and authority of a Prime Minister.<sup>18</sup> Such a situation would at the same time require the Monarch to dismiss the recalcitrant Prime Minister from office and appoint the Leader of the Opposition. Before taking such action, the Palace would be well-advised to await, and if unforthcoming to request, an Humble Address from the House of Commons on the matter. This petition would declare the unconstitutional nature of the Prime Minister's actions and request the Monarch to reject the Prime Minister's advice and dismiss them from office, appointing in their place the Leader of the Opposition. This would provide confirmation of the constitutional basis and authority for the royal intervention.

The commencement ("State Opening") and termination ("prorogation") of each annual session of legislative business within the lifetime of a Parliament is also put into legal effect under the Monarch's royal prerogative. These actions are purely ceremonial, conducted on prime ministerial advice.

The State Opening, which is performed by the Monarch personally in full regalia wearing the Imperial State Crown and seated on the throne in the House of Lords, is the most high-profile political theatre in the country's annual calendar.<sup>19</sup> The Monarch travels to the Palace of Westminster from Buckingham Palace by coach and horses or limousine, and on arrival in the Robing Room puts on the Crown that has been conveyed separately from the Tower of London. Once inside the Chamber and seated, they command the Gentleman Usher of the Black Rod to summon members of the House of Commons to attend. All the peers present in the Chamber are in their robes and remain standing until the Monarch commands

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<sup>15</sup> These timeframes are the duration of the Parliament following each prior dissolution: see Robert Blackburn, *The Electoral System in Britain* (London: Macmillan, 1995), Ch. 2.

<sup>16</sup> In other words, where the general election produces no overall majority for any one of the political parties.

<sup>17</sup> The Address is the motion of the House of Commons made in response to the government's legislative programme set out in the Queen's Speech at the meeting of the new Parliament. In substance it performs the constitutional role of confirming the new government in office.

<sup>18</sup> At the time of writing, the government in its Dissolution and Calling of Parliament Bill [2021-22] HC 8 has included a clause 3 providing that the exercise of the power of dissolution is non-justiciable, thereby leaving the Monarchy to serve as the only legal constitutional long-stop to protect the existence of Parliament.

<sup>19</sup> See House of Lords Standing Orders (Public Business) (2013, HL 105), no. 1; and *Report of the Joint Committee on the Presence of the Sovereign in Parliament* (1901, HC 212).

them to be seated. The Monarch then delivers a speech, the "Queen's Speech" or "King's Speech", every syllable of which has been written for her by the Prime Minister with his colleagues, setting out the government's legislative and policy programme for the coming year. As the late Duke of Windsor, formerly King Edward VIII, once drily commented, "Nothing could be more calculated to remind the Monarch that he is only a figurehead".<sup>20</sup> The speech is handed over by the Lord Chancellor to the Monarch, who after reading it out aloud, returns it to the Lord Chancellor, before retiring from the Chamber.

The prorogation of each annual session is conducted in a ceremony in the House of Lords, performed by a Commission of peers expressly appointed for the purpose by the Monarch by letters patent under the Great Seal.<sup>21</sup> At the same time, any outstanding Bills receive the Royal Assent, and the senior Commissioner usually reads a speech from the Monarch outlining the work and achievements in the session being closed. The Commission will state the date on which the two Houses of Parliament will re-assemble to commence their next annual session, usually six days later.

Both in the UK and in some Commonwealth realms, notably Canada,<sup>22</sup> prorogation has recently been used as a political device by a Prime Minister to prevent parliamentary discussion or action on a controversial matter of the day which the Prime Minister wished to avoid. When the decision of Prime Minister Boris Johnson to prorogue Parliament for precisely such a reason was declared unlawful by the Supreme Court in the *Miller No. 2* case in 2019,<sup>23</sup> none of the parties including the Court claimed the Monarch possessed any discretion or role to play in the matter, save automatically processing the decision by Order in Council.

## **Monarchy and legislation**

Since the Monarch, together with the House of Commons and House of Lords, is one of the three components of Parliament, their formal Assent to a parliamentary Bill is required before it can have the force of law. This is one of the Monarch's direct prerogative powers, which only they, or a commission expressly authorised by them, may exercise. It is carried out routinely on the advice of government Ministers.

The procedure is that, following agreement by both Houses on the text of a Bill,<sup>24</sup> it is prepared and presented to the Monarch for their Assent by the parliamentary clerks. The Royal Assent has not been given in person by attendance at the House of Lords since 1854. Today under the Royal Assent Act 1967, the Speaker in each House simply notifies the House at a convenient moment that the Queen has signified her Royal Assent to certain Acts and this is recorded in the Journals. The ceremonial form of wording by the Speaker is that, "I have to notify the House in accordance with the Royal Assent Act 1967 that the Queen has signified Her royal assent to the following Acts [and Measures] ...".

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<sup>20</sup> Documentary film, *A King's Story* (Producer: Jack Levin, Columbia Pictures, 1965).

<sup>21</sup> Down to 1854 Monarchs regularly prorogued Parliament in person.

<sup>22</sup> See Peter Hogg, "The 2008 Constitutional Crisis: Prorogation and the Power of the Governor General", *National Journal of Constitutional Law* 27 (2010).

<sup>23</sup> *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41.

<sup>24</sup> If the terms of the Parliament Act 1911-49 apply, a Bill passed by the House of Commons may go directly for the Royal Assent, without the prior approval of the House of Lords.



A commission may be authorised by the Monarch under letters patent to signify the Royal Assent by attendance in the House of Lords with the Commons attending, but since 1967 in practice this only now occurs at the end of a parliamentary session when a commission is required to prorogue Parliament, so it is convenient at the same ceremony to signify the Royal Assent to any outstanding Bills before declaring the prorogation.

The ceremony when Assent is given by commission is that the Clerk of the Crown and the Clerk of the Parliaments position themselves on either side of the table in front of the Lords Speaker, the Clerk of the Crown recites the short title of the Bill, and the Clerk of the Parliaments then turns towards the bar of the House opposite the throne and pronounces the Royal Assent in Norman French. For an ordinary public or private Act or a Measure, this Assent is pronounced by the words "La Reyne le veult".<sup>25</sup> This ceremony is pure theatre and encapsulates the essentially ceremonial nature of the Royal Assent.

The last occasion of a Monarch exercising a Royal Veto over government legislation was in 1707 when Queen Anne objected to a Bill for settling the militia in Scotland.<sup>26</sup> Some commentators today argue that a Monarch could reject legislation in specified categories of crisis,<sup>27</sup> despite the Bill having duly passed through Parliament and government advice that the Monarch should proceed to Assent. However, in such a situation the Monarchy would lack any democratic or constitutional authority on which to challenge the government. The better view, as expressed by a former Prime Minister, Herbert Asquith, to the House of Commons in 1910, is that the Royal Veto is "literally as dead as Queen Anne",<sup>28</sup> meaning that the Monarch retains no independent discretion or judgement over parliamentary legislation.<sup>29</sup>

It is conceivable, if highly unlikely, that a government for some extraordinary reason or changing circumstances might decide not to proceed with a Bill after its parliamentary stages had been completed, approved by both Houses, and sent to the Palace for signature.<sup>30</sup> In such a situation, since the Monarch's actions are always covered by ministerial advice, she would be obliged to withhold her Assent.<sup>31</sup>

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<sup>25</sup> For Acts granting financial supply the words are "La Reyne remercie ses bons sujets, accepte leur benevolence, et ainsi le veult" and for a private Act "Soit fait comme il est désiré".

<sup>26</sup> L.J. 1705-09, 506 (1707).

<sup>27</sup> See Rodney Brazier, *Constitutional Practice: The Foundations of British Government* (Oxford University Press, 3rd ed. 1999), pp.193-196, and "The Royal Assent to Legislation", *Law Quarterly Review* (2013) pp.184-204; and for critique, Robert Blackburn, "Monarchy and the Personal Prerogatives", *Public Law* (2004) pp.546-563. See also Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018), Ch. 9.

<sup>28</sup> Cited in Harold Nicolson, *King George V: His Life and Reign* (London: Constable & Co., 1952), p.116.

<sup>29</sup> On the situation of a Monarch wishing to absolve themselves on grounds of conscience or religious belief, see Robert Blackburn, "The Royal Assent to Legislation and a Monarch's Fundamental Human Rights", *Public Law* (2003), pp.205-210.

<sup>30</sup> The Monarch signs Letters Patent authorising the Royal Assent to be communicated by way of a Commission or declaration by speakers in both Houses under the Royal Assent Act 1967.

<sup>31</sup> "While the Queen may not of her own initiative refuse the royal assent, the position might be different if ministers themselves advised her to do so": A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (London: Longman, 15th ed. 2011), p.21. Parliamentary practice is that after a Bill has completed its parliamentary stages, the clerks present the Bill directly to the Monarch notwithstanding any contrary instructions including from ministers: Erskine May, *Parliamentary Practice* (London: Butterworths, 23rd ed. 2004) p.652. However, this is an internal rule about delivery of the document, and not an instruction, advice or authority from the two Houses on whether or not Assent should be given.

A constitutional conundrum of a different and more complex equation occurred in 2019 when a Private Members' Bill<sup>32</sup> managed to pass both Houses, in the context of a deeply divided Parliament over Brexit<sup>33</sup>, despite the opposition of the government. For a while it was unclear whether the government would advise the Queen to withhold her Assent, vetoing the Bill, or allow it to proceed. In the event, the Prime Minister decided not to intervene, but had he done so then the Queen would have been constitutionally obliged to comply in accordance with the doctrine of ministerial responsibility for her actions.<sup>34</sup> Whether or not that "advice" from the Prime Minister might have been challenged in the courts, analogous to his advice on parliamentary prorogation held to be unlawful in the *Miller No. 2* case, is a matter of conjecture.<sup>35</sup>

One of the ancient remains from when the Monarch personally governed the country is "Her Majesty's Most Honourable Privy Council". In earlier times it was the body with and through whom Kings and Queens ruled, comprising royal advisers drawn from the senior aristocracy and major officials of state. In the eighteenth century as power shifted away from the Monarch, a governing Cabinet of ministers chaired by a Prime Minister as First Lord of the Treasury emerged as a committee of the Privy Council taking over control and direction of executive policy and deliberative functions of state. Today as a matter of political convenience the Privy Council continues to serve as the formal process through which royal proclamations, subordinate legislation,<sup>36</sup> and appointments are made as Orders in Council either under the authority of the royal prerogative or an Act of Parliament. The Privy Council office describes itself as, "the mechanism through which interdepartmental agreement is reached on those items of Government business which, for historical or other reasons, fall to Ministers as Privy Counsellors rather than as Departmental Ministers".<sup>37</sup>

By way of random illustration of the nature of its work, the business conducted on 10 December 2014 which was attended by the Deputy Prime Minister and three senior government ministers (all Privy Council members) at Buckingham Palace with the Queen, included making four Proclamations concerning coinage; granting a Royal Charter to the National Society (Church of England) for Promoting Religious Education; re-appointing an ordinary member of the BBC Trust; prohibiting burials in specified locations under the Burial Acts 1853-55; and eight Orders affecting the UK as a whole under statutory powers dealing with civil aviation, misuse of drugs, nursing and midwifery, tax credits, and same sex marriages.

Membership of the Privy Council for the great majority of those appointed is not a position of work but an honour, entitling the recipient to be addressed as "Right Honourable" and given precedence at ceremonial occasions. There are currently about 600 Privy Counsellors appointed for life by the Monarch on the advice of the Prime Minister, drawn

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<sup>32</sup> In other words, a Bill presented by an ordinary Member of Parliament, not a government minister

<sup>33</sup> The term adopted to describe the decision and process of the UK withdrawing from the European Union.

<sup>34</sup> For academic discussion at this time see Letters to the *Times* newspaper by Paul Craig et al. 3 April 2019 and Rodney Brazier 4 April 2019; Rob Craig, "Could the Government Advise the Queen to Refuse Royal Assent to a Backbench Bill?", U.K. Const. L. Blog, 22 January 2019; Jeff King, "Can Royal Assent to a Bill be Withheld If So Advised by Ministers?", U.K. Const. L. Blog (5 April 2019).

<sup>35</sup> For a view that it would be, see David Pannick, "Constitutional Law Does Not Let Ministers Make a Pawn of the Queen", *Times* newspaper, 11 April 2019.

<sup>36</sup> Subordinate in the sense that they derive their authority from an Act of Parliament or are otherwise of a lower legislative authority to an Act: see A. W. Bradley, K. D. Ewing & C. J. S. Knight, *Constitutional and Administrative Law* (London: Longman, 17th ed. 2018), pp.253ff.

<sup>37</sup> <https://privycouncil.independent.gov.uk>, accessed 1 January 2022.

from various categories of person including senior members of the Royal Family and household, senior members of the clergy, senior politicians and judicial-office holders in the UK and Commonwealth, and persons of great eminence in the sciences or arts. Many appointments are routine by virtue of the positions they hold, notably the two Archbishops, the Speakers of the two Houses of Parliament, Cabinet ministers, and judges of the Supreme Court.

Meetings of the Privy Council are formal and short, lasting little more than fifteen minutes, and the number of persons attending is small, with a quorum of three, generally including the Lord President of the Council (a Cabinet minister) and a few other government ministers who are Privy Counsellors. Meetings are held monthly, about ten a year, and held at Buckingham Palace or wherever the Monarch happens to be or is most convenient for her. The role of the Monarch is automatic, with all the documentation prepared in advance by the Crown Office and Privy Council Office depending on which departmental ministers have prepared the Order. Everyone remains standing during the ceremony, with the Lord President on the right-hand side of the Monarch reading out the names of the Orders in Council in turn, to which the Monarch responds, "Agreed", with no discussion. The ceremony is a curious archaic ritual, all the more remarkable for being conducted in private, but one that continues to serve as the legal formality for processing a considerable amount of legislative and administrative business of the government.

### **State honours and titles**

The Crown is colloquially referred to as "the fount of honours", referring to the Monarchy being the legal authority for the appointment of state honours and titles.

There is a vast array of these titles and medals, ranging from peerages and knighthoods down to various ranks attached to the former British Empire. They are distributed on two occasions each year, on the Queen's birthday and at New Year. The selection is conducted by a Ceremonial Secretariat in the Cabinet Office, receiving nominations from government departments and any member of the public or organisation. The suitability of nominees is considered in eight subject sub-committees, namely arts and media; community, voluntary and local services; economy; education; health; science and technology; sport; and the state. Recommendations go from each sub-committee to a Main Honours Advisory Committee chaired by the Cabinet Secretary, who then prepares a final list for submission to the Prime Minister.

Although the convention is that these honours are automatically conferred by the Monarch on the advice of the Prime Minister, there is reserved to the Monarch personal responsibility for the selection and appointment of a small number of particular honours, being the Order of Merit, the Order of the Thistle, the Order of the Garter, and the Royal Victorian Order. These honours are formally bestowed upon recipients at a series of investiture ceremonies, around twenty-five each year, at Buckingham Palace or one of the other royal palaces by the Monarch personally or a close member of his family.<sup>38</sup>

### **Prime ministerial appointment**

The most politically charged of all the Monarch's formal functions is to perform the act of

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<sup>38</sup> In recent years Prince Charles, Prince William (since 2013) and Princess Anne have conducted an increasing number of the investitures, relieving the Queen from most of this work.

appointing a Prime Minister under the legal authority of the royal prerogative.<sup>39</sup> This is performed at Buckingham Palace, at a private audience but in a formulaic short ceremony whereby the Queen issues an invitation to the party leader concerned which is then formally accepted. Recently, the spouse of the new Prime Minister travels with them, and the limousine conveying both to the Palace is filmed and viewed on national television for public enjoyment and to convey a sense of public occasion.

There are established conventions dictating whom the Monarch appoints. If the occasion for the appointment arises following the resignation or death of a serving Prime Minister, each party has its own leadership election rules which determines the person who will take over at 10 Downing Street and is therefore invited by the Monarch to form an administration. Difficulties arose in 1958 and 1963 because the Conservative Party, which was the party in office, did not have any leadership election rules, but such occasions will not re-occur.<sup>40</sup> In those two circumstances, it might be noted, the Queen did not act independently so as to form her own judgement on who was most suitable, but acted strictly on the nomination ("advice") of the Conservative Party as represented by the person best placed to give her "advice" (the outgoing Prime Minister in 1963, and two senior Conservatives who took soundings in the party in 1957).

Following a general election, where one party achieves an overall majority in the House of Commons, the Monarch will appoint the leader of that party as Prime Minister. Where no overall majority is achieved for any individual party, the conventions are that (a) the incumbent Prime Minister has the first opportunity to continue in office and form an administration, and (b) if the incumbent Prime Minister is unable to form an administration (and resigns or is defeated on the Address at the meeting of the new Parliament), then the leader of the largest opposition party is appointed Prime Minister. These conventions have been followed consistently throughout the reign of Queen Elizabeth, including at the 2010 election that produced a hung Parliament.<sup>41</sup>

If any special circumstances arise which necessitate inter-party negotiations to reach agreement on the formation of a Coalition agreement or pact whereby the government will sustain a confidence motion in the House of Commons, the parties themselves dictate the location, manner and terms in which the negotiations take place.<sup>42</sup> In earlier times, Buckingham Palace (in 1931) and 10 Downing Street (in February 1974) supported by their respective private staff have been the locations for such negotiations, but on the last occasion in 2010 they were held in parliamentary offices and the Cabinet Office<sup>43</sup> which are likely, but not necessarily, to be selected by the party leaders or their representatives involved on any

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<sup>39</sup> For comparison with other European Monarchies on this and other royal functions, see Robert Hazell and Bob Morris (eds.), *The Role of Monarchy in Modern Democracy: European Monarchies Compared* (Oxford: Hart, 2020).

<sup>40</sup> The Conservative Party adopted leadership election rules in 1965: see Robert Blackburn, *The Electoral System in Britain* (London: Macmillan, 1995), Appendix 1; and Rodney Brazier, *Choosing the Prime Minister: The Transfer of Power in Britain* (Oxford University Press, 2020), Ch. 5.

<sup>41</sup> See Robert Blackburn, "The 2010 General Election Outcome and Formation of the Conservative-Liberal Democrat Coalition Government", *Public Law* (2011) pp.30-55. See also Rodney Brazier, *Choosing a Prime Minister: The Transfer of Power in Britain* (Oxford University Press, 2020).

<sup>42</sup> It is conceivable, if unlikely, that the parties might agree upon a Coalition led by a Prime Minister who is not one of the party leaders, and if so, the party to which that person belonged would under its own rules have to change their leader or otherwise ratify the arrangement.

<sup>43</sup> The former Cabinet Secretary, Gus O'Donnell, believed the Cabinet Office and its staff should assist and support such inter-party negotiations, and this is now reflected in the government's Cabinet Manual (see above) whose preparation he oversaw.

future such occasions.

The precedent of the 2010 government formation reinforced the already pre-existing convention that the Monarch no longer performs any personal or independent element in the decision on who will be Prime Minister. Nonetheless the Monarch through their Private Secretary will be kept closely informed of the inter-party negotiations, in case they can assist in any protocols arising including so the Monarch knows where and when they need to be (usually but not necessarily Buckingham Palace) to make the formal appointment. The situation as publicly stated in a form of words agreed between the Cabinet Office, Buckingham Palace, and 10 Downing Street, is that "the Sovereign would not expect to become involved in any negotiations, although there are responsibilities on those involved in the process to keep the Palace informed."<sup>44</sup>

### **International diplomacy**

As Head of State the Monarch performs the diplomatic function of a non-political nature in hosting visiting other Heads of State and foreign dignitaries at banquets or conferences, and making State visits abroad. This function is to promote good relations and goodwill in the UK's foreign relations and is entirely social, devoid of any executive policy matters. The special grandeur of British royal ceremony, its magnificent Palaces and horse-drawn carriages, adds substantially to the enjoyment of visitors and impression made on these occasions. The role played by King George VI<sup>45</sup> and Queen Elizabeth II is regarded as having been outstanding in this respect, requiring great tact and personal charm. The Monarch's role as Head of Commonwealth is to some extent an extension of this public function.

The Monarch is constantly invited to and presides at commemorative events, at all levels of society, from State ceremonies such as Remembrance Day to local communities such as laying foundation stones, unveiling plaques, or opening new buildings. The modern Monarchy has also assumed a charitable and philanthropic role for itself, described on its official website as being "to support and encourage public and voluntary service". For example the Queen Elizabeth is patron to over six hundred organisations, and throughout her reign has attended innumerable celebrations and events in support, encouragement or recognition of such work. The Monarchy thereby aims to foster good citizenship within the country generally.

At many of these ceremonies, the Monarch will make speeches.<sup>46</sup> By convention these will not include a personal opinion on a matter of current government policy or action if it is in the least contentious across the political parties or is a matter of heated public controversy and debate. High-profile speeches prepared by the Monarch's private office are routinely sent in advance to the Prime Minister's office for comment, including even the Christmas

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<sup>44</sup> Para. 2.13. The conduits of communication to the Palace are stated to be any or all of the Cabinet Office, the political parties, and/or the Principal Private Secretary to the Prime Minister. In 2010 the Queen's Private Secretary Sir Christopher (now Lord) Geidt was offered the use of an office at the Cabinet Office during the period of Coalition talks held there: see Robert Blackburn, "The 2010 General Election Outcome and Formation of the Conservative Liberal-Democrat Coalition Government", *Public Law* (2011) pp.30-55.

<sup>45</sup> For example, King George VI is credited with making a considerable impact in promoting good Anglo-American relations with President Roosevelt and in American public opinion when he and his wife Queen Elizabeth made the first visit by a British Monarch there in June 1939: see Robert Rhodes James, *A Spirit Undaunted: Political Role of George VI* (London: Little Brown & Co. 1998).

<sup>46</sup> In general Buckingham Palace only releases public statements on matters relating to their public engagements or an event in the Royal Family, never on matters of public policy.

broadcast to the Commonwealth that is prepared personally by the Monarch in their separate capacity as Head of the Commonwealth.<sup>47</sup>

The principle that a Monarch always acts and speaks on ministerial advice is not only to protect the democratic process but the Monarchy itself, for if ministers are always responsible then no blame or criticism can be laid against the Monarch personally and embroil the institution in controversy.<sup>48</sup> For the same reason, it is a rule of parliamentary conduct that the Monarch must not be publicly criticised, and they are, will not answer. The Speaker has described this as "our well-established rule that any references to the Royal Family must be phrased in courteous language and must not reflect upon the conduct of the Sovereign. This does not, however, inhibit the full discussion of any advice which may or may not have been given to Her Majesty".<sup>49</sup>

All recent Monarchs including Queen Elizabeth have strictly complied with this convention. Public statements and press releases from Buckingham Palace do not contain expressions of opinion on matters of public policy and administration, and only relate to royal engagements, activities and significant domestic news such as marriages or births of the Royal Family. The intention of a Monarch, exemplified in the conduct of the Queen throughout her reign, must be to avoid controversy on all matters, which is crucial to maintaining the stability of the Monarchy and its popular and political support. A striking recent example was the complete absence of any public statement by her during the course of the 2014 referendum on Scottish independence, when clearly she would have been distraught at the prospect of Scotland seceding from the Union.<sup>50</sup>

### **Interaction with government**

Whatever the personal views of a Monarch happen to be, whether they are of their ministers or the quality of their ministers' policies and actions, these will always be a subject of perennial interest to the newspapers and anyone curious about royal celebrity. Many books and articles have been written trying to assess the political influence of the Monarchy, through exchanges of views between a Monarch and their ministers.<sup>51</sup>

The constitutional position governing the expression of personal views that are privately communicated to government ministers was famously described by Walter Bagehot in his book *The English Constitution* published in 1867, and has come universally to be regarded as encapsulating the convention governing the matter ever since. He wrote,

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<sup>47</sup> See Robert Blackburn, "The Queen and Ministerial Responsibility", *Public Law* (1985) pp.361-368; Vernon Bogdanor, *The Monarchy and the Constitution* (Oxford University Press, 1995) pp.265-266.

<sup>48</sup> In Sir Ivor Jennings' words, "The King never takes responsibility. He is carefully shielded from it; for responsibility implies criticism", *Cabinet Government* (Cambridge University Press: 3rd ed. 1959)p. 341.

<sup>49</sup> *Commons Hansard*, 21 November 1979, col. 402.

<sup>50</sup> This point was reinforced by the Prime Minister David Cameron having a private conversation with the Mayor of New York, captured on film and broadcast by the BBC, in which he expressed the Queen's joy at the decision against independence: he subsequently issued a public apology for divulging the content of his conversations with the Queen (BBC News, 28 September 2014).

<sup>51</sup> For example Ben Pimlott, *Queen Elizabeth: A Biography of Elizabeth II* (London: HarperCollins, 1996); Robert Hardman, *Queen of the World* (London: Random House, 2019).

"To state the matter shortly, the sovereign has, under a constitutional monarchy such as ours, three rights - the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others."<sup>52</sup>

There is nothing objectionable or surprising about the Monarch speaking privately with ministers on affairs of State including government intentions or actions, and to this extent any knowledge or opinion shared by the Head of State to the Prime Minister or other senior ministerial colleague might be helpful and therefore prove of some influence. Of course, this greatly depends upon the quality of knowledge and judgement of the individual Monarch. Whatever exchanges of opinion might take place, ministerial responsibility remains dominant, however strongly a Monarch may feel on a subject. The formal situation remains the same today as expressed one hundred years ago by the Prime Minister Herbert Asquith to the new King George V:<sup>53</sup>

"Ministers will always pay the utmost deference, and give the most serious consideration, to any criticism or objection that the Monarch may offer to their policy; but the ultimate decision rests with them; for they, and not the Crown, are responsible to Parliament."

Meetings between the Monarch and ministers happen every week as part of normal business, whether it be one of the numerous ceremonies, lunches, unveiling ceremonies, foreign visitor receptions, or simply conversation before or after Privy Council meetings. The key institution for such communication, however, is that between the Monarch and Prime Minister taking place through a weekly Audience held at Buckingham Palace or wherever the Queen happens to be, and if needs be by way of a telephone conversation.

This weekly Audience is strictly confidential and no minutes are taken. It is only from a few brief and general comments from former Prime Ministers in their diaries or memoirs that we know anything at all about these occasions. Virtually all the Prime Ministers of the Queen have clearly enjoyed these meetings a great deal and valued the privilege of making her personal acquaintance. The Queen, having witnessed and observed 63 years of British political history at close quarters, is a source of immense knowledge and experience, and Prime Ministers have spoken highly of any views she has expressed. In his autobiography Sir John Major refers to the Queen's "encyclopaedic knowledge" of Commonwealth member states, commenting, "I found them invaluable on many occasions."<sup>54</sup> In his speech at the Queen's golden wedding anniversary banquet on November 20, 1997, his successor Tony Blair said, "She is an extraordinarily shrewd and perceptive observer of the world. Hers is advice worth having". These may be polite exaggerations, and it is almost certain that at these Audiences she listens considerably more than speaks. A glimpse of what happens from the Queen's own perspective was provided in the BBC television documentary produced in 1992, with the assistance and co-operation of Buckingham Palace and the Queen herself, entitled *Elizabeth R*, when she commented, "they unburden themselves if they have any problems... occasionally one can put one's point of view and perhaps they had not seen it from that angle".

The confidentiality of communications between the Monarch and government

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<sup>52</sup> *The English Constitution* (1867; Oxford University Press, 2001), p.64.

<sup>53</sup> Memorandum for the King on relations with the Opposition (1910), quoted in H. J. Hanham, *The Nineteenth Century 1815-1914* (Cambridge University Press, 1969), p.40.

<sup>54</sup> *John Major, the Autobiography* (London: HarperCollins, 1999), p.508.

ministers is an essential part of keeping the Monarchy out of politics, maintaining its neutrality, and avoiding controversy. There have been remarkably few information leaks or allegations in the press about the Queen holding views at odds with government policy. One rare occasion was in 1986 when sensationalised claims were made in the press of a rift between the Queen and Prime Minister, then Margaret Thatcher, over government dealings with the Commonwealth. In response Sir William Heseltine, then the Queen's Private Secretary, wrote a *Letter to the Times*, setting out the constitutional position from the Palace's perspective.<sup>55</sup>

"(1) The Queen has the right - indeed the duty - to counsel, encourage and warn her government. She is thus entitled to have opinions on government policy and to express them to her chief minister. (2) Whatever personal opinions the Queen may hold or may have expressed to her government, she is bound to accept and act on the advice of her ministers. (3) The Queen is obliged to treat her communications with the Prime Minister as entirely confidential between the two of them."

From what is known therefore, it seems that throughout her reign since 1952 the Queen has strictly followed the tripartite convention principles articulated by Walter Bagehot, exercising a form of passive judgement rather than seeking to influence or advocate any particular policies or lines of action the government should adopt. She has relied on ministers to consult her so that she is well informed on all matters affecting her functions as Head of State, and she has offered support and encouragement to her Prime Minister and ministers when she felt it appropriate or necessary.

### **Royal succession**

The rules on who becomes Monarch, and how succession to the throne and therefore Head of State takes place, are derived from a mixture of feudal common law principles, modified by some ancient and modern parliamentary statutes. Primogeniture applies, the Crown passing on a demise to the eldest child of a monarch or closest relative, with certain statutory conditions and disqualifications of a religious nature. Male preference was abolished by the Succession to the Crown Act 2013, in line with new gender equality laws introduced in the royal succession laws of Sweden in 1980, Netherlands in 1983, Norway in 1990, Belgium in 1991 and Denmark in 2006 after a referendum on the matter.

In ancient legal theory "the Monarch never dies", or to use the more popular expression, "The King is dead, long live the King!" At the very moment the previous Monarch, George VI, died in his sleep in the early hours of 6 February 1952, his eldest daughter Princess Elizabeth instantly and automatically became Queen Elizabeth II. The same simultaneous process will occur at the death of Queen Elizabeth, now nearing her 100th birthday, and assumption of the throne by her eldest child, Prince Charles (or her grandson Prince William, should Charles predecease his mother).

A formal state coronation ceremony is therefore not a legal requirement. Edward VIII reigned for ten months in 1936, between accession and abdication, without ever being crowned at a coronation service. However, a political process supervises the changeover, and can intervene in cases of difficulty. This is conducted by way of the Privy Council constituting itself as an Accession Council within days, its proceedings managed by the

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<sup>55</sup> Letter to the *Times*, 29 July 1986.



government represented by the President of the Council and Lord Privy Seal, both of whom are Cabinet members and usually Leaders of the House of Lords and House of Commons respectively. Arrangements are made for the presence of High Commissioners from the Commonwealth realms, and senior clergymen of the Church of England, as well as ceremonial officers from the City of London and Parliament. The traditional method of publishing the Accession Council's proclamation formally recognising the new Monarch is by it being read out in prominent places, notably at St James's Palace in London by the Garter King of Arms and being published in the *London Gazette*.

Since the "Glorious Revolution" of 1688,<sup>56</sup> royal succession has been subject to parliamentary modification, in line with the constitutional settlement that year dictating that all aspects of the Crown and its prerogatives were henceforth to be subordinate to an Act of Parliament. Under the Bill of Rights 1688, the Act of Settlement 1701, the Act of Union 1707 and the Accession Declaration Act 1910, Roman Catholics are excluded from the throne, and a Monarch is required to declare they are a Protestant and "in communion" with the Church of England and swear to uphold the established Churches of England and Scotland.

The terms of the 1688 and 1701 statutes declared that the Catholic disqualification also applied to whoever "shall marry a papist", but this provision was repealed by the Succession to the Crown Act 2013. A widespread view is that this reform on Catholic disqualification is incomplete and should also apply to the person who is Monarch. There is now considerable support for the proposition that the ancient prohibition on Roman Catholics becoming royal Head of State should be abolished altogether.<sup>57</sup>

Certainly, Roman Catholicism is no longer viewed as a threat to the political security of the state, as it was at the time three centuries ago when the Bill of Rights and Act of Settlement were passed. It has been argued that leaving this religious disqualification in force is offensive in terms of freedom of expression, religion and belief, and that the proper role of the Monarchy should be to symbolise and represent the British nation as a whole, since today the UK is a multi-religious society.<sup>58</sup> Indeed, according to this view, it is as symbolically offensive to discriminate in the royal succession law against a particular religious faith as it is upon grounds of female gender.

Others have simply remarked on the offensiveness of the discrimination, such as on the Conservative side Michael Howard ("it is an anachronism that Catholicism should be singled out") and Michael Forsyth ("the British constitution's grubby secret and nobody wants to tackle it"); and on the Labour side Tony Blair (who converted to Roman Catholicism shortly after resigning as Prime Minister in 2007) and John Reid ("as a Roman Catholic myself, I am only too well aware of the very deep feelings and passions which surround this issue"). Some attempted Private Members Bills have been presented to Parliament to repeal the Catholic bar on a Monarch, such as Kevin McNamara's Treason Felony, Act of Settlement and Parliamentary Oath Bill in 2001.<sup>59</sup>

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<sup>56</sup> The Roman Catholic King James II was forced from the throne into exile, replaced by the Protestant King William and Queen Mary.

<sup>57</sup> For an account, see Robert Blackburn, *King and Country: Monarchy and the Future King Charles III* (London: Politico's, 2006), Ch. 4.

<sup>58</sup> See Report of the Commission on Religion and Belief in British Public Life, *Living with a Difference: Community Diversity and the Common Good* (2015).

<sup>59</sup> *House of Commons Debates*, 19 December 2001, col. 377.

In the Scottish Parliament, resolutions have been passed calling for repeal of the anti-Catholic provision in the Act of Settlement for many years. In 1999 for example, a motion was approved believing, "that the discrimination contained in the Act of Settlement has no place in our modern society, expresses its wish that those discriminatory aspects of the Act be repealed, and affirms its view that Scottish society must not disbar participation in any aspect of our national life on the grounds of religion". Naturally, senior members of the Catholic church in the UK have often protested publicly on the subject.<sup>60</sup>

The case for retention of the existing prohibition is the establishment of the Church of England, effectively a state religion, and the formal position of the Monarch as its Head and Supreme Governor.<sup>61</sup> Unsurprisingly therefore, there is a high correlation between those who advocate repeal of the religious provisions in the Bill of Rights and Act of Settlement and those who favour disestablishment of the Church of England which would render the disqualifying provisions redundant. A part precedent exists from a century ago, when the Church of England in Wales was disestablished.<sup>62</sup> In recent decades, some senior politicians have advocated disestablishment including the Liberal Democrat party, as well as some priests in the Church of England itself. A well-known advocate has been Canon Paul Oestreicher who has written, "The patchwork of customs and ancient customs that tie the Church to the apron strings of palace and parliament do nothing for the nation, limit the Church's freedom to represent Christ to the people and, on a lighter note, have simply become faintly ridiculous".<sup>63</sup>

However, the Conservative Party in government since 2010 has continued to emphasise its commitment to the establishment of the Church of England and the Sovereign as its Supreme Governor,<sup>64</sup> as did the Labour government before it.<sup>65</sup> The depth of this commitment however is unclear. The value-driven claims for religious freedom and non-discrimination on grounds of faith in British society today are strong, particularly now that the proportion of practising Anglicans in comparison with other faith groups is in marked decline. Thus the National Social Attitudes survey in 2019 showed that the proportion of the British population identifying as Christian has fallen from two-thirds (66%) to just over one-third (38%) since 1983.<sup>66</sup> This historically vital element in the role of the Monarchy as Head of State in the UK can be expected to be reviewed in the next reign.

## Regencies and retirement

There is no law, and there are no precedents, supporting a Monarch choosing to retire simply on grounds of old age or for reasons of personal preference. A Regency Act was passed in 1937,<sup>67</sup> in response to the problems encountered in the reign of George V when he was on

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<sup>60</sup> See Robert Blackburn, *King and Country: Monarchy and the Future King Charles III* (London: Politico's, 2006), pp.121-22.

<sup>61</sup> Dominic Grant, "By Law Established: The Church of England and its Place in the Constitution", in Robert Blackburn (ed), *Constitutional Studies* (London: Mansell, 1992); I. Leigh, "By Law Established? The Crown, Constitutional Reform and the Church of England", *Public Law* (2004) p.266; Javia Garcia Oliva, "Church, State and Establishment in the United Kingdom in the 21st Century: Anachronism or Idiosyncrasy?", *Public Law* (2010) p.482.

<sup>62</sup> Welsh Church Act 1914.

<sup>63</sup> "Free the Church", *Guardian* newspaper, 12 December 2000.

<sup>64</sup> See for example, Government Response, House of Commons Political and Constitutional Reform Committee, *Rules of Royal Succession*, 2012-13, HC 586.

<sup>65</sup> *The Governance of Britain*, CM 7170 (2007), para. 57.

<sup>66</sup> National Centre for Social Research, *British Social Attitudes 36* (2019).

<sup>67</sup> Amended for Elizabeth II's reign by the Regency Act 1953.

occasion too ill to deal with even straightforward matters of signature, providing for the first time a permanent<sup>68</sup> statutory basis for a Regency where the Monarch is "by reason of infirmity of mind or of body incapable of performing the royal functions, and until he or she recovers". The Act also covers the situation of a minor, below the age of eighteen years, succeeding to the throne. The incapacity is to be declared by persons specified in the Act (which include the spouse of the Monarch, Speaker of the House of Commons, Lord Chief Justice and Master of the Rolls). The person to be appointed Regent under the terms of the Act is whoever is next in line of succession.

The Act has a provision extending to being "for some definite cause not available for the performance" of the royal functions.<sup>69</sup> Two examples given by the Home Secretary, Sir John Simon, when presenting the Regency Bill to the House of Commons was if the Monarch was taken prisoner of war or shipwrecked, but he added that the purpose of the provision was to provide flexibility to provide for all kinds of event which could give rise to a Regency.<sup>70</sup>

The performance of royal functions, as Monarch or, to a lesser extent as member of the Royal Family performing public functions in support of the Monarchy, is demanding and requires acute mental sensitivity, strength of character, and intelligence. The recent much publicised experience of the Duke and Duchess of Sussex who have absolved themselves from the Royal Family to a commercial existence in California is a salutary lesson of incapacity or unwillingness for the role. So too was the more sensational case of the hugely popular King Edward VIII in 1936 who simply wished to marry the woman of his choice but was told by the Prime Minister that if he wished to do so, he must abdicate, which obediently he proceeded to do.<sup>71</sup>

At the present time, hardly anyone wishes Elizabeth II to step down as Monarch. If she became incapacitated for reasons of age, it seems certain that a Regency for Prince Charles would be created. More of a question for debate is whether on the Queen's demise, Prince Charles, now in his mid-seventies and regarded by some as already too controversial in his private life and opinions to serve as Monarch, might step aside enabling a generation to be skipped and succession of the throne to pass to his son, Prince William, with the Duchess of Cambridge, Katherine, as his Queen. Opinion polls indicate that this would be popular,<sup>72</sup> especially as Charles is past the normal age of retirement and the role of Monarch is increasingly perceived as a professional role to be performed, rather than a matter of privilege and hereditary entitlement. The practice of a Monarch retiring on grounds of age has emerged elsewhere in Europe in recent years, including Queen Beatrix of the Netherlands in 2013 and King Juan Carlos of Spain in 2014. Equally influential is the practice of some Heads of Church, most notably Pope Benedict XVI of the Roman Catholic Church in 2013.

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<sup>68</sup> Earlier Regencies had taken place, such as the Prince Regent (later George IV) in 1811 when George III lost his mental faculties, dealt with by an ad hoc Regency Act.

<sup>69</sup> Section 2(1).

<sup>70</sup> *House of Commons Debates*, 1 March 1937, cols. 107-111. See also Robert Blackburn, "The Royal Assent to Legislation and a Monarch's Fundamental Human Rights", *Public Law* (2003) pp.205-201, where it is suggested that a short-lived Regency could be appointed under this provision so a Monarch could avoid being compelled to give Assent to legislation on grounds of conscience or belief.

<sup>71</sup> See Robert Blackburn, "The Abdication of Edward VIII: Legal and Constitutional Perspectives", in Matthew Glencross et al (eds.), *The Windsor Dynasty 1910 to the Present: Long to Reign Over Us?* (London: Palgrave Macmillan, 2016), Ch. 7.

<sup>72</sup> YouGov poll, 2 December 2021.

The position is best stated that there are no constitutional impediments to a Monarch choosing to retire from or abdicate the throne if they wish to do so for any reason. In terms of process all that would be required is government support and the Monarch's declaration of their vacation of the throne, followed by a simple Act of Parliament giving effect to the declaration and passage of the Crown onto the next in line of succession. By convention, formal agreement should be obtained by the Parliaments of the Commonwealth Realms, who would enact their own national legislation in parallel fashion.<sup>73</sup> There would certainly be nothing “unconstitutional” in putting into effect any future wish of Prince Charles that Prince William succeeds Queen Elizabeth, rather than himself.

### **Future of Monarchy as Head of State**

Queen Elizabeth II, the longest reigning and arguably most popular of any Monarch of modern times, has set the gold standard for how a constitutional Monarch should conduct themselves in the context of a political and social democracy. Much of this success has been down to her self-restraint and detachment from the political process, always maintaining her strict impartiality and neutrality on issues of public policy.

The Queen will leave the institution of Monarchy after her demise with a high level of popular support, with little overt republicanism.<sup>74</sup> However, in-depth social surveys reveal this support to be of a far more shallow and volatile nature than at any time since she came to the throne in 1952.<sup>75</sup> British society has changed radically since then, especially in terms of deference towards authority and social class where previously Monarchy stood at its apex. The spiritual dimension of Monarchy has evaporated alongside, with Britain a far more secular country than in the immediate post-War period.<sup>76</sup>

Across the Commonwealth Realms, especially Australia,<sup>77</sup> there are growing republican movements and it is clear that several countries will take steps soon after the demise of Elizabeth to remove the British Monarchy as their Head of State, replacing their Governor Generals with a national Presidency.<sup>78</sup> This could have a domino effect across the other Realms, and will feed into the many discussions and debates about Monarchy within the UK which are certain to take place at the accession of the new Monarch and new reign. The future of the Monarchy will depend on maintaining its popularity, and this in turn will be strongly influenced by the personality and conduct of future Monarchs. For how the

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<sup>73</sup> This obligation to obtain assent of the Parliaments of the Realms is stated in the preamble to the Statute of Westminster 1931, being the UK legislation giving legal status to the independence of the former Dominions of the British Empire.

<sup>74</sup> According to an Ipsos-Mori poll in March 2021, 42% thought the UK would be "worse off" without the Monarchy, "18% "better off", and others "make no difference". A high-profile republican politician in recent times was Tony Benn, a former Labour Cabinet minister: *Common Sense: A New Constitution for Britain* (London: Hutchinson, 1993).

<sup>75</sup> See Roger Mortimore, "Measuring British Public Opinion on the Monarchy and the Royal Family", in Matthew Glencross et al (eds.), *The Windsor Dynasty 1910 to the Present: Long to Reign Over Us?* (London: Palgrave Macmillan, 2016), Ch. 6.

<sup>76</sup> See Ian Bradley, *God Save the Queen: The Spiritual Heart of the Monarchy* (London: Bloomsbury, 2012).

<sup>77</sup> George Winterton, *Australian Republican Government* (Oxford University Press, 1986); B. T. Jones and M. McKenna (eds.), *Project Republic: Plans and Arguments for a New Australia* (Collingwood: Black Inc., 2013).

<sup>78</sup> In 2021 Barbados replaced the Queen by a Presidency as their Head of State.

Monarchy as an institution is perceived in the public mind is powerfully shaped by how the individual on the throne is viewed and approved of as a person.<sup>79</sup>

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<sup>79</sup> See Robert Blackburn, *King and Country: Monarchy and the Future King Charles III* (London: Politico's, 2006), Ch, 5.