LEGISLATION

The Succession to the Crown Act 2013: Modernising the Monarchy

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Constitutional reform has occupied a relatively high position on the legislative agendas of successive UK governments in recent decades. Yet little of it has impinged directly upon the monarchy. The Succession to the Crown Act 2013 is therefore a significant and uncommon enactment. This article commences by sketching out a little of the background to the Act, including the need for a common position across the Commonwealth Realms which recognise the Queen as their Head of State. It then proceeds to consider the Act's three central provisions. These will ensure gender equality in the royal succession, abolish the prohibition on a royal heir marrying a Roman Catholic, and recast the law on consent to Royal Marriages. As such, they are non-controversial. Controversy remains, however, in an issue which the 2013 Act deliberately does not address; the bar on a Roman Catholic succeeding to the throne.

INTRODUCTION

Writing in 2007, Professor Brazier drew attention to the fact that during the course of the present Queen's long reign, few if any of the statutes passed by Parliament had related directly to the role and position of the monarch in the UK's constitutional settlement. A number of reasons were offered to explain this state of inertia. These included the 'doctrine of unripe time', whereby ministers respond to arguments for change by contending that the time is not yet quite right to make them. This argument may be advanced even where there is a good measure of public support in favour of the change. As Professor Brazier also notes, however, Parliament's legislative silence over the monarchy can be swiftly ended if circumstances demand it, such as when a monarch wishes to abdicate,[1] or there is a need to make clearer provisions for a regency.[2]

Prior to the Succession to the Crown Act 2013 (the 2013 Act), various unsuccessful attempts were made by backbench MPs and peers to address issues

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1 In speaking against the programme motion passed in respect of the Succession to the Crown Bill, Jacob Rees-Mogg MP noted that His Majesty's Declaration of Abdication Act 1936 had, 'completed its passage in the House of Commons in under a minute', and that it was, 'not a happy precedent': see HC Deb vol 557 col 189 22 January 2013.

2 See R. Brazier, 'Legislating about the Monarchy' [2007] CLJ 86, 93–95. At the new King's request, the Regency Act 1937 was passed a mere two weeks after George VI commenced his reign: see R. Brazier, 'Royal Incapacity and Constitutional Continuity' [2005] CLJ 352, 357–358. Bonney and Morris also note that when a government wishes to legislate on the succession, the obstacles in its way can usually be overcome: see N. Bonney and B. Morris, 'Tuvalu and You: The Monarch, the United Kingdom and the Realms' (2012) 83 *The Political Quarterly* 368, 369.

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which the new law covers.[3] The most recent of these was a ten-minute Rule Bill introduced by Keith Vaz MP,[4] which merely sought to ensure that henceforth, no account would be taken of gender in determining the line of accession to the throne.

Of all the private Members' Bills introduced since 1979, only three ever reached the Second Reading stage.[5] Of these, that which most closely resembled the 2013 Act was the Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill,[6] introduced by Dr Evan Harris MP.[7] Like the 2013 Act, it would have ensured gender equality in the succession to the throne, removed the disqualification on marrying a Roman Catholic, and repealed the Royal Marriages Act 1772. However, unlike the 2013 Act, it made no provision for an amended version of the consent to marry requirement. Significantly, neither Dr Harris's Bill nor the 2013 Act address the controversial issue of the bar on a Roman Catholic becoming monarch.

DRAFTING AND COMMENCEMENT

The preamble to the Statute of Westminster 1931 states, amongst other things:

> inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, 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.

The presence of this provision in the preamble rather than the text of the 1931 Act ensures that it is, 'in the nature of a constitutional convention'.[8] Since the 1931 Act was passed, the status of several of the original Dominions has changed with the result that only the UK, Australia and Canada remain subject to the Act's preamble. There is an arguable case, however, that the scope of the convention may have subsequently expanded to include all the Commonwealth Realms.[9] Such an interpretation is supported by the events surrounding the enactment of the 2013 Act.

3 Thus Mary Macleod MP, a former employee of the Royal Household, noted that: 'There have been many attempts to amend Crown succession over the years – one parliamentary paper lists 12 private Members' Bills, from members in all parts of the House, that have attempted to do so since 1979': see HC Deb vol 557 col 226 22 January 2013. The paper to which she referred is entitled 'Attempts to Amend Crown Succession since 1979' SN/PC/04663 (19 January 2011).

4 HC Deb vol 521 col 704 18 January 2011.

5 See A. Twomey, 'Changing the Rules of Succession to the Throne' [2011] PL 378, 379.

6 Bill 29, 2008–09 session.

7 The second reading debate on the Bill was held on 27 March 2009: see HC Deb vol 490 col 556.

8 See the view of Professor Blackburn published in *Rules of Royal Succession*, 11th report HC 1615 (2010–12) Ev 18. See also R. Brazier, 'Skipping a Generation in the Line of Succession' [2000] PL 568, 572, and Twomey, n 5 above, 383–389.

9 This possibility is raised by Twomey, *ibid*, 388.

Given that the need for assent from all of the Realms for a change to the succession to the throne arises due to a non-legal rule rather than a statutory duty, it follows that the UK Parliament could,[10] if it so wished, have passed legislation altering the succession without first seeking the agreement of the other Realms. Had it done so,[11] it would not have acted unlawfully. Instead, it would simply have broken the convention, and political rather than legal ramifications would have been likely to ensue,[12] such as the fuelling of the fires of republican movements wherever they may exist in the Realms. It may also have created the risk that some of the Realms would have chosen not to follow the UK's lead, with the result that their own laws relating to the succession may have become different to those in the UK.[13] Thus, for example, if a Realm had decided not to dispense with male preference primogeniture, the heir to its throne may at some point in the future have been a different person to the heir to the UK throne.[14]

We must also not overlook the fact that had the UK Government decided to act unilaterally on the issue of royal succession, this may have been contrary to the wishes of the Queen who, as monarch, has, as Bagehot noted,[15] the right to be consulted, the right to encourage, and the right to warn Her Government.[16] Given that the Queen's interest in, and authority on, matters of the Commonwealth has been praised by several of her former Prime Ministers,[17] it seems likely that had she been consulted, she may have exercised her right to encourage her Government to act inclusively, and to warn of the potential adverse consequences to her continued role as Head of State in some of the Realms affected if it did not. Any views which the Queen had would have been expressed privately, perhaps during her weekly audiences with the Prime Minister and in correspondence. Nevertheless, in the event of a continued difference of opinion

10 Matters relating to the succession are 'reserved' for the purposes of the devolution legislation: see, for example, the Scotland Act 1998, Sch 5, Pt 1, para 1. Accordingly, although the coalition Government kept the devolved administrations informed as to progress on the drafting of the new succession legislation, it was not under a duty to seek their consent to the measure.

11 Although such an event is theoretically possible, it was unlikely to happen in practice since the convention in the Statute of Westminster 1931 has been, 'applied routinely as if it represented a rule of law': see R. Brazier, n 2 above, 101.

12 See the remarks of the Deputy Leader of the House of Commons, Tom Brakes MP, HC Deb vol 557 cols 729–730 28 January 2013.

13 As Bonney and Morris suggest, such an outcome would have been 'undesirable': see n 2 above, 368.

14 There is a 19th century precedent for this happening. Thus although Britain and Hanover had shared a monarch since 1714, when Princess Victoria became Queen in 1837, she did not inherit the Hanoverian throne because salic law excluded women from the succession. Instead, that throne passed to her uncle, the Duke of Cumberland, who became King Ernest Augustus of Hanover.

15 *The English Constitution* (1867).

16 Professor Brazier has referred to this as the 'tripartite convention'. He notes that in practice, it is far more important than if a monarch were to express disapproval by refusing assent to legislation: see 'Royal Assent to Legislation' (2013) 129 LQR 184, 200.

17 See, for example, the comments of James Callaghan in *Time & Chance* (London: Collins, 1987) 380–381, and John Major in *The Autobiography* (London: Harper Collins, 1999) 508.

(2013) 76(6) MLR 1070–1093

over the matter, the Queen would have felt obliged to follow the advice of Her Ministers.[18]

As it was, however, the Government clearly felt the need to comply with the obligations set down in the Statute of Westminster's preamble.[19] Thus prior to the marriage of Prince William and Catherine Middleton (now the Duchess of Cambridge), the Deputy Prime Minister, Nick Clegg MP, indicated in an interview with the BBC that both he and the Prime Minister were sympathetic to bringing an end to the rule of male preference primogeniture in relation to royal succession, but that any such reform would need to be approved by the Commonwealth Realms.[20] The Prime Minister subsequently wrote to the political leaders of the Realms setting out the Government's plans,[21] and accordingly, an agreement was duly reached at the bi-annual Commonwealth Heads of Government meeting held in Perth, Western Australia, on 28 October 2011. That agreement (the Perth Agreement) was made between the UK Government and the 15 other Commonwealth Realms[22] which currently recognise the Queen as their Head of State.[23] The germane part of the Agreement was as follows:

> All countries wish to see change in two areas. First, they wish to end the system of male preference primogeniture under which a younger son can displace an elder daughter in the line of succession. Second, they wish to remove the legal provision that anyone who marries a Roman Catholic shall be ineligible to succeed to the Crown. There are no other restrictions in the rules about the religion of the spouse of a person in the line of succession and the Prime Ministers felt that this unique barrier could no longer be justified.[24]

18 This has been referred to as the 'cardinal convention of the British constitution': see Brazier, n 16 above, 200. Professor Brazier contends that the convention demands that the monarch must 'normally' act on ministerial advice. A departure from that advice is therefore possible. It might be argued that the Queen's role as Head of the Commonwealth provides a relatively firm foundation on which to depart from ministerial advice on Commonwealth matters. The phrases 'tripartite convention' and 'cardinal convention' were adopted by the Upper Tribunal for the purposes of the litigation in *Evans* v *Information Commissioner* [2012] UKUT 313 (AAC) at [76] – [88]. The Divisional Court also used them in *R (on the application of Evans)* v *Attorney-General* [2013] EWHC 1960 (Admin).

19 In addition to the present case, assent from the Commonwealth Realms pursuant to the Statute of Westminster 1931 has been sought on three other occasions: the abdication of Edward VIII (1936); the removal of the title of Emperor of India from the titles held by George VI following Indian independence (1948); and when the present Queen adopted different titles for Her Realms (1953): see Brazier, n 8 above, 572.

20 'Royal succession reform is being discussed, Clegg says' BBC News 16 April 2011 at http://www.bbc.co.uk/news/uk-13103587?print=true (last visited 9 July 2013).

21 'David Cameron proposes changes to royal succession' BBC News 12 October 2011 at http://www.bbc/co.uk.news/uk-politics-15282940?print=true (last visited 9 July 2013).

22 They are: Antigua and Bermuda; Australia; the Bahamas; Barbados; Belize; Canada; Grenada; Jamaica; New Zealand; Papua New Guinea; St Christopher and Nevis; St Lucia; St Vincent and the Grenadines; the Solomon Islands; and Tuvalu. For the populations of the 16 realms as of 2011: see Table 1 in Bonney and Morris, n 2 above, 369. It indicates, amongst other things, that Tuvalu is by far the smallest of the realms with a population of less than 11,000, and that cumulatively, the population of the 16 realms stands at 134 million.

23 It has rightly been suggested that the fact that the UK's constitution is, 'uniquely bound to those of 15 other states' is one of its, 'less well known features' *ibid*, 368.

24 For the full text of the Perth Agreement, see Annex 1 of *Rules of Royal Succession*, 11th report, n 8 above, and House of Commons Library Research Paper 12/81 (19 December 2012) 6–7.

It should be noted that in addition to the 'two areas' referred to above, the 2013 Act addresses a third; the need for the Monarch's consent in respect of certain royal marriages.[25] The matter was not included in the text of the Perth Agreement since it was felt that it did not directly affect the royal succession. Nevertheless, although the UK Government was 'free from the constitutional requirements in the Statute of Westminster 1931', it felt it appropriate to consult the Commonwealth Realms and for them to signify their agreement to any reform of the Royal Marriages Act 1772.[26]

The task of co-ordinating the implementation of the reforms across the 16 Realms fell to New Zealand. Detailed discussions lasting more than a year were necessary before full agreement was reached.[27] As a result of needing to secure the passage of a text which properly reflected the common position, the 2013 Act may be likened to an international treaty.[28] Certainly it is the case that during the course of the Bill's parliamentary stages, the Government would not be deflected from the task of securing its enactment in an un-amended form. Suggested additions were therefore objected to on practical as well as principled grounds.[29] Although the Realms will need to bring the relevant measures into force, not all of their own arrangements require them to legislate.[30] Thus on behalf of the Government, Lord Wallace of Tankerness explained: 'Some, such as Canada,[31] will pass their own legislation[32] to achieve these goals, while others, such as Belize and Papua New Guinea, have been clear that legislation is not required in their jurisdictions and the laws can apply directly'.[33]

In order to take account of the need for a uniform and coordinated approach, section 5 of the 2013 Act is the only provision which came into force on the date of Royal Assent.[34] The other provisions in the Act will come into force on such day or days and at such time or times as the Lord President of the Council[35] may by order made by statutory instrument appoint.[36] During the Bill's Second Reading and in Committee, it was confirmed on behalf of the Government that the Act would not be brought into force until the necessary legal changes have been made in the 15 other Commonwealth Realms.[37]

25 2013 Act, s 3.
26 See Blackburn, n 8 above, Ev 17, and the remarks of Lord Wallace of Tankerness, HL Deb vol 743 col 783 14 February 2013.
27 HC Deb vol 557 col 211 22 January 2013, and HL Deb vol 743 col 783 14 February 2013.
28 See the remarks of Lord Wallace of Tankerness, n 26 above.
29 See, for example, HC Deb vol 557 cols 210–212 22 January 2013.
30 See the remarks of the Parliamentary Secretary at the Cabinet Office, Chloe Smith MP, HC Deb vol 557 col 282 22 January 2013.
31 For a discussion of the constitutional amendment procedures in the three major Realms, Canada, Australia and New Zealand, see Blackburn, n 8 above, Ev 18–19, Twomey, n 5 above, 390–401, and the Appendix to the House of Commons Library Research Paper 12/81 (19 December 2012).
32 Canada's Succession to the Throne Act 2013 received Royal Assent on 27 March 2013.
33 HL Deb vol 743 col 784 14 February 2013. Earlier, in the House of Commons, the Deputy Prime Minister had also suggested that Jamaica did not need to, 'go through the full legislative process', see HC Deb vol 557 col 212 22 January 2013.
34 25 April 2013: 2013 Act, s 5(1).
35 A position currently held by the Deputy Prime Minister, Nick Clegg MP.
36 2013 Act, s 5(2) and (3).
37 HC Deb vol 557 col 282 22 January 2013.

(2013) 76(6) MLR 1070–1093

The reference to 'time' in section 5(2) therefore allows for the 2013 Act to be brought into force taking account of the local time differences in the other Realms.[38] If there is a breakdown in the 'careful choreography',[39] there is room for a more flexible approach by virtue of section 5(3), which allows for provisions other than section 5 to be brought into force on different days and times.[40] It remains to be seen, however, whether the UK Government will need to make use of this provision to bring the Act's substantive provisions into force by stages.

GENDER EQUALITY

Historically, the throne of England, and more recently, the throne of the United Kingdom, has generally passed to new monarchs in accordance with the common law rule of male preference primogeniture.[41] Essentially this has meant that on the death of a reigning monarch, the throne has passed to the monarch's eldest surviving son[42] or, in the absence of issue, their closest male relative, eg a brother. Very occasionally, the throne has passed to a female.[43] Thus, for example, on the death of George VI, the throne passed to our present Queen, Queen Elizabeth II, as the eldest of his two daughters.[44] The rule of male preference primogeniture is evident in the present line of succession to the throne. Thus although the Queen has four children, her second eldest, Princess

38 See the remarks of Lord Wallace of Tankerness, HL Deb vol 743 col 830 14 February 2013.

39 Lord Wallace of Tankerness, HL Deb vol 743 col 783 14 February 2013.

40 Somewhat unusually, the territorial extent of the 2013 Act is not specified in the final section (s 5). It is stated in the *Explanatory Notes* (at para15) that the 2013 Act extends to Crown Dependencies and British Overseas Territories by necessary implication. This is in accordance with the precedents established by earlier legislation relating to the throne, such as the Accession Declaration Act 1910, and the Regency Acts of 1937, 1943 and 1953, respectively.

41 There have of course been occasions when the line of succession has been changed by way of an Act of Parliament: see, for example, the Act of Settlement 1700 and Princess Sophia's Precedence Act 1711.

42 There have been a number of occasions when a monarch has outlived his or her male heir apparent. Thus, for example, Fredrick Louis, Prince of Wales (1707–1751) predeceased his father, George II, who was accordingly succeeded by Frederick Louis' son, who became George III in 1760.

43 For an historical discussion of the status of women in the royal succession in England and beyond, see A. Lyon, 'The Place of Women in European Royal Succession in the Middle Ages' (2007) 27 Liverpool LR 361.

44 Professor Blackburn has noted that under the feudal property law of primogeniture, 'if there are no sons and more than one daughter of the departing monarch, then the daughters are considered equal in law, regardless of age, and succeed to their father's estate jointly', see n 8 above, Ev 12. He contends, therefore, that on the death of George VI, a claim could have been made on behalf of Princess Margaret to rule jointly with her sister, Princess Elizabeth. As it was, the Accession Council which is customarily constituted on the death of a monarch proclaimed Princess Elizabeth Queen, and her succession was endorsed by Parliament. Jacob Rees-Mogg MP was of the view that female primogeniture ought to have been addressed in the 2013 Act : see HC Deb vol 557 col 248 22 January 2013. The Government was confident, however, that the law was clear that the eldest daughter would inherit in these circumstances: see HC Deb vol 557 col 256 22 January 2013, and HL Deb vol 743 col 784 14 February 2013. Its view reflects that previously expressed by Brazier, n 8 above, fn 5, and A. Bradley and K. Ewing, *Constitutional and Administrative Law* (London: Longman, 15th ed, 2011) 234.

Anne, the Princess Royal, was only fourth in line to the throne even before her brothers married and produced their own issue.

The UK is of course not alone in Europe in having an hereditary monarchy. Sweden, Belgium, the Netherlands, Norway, Denmark, Luxembourg and Spain also have such monarchies,[45] and they too have either addressed, or seem likely to address, the issue of gender equality in terms of royal succession. Current practice elsewhere thus informed the parliamentary debates on the Bill which became the 2013 Act. On behalf of the Labour Opposition, in expressing its strong support for the Bill, Wayne David MP stated:

> Modifying the succession rule will bring the British monarchy into a position similar to that of most other European monarchies – I hope that hon. Members will consider that to be an argument in favour of the change. Hon. Members will note that gender equality in succession laws was achieved in Sweden in 1980, the Netherlands in 1983[46] and Norway and Belgium in the early 1990s. It was introduced in Denmark in 2006 and is anticipated before too long in Spain. The change is in tune with enlightened attitudes in many other European countries as well as here in the United Kingdom.[47]

In has been noted that on one occasion, when a private Member's Bill which sought to remove the gender discrimination provision from the statute book was debated in the House of Lords, a minister responding on behalf of the Government informed their Lordships:

> I should make it clear straight away that before reaching a view the Government of course consulted the Queen. Her Majesty had no objection to the Government's view that in determining the line of succession to the throne daughters and sons should be treated in the same way. There can be no real reason for not giving equal treatment to men and women in this respect.[48]

These remarks[49] were made in relation to the Succession to the Crown Bill, introduced by Lord Archer. Admittedly, that Bill was less far-reaching than the present Act in that it only addressed the issue of gender equality. It would be

45 With the exception of Sweden, the European states which possess monarchies are also members of the EU. For a discussion of the relationship between these states and the EU, see H. U. J. D'Oliveira, 'The EU and its Monarchies: Influences and Frictions' (2012) 8 ECL Review 63.

46 The position in the Netherlands was somewhat unusual in that gender inequality had failed to prevent the country being reigned over by three successive Queens between 1890–2013.

47 HC Deb vol 557 col 216 22 January 2013. See also the remarks of Mary Macleod MP, HC Deb vol 557 col 225 22 January 2013, and the written evidence of Professor Blackburn, n 8 above, Ev 13.

48 Per Lord Williams, HL Deb vol 586 cols 916–917 27 February 1998. Quoted by Professor Blackburn, n 8 above, Ev 13. The Queen's willingness to consider reform of the rules of succession was noted later that same year in T. Hames and M. Leonard, *Modernising the Monarchy* (London: Demos, 1998). Whilst its authors considered it an 'entirely appropriate reform to propose', they opined that it would not have an enormous impact on the monarchy as an institution by reason of its delayed effect: *ibid*, 19–20.

49 Lord Williams had to vigorously defend himself against the suggestion, made by Lord Marlesford, that he had acted in a constitutionally improper manner by making public the Queen's view on the matter: see HL Deb vol 586 col 917 27 February 1998.

going too far, therefore, to suggest that the Queen agrees with all that is in the present Act on the basis that she has 'consented'[50] to it and because she was not previously opposed to what Lord Archer's Bill proposed to do. It is not unreasonable to assume, however, that at the very least, the Queen is in favour of what is now section 1 of the 2013 Act.

In moving that the Bill be read a second time, the Deputy Prime Minister, Nick Clegg MP, made the case for gender equality in the royal succession.[51] Section 1 of the 2013 Act therefore brings to an end a rule which could no longer be justified in the 21st century. It makes the rules relating to the royal succession in this country more in line with those of other European countries with hereditary monarchies.[52] Indeed in the case of Sweden, the relevant change in the law had an immediate impact upon the line of succession because until then, the heir to the throne had been a younger boy who was, in the words of Chris Bryant MP, 'ousted from his hereditary status by his older sister'.[53]

The change made by section 1 is not so immediate. Although the provision is retrospective, its reach is very limited since it applies only to persons born after 28 October 2011.[54] Accordingly, its impact on the succession will be delayed until the offspring of the present Duke of Cambridge, the Prince of Wales' heir, are the immediate heirs to the throne. It will mean that regardless of the gender of his first born child,[55] he or she will in due course become the monarch. Thus in the case of a daughter, due to the operation of the 2013 Act, her place in the line of succession will not be affected by the subsequent birth of a brother. Of course, had the UK Government and the other Commonwealth Realms wanted to, they could have provided that the new rule should apply from an earlier date than the Perth Agreement. Such an approach would have had a significant effect on the current line of succession if, for example, it had retrospectively removed the rule of male-preference primogeniture in respect of the issue of the present

50 In moving that the Succession to the Crown Bill be read a second time, the Deputy Prime Minister informed the House of Commons that the Queen had, 'consented to place her prerogative and interest, so far as they are affected by the Bill, at the disposal of Parliament and for the purposes of the Bill' (HC Deb vol 557 col 208 22 January 2013). The same statement was later repeated in the House of Lords: see HL Deb vol 743 col 782 14 February 2013. Despite the ordinary meaning of 'monarch's consent', this customary statement does not signify that the Queen has agreed to the Bill in question. Rather, it indicates that the monarch is content for the subject matter of the Bill to be debated by Parliament. For a fuller discussion of this 'peculiar attribute', see Brazier, n 2 above, 94–98, and *Erskine May Parliamentary Practice* (London: LexisNexis Butterworths, 24th ed, 2011) 165–167.

51 HC Deb vol 557 col 210 22 January 2013.

52 Various terms have been used to describe the position whereby the eldest child inherits regardless of gender. They include absolute, equal, lineal and cognatic primogeniture.

53 HC Deb vol 557 col 231 22 January 2013.

54 The date of the Perth Agreement. On behalf of the Government, Chloe Smith MP thought this 'element of retrospection' to be 'justifiable' given its limited effect: see HC Deb vol 557 col 729 28 January 2013.

55 The Duchess of Cambridge's pregnancy was announced the day after the UK Government received confirmation from all of the Commonwealth Realms affected that they consented to the changes made by the present Act: see HC Deb vol 557 col 211 22 January 2013. The relevant dates were 3 and 4 December 2012.

Queen. Princess Anne, the Princess Royal, would have been elevated above[56] her younger brothers and her own offspring[57] would also have seen a corresponding rise in their position in the line of succession.[58] An amendment which would have brought about this outcome[59] was opposed by the Government during the Report Stage in the House of Commons on the basis that it did, 'not believe it is fair or reasonable to alter the legitimate expectations of those currently in the line to the throne'.[60] Evidently the same view did not prevail in Sweden. However, in defence of the Government's position, more royal heirs would have been directly affected had section 1 been given a retrospective effect which was similar to that accorded to section 2 of the 2013 Act. Although we can only speculate, it seems unlikely that either the Duke of York or the Earl of Wessex would have wished themselves and their heirs to be demoted in the line of succession.

MARRYING A CATHOLIC

Section 2 of the 2013 Act tackles a further piece of discrimination in relation to succession to the throne; the disqualification which arose from marriage to a Roman Catholic. It was provided for by both the Bill of Rights 1688 and the Act of Settlement 1700. The language used in the Bill of Rights was, by modern standards, both intemperate and offensive. Thus it declared:

> And whereas it hath beene found by experience that it is inconsistent with the safety and welfaire of this protestant kingdome to be governed by a popish prince or by any King or Queene marrying a papist the said lords spirituall and temporall and commons doe further pray that it may be enacted that all and every person and persons that is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall professe the popish religion or shall marry a papist shall be excluded and be for ever uncapeable to inherit or possesse or enjoy the crowne and government of this realme and Ireland and dominions thereunto belonging or any part of the same or to have use or exercise any regall power authoritie or jurisdiction within the same.

This exclusion of Roman Catholics, and those married to Roman Catholics, from succession to the throne was reiterated in section 2 of the Act of Settlement 1700. The language used in both statutes did not escape critical comment during the course of the parliamentary debates on the Succession to the Crown Bill. The Deputy Prime Minister, Nick Clegg MP, considered that both pieces of legislation 'rather insultingly' barred heirs to the throne marrying Roman

56 At the time of writing, Princess Anne is 10th in line of succession. Under the hypothetical reform being discussed, she would have risen to fourth in line.

57 Peter Phillips and Zara Tindall. It will be noted that unlike their royal cousins, Princess Anne's children do not possess a royal style or title.

58 At the time of writing, they are 11th and 14th in line of succession, respectively. Had their mother become 4th in line of succession, they would have become fifth and eighth in line, respectively.

59 It was withdrawn by Paul Flynn MP in the light of Government opposition: see HC Deb vol 557 col 729 28 January 2013.

60 Per Chloe Smith MP, HC Deb vol 557 col 728 28 January 2013.

(2013) 76(6) MLR 1070–1093

Catholics,[61] and Mark Durkan MP contended that the provisions in the earlier legislation were 'sectarian', 'grossly arcane', and 'offensive' in their language.[62]

Putting to one side the offensiveness of their language, the constitutional importance of the Bill of Rights 1688 and the Act of Settlement 1700 in the present context lies in the fact that they established, and then applied, the principle that succession to the throne was a matter for Parliament to determine, and that in the future, no Roman Catholic would be either King or Queen. Both are amended by the 2013 Act, which deletes the offending words.[63]

Although the disqualification was originally set down more than 300 years ago, it has contrived to have a continuing effect right up until the present day. It has meant that enquiries have routinely been made of the religion of those who have been potential brides or husbands to heirs to the throne. Indeed, it should not be forgotten that prior to the marriage of the Prince of Wales and Mrs Camilla Parker Bowles (now the Duchess of Cornwall), questions had been asked as to her faith given that her first husband, from whom she later divorced, was a Roman Catholic. Buckingham Palace sought to clarify the issue by pronouncing in advance of the marriage that Mrs Parker Bowles is a member of the Church of England. Accordingly, in the words of Professor Blackburn, 'all four quarters of the rectangle concerned, therefore – Clarence House, Buckingham Palace, Lambeth Palace, and 10 Downing Street – concurred that there is no problem arising from Mrs Parker Bowles' earlier marriage to a Roman Catholic'.[64] It has been suggested that doubts about the validity of the royal marriage may have been resolved in a different manner; by the introduction of a 'short Bill'.[65] Such a Bill might have consisted of a single substantive clause in which it was stated that for the avoidance of doubt, the royal marriage was legally valid.[66] Dealing with the matter in this way would have provided the desired clarity as well as ensuring that the declaration was beyond legal challenge by virtue of the form in which it had been made. It would have signified that in

61 HC Deb vol 557 col 212 22 January 2013.

62 HC Deb vol 557 cols 265–266 22 January 2013.

63 2013 Act, s 4 and Sch, paras 2 and 3. Professor Brazier had previously suggested that the legislative techniques used in the ancient statutes, particularly their lack of punctuation, made their amendment more difficult than it might otherwise have been: see n 2 above, 100.

64 See n 8 above, Ev 15–16.

65 See Brazier, n 2 above, 90–91.

66 The same solution was also proposed as a way of dealing with the main point of constitutional contention raised by the royal marriage, whether the terms of the Marriage Act 1949 (the 1949 Act) meant that a civil ceremony was not available to members of the Royal Family: see S. Cretney 'Royal Marriages: the Law in a Nutshell' [2005] Fam Law 317, 321. The Government of the day sought to clarify the legal position in a written statement made by the then Lord Chancellor, Lord Falconer, in which it was contended that it was lawful for Prince Charles to marry Mrs Parker Bowles in a civil ceremony at Windsor Guildhall due to the construction of the 1949 Act, s 79(5) and because the Human Rights Act 1998 had put the modern meaning of the 1949 Act, 'beyond doubt'. However, as Professor Cretney notes, since this later construction of s 79(5) was at odds with previous governments' constructions, there was at least an arguable case that the 1949 Act did preclude the availability of a civil ceremony, hence the desirability of a 'short and simple Bill' to provide legal certainty. For a further discussion of the issue, see R. Probert, 'The Wedding of Prince Charles: Royal Privileges and Human Rights' (2005) 17 *Child and Family Law Quarterly* 363, and S. Cretney, 'Royal Weddings, Legality and the Rule of Law' [2007] Fam Law 159.

addition to the royal households, the Church of England and the Government, Parliament was also satisfied as to the valid status of the royal marriage.

The disqualification provided for in the Bill of Rights 1688 and the Act of Settlement 1700 has been applied in recent times. It meant that when the Queen's cousin, Prince Michael of Kent, married Baroness Marie-Christine Agnes Hedwig Ida von Reibnitz,[67] he thereby ceased to occupy a place in the line of royal succession on account of his wife being a Roman Catholic.[68] Since section 2 has retrospective effect,[69] it follows that Prince Michael, and any others in the same position,[70] will be restored to the line of succession when the provision enters into force.[71] It is the case, however, that this will not have a significant impact on the line of succession. Thus, for example, although Prince Michael of Kent will once again feature in the line of succession, the position which he will now occupy will be less lofty than it was in 1978 given the subsequent births of more immediate heirs to the throne. Short of some catastrophic event, he is highly unlikely ever to become King by virtue of the operation of section 2.

As a consequence of section 2, a more likely event is that at some point in the future, an immediate heir to the throne will marry a Roman Catholic. During the parliamentary debates, a number of MPs and Lords raised the question of what faith a child of a mixed faith marriage would be brought up in, and whether the present Act's abolition of one anti-Catholic provision sat well with the continued bar on a Roman Catholic being King or Queen. Speaking on behalf of the coalition Government, the Deputy Prime Minister framed the issue as follows:

> I know that some hon. Members have concerns – we have heard them today – about potential unintended consequences of the reform. One concern, for example, is that if a monarch married a Catholic their heir would have to be brought up in the Catholic faith, and that, on becoming King or Queen,[72] they would then assume their role as supreme governor of the Church of England,[73] which would, in turn, lead to the disestablishment of the state church. If we followed that logic, however, we should be introducing bans on marriage to members of every other faith and, indeed, people with no faith. Right now the monarch can marry a Muslim, a Jew,

67 The marriage took place on 30 June 1978.

68 It is worth noting that the disqualification did not apply where the spouse of a royal heir converted to Catholicism after the marriage had taken place. Thus Prince Michael's elder brother, the Duke of Kent, remained in the line of succession despite his wife's subsequent conversion: see Brazier, n 8 above, 569, fn 7.

69 2013 Act, s 2(2).

70 The Earl of St Andrews was also mentioned during the parliamentary debates: see HC Deb vol 557 col 235 22 January 2013.

71 Like the other provisions in the 2013 Act, except s 5, this section will enter into force on such day or time as the Lord President of the Council may appoint by order made by statutory instrument: see s 5(2) and (3).

72 The error here in the Deputy Prime Minister's remarks is that a Catholic heir to the throne is barred from becoming King or Queen by virtue of the Bill of Rights 1688 and the Act of Settlement 1700.

73 See the Act of Supremacy 1588, which restored the law to what it had been under the Act of Supremacy 1534.

(2013) 76(6) MLR 1070–1093

> a Hindu or an atheist, yet no one is alleging today that we are teetering on the edge of a constitutional crisis.[74]

The Deputy Prime Minister's remarks illustrate the anomalous and discriminatory state of the law prior to the enactment of the 2013 Act. In commenting further on the matter, he explained that, 'the Catholic Church does not have any blanket rule dictating that all children in mixed marriages must be brought up as Catholics'.[75] He then proceed to note that the issue of the marriage between Prince and Princess Michael of Kent, Lord Frederick Windsor and Lady Gabriella Windsor, are both Anglican and retain their place in the line of succession despite the fact that their father is an Anglican and their mother a Roman Catholic. In response, however, Jacob Rees-Mogg MP referred the Deputy Prime Minister to, 'canon 1125 of the Catholic Church, which states clearly that a party to a mixed marriage must make his or her best efforts to bring up the children in the Catholic faith'.[76] In the case of the offspring of Prince Michael of Kent, this requirement of canon law has been waived by papal dispensation.[77]

In addition to the unease over what Sir Alan Beith MP referred to as, 'the early age problem',[78] several MPs expressed concerns that the impact of the present section may be undermined by the operation of section 3. Thus Chris Bryant MP asked:

> Is it not one of the ironies that [section] 2 states that no one should be disqualified from succeeding to the throne through being married to a Catholic, yet [section] 3 allows the monarch to exclude someone by refusing to consent to their marriage, potentially to a Roman Catholic?[79]

On behalf of the coalition Government, the Minister responded as follows:

> As [section] 2 will be a part of this legislation, it will be lawful for Ministers to refer to it. I would therefore say that [section] 2 does apply to decisions made under [section] 3.[80]

It would seem, therefore, that in the light of these brief remarks, when advising the monarch on the issue of consent, his or her Ministers must take account of the purpose and intent underlying section 2. Advising the monarch to refuse to consent to a marriage with a Roman Catholic would thus be at odds with section 2, unless the reason for that advice was completely unconnected to that person's faith. An appropriate basis on which to refuse consent might be, for example, where the relevant person has been convicted of a non-minor criminal offence.

74 HC Deb vol 557 col 213 22 January 2013.
75 *ibid.*
76 HC Deb vol 557 col 214 22 January 2013.
77 See *Rules of Royal Succession*, n 8 above, para 10.
78 HC Deb vol 557 col 263 22 January 2013.
79 HC Deb vol 557 col 249 22 January 2013.
80 HC Deb vol 557 col 281 22 January 2013.

The fact that the person was also a Roman Catholic would be irrelevant to the decision.

CONSENT TO ROYAL MARRIAGES

The rule that the monarch's consent must first be obtained for a marriage involving a person in line of royal succession derives from the 'ancient common law', whereby, 'the monarch has a duty and a right of care over the upbringing of his or her close relatives, particularly children, grandchildren, nephews and nieces'.[81] The principle received statutory reinforcement through the enactment of the Royal Marriages Act 1772 (the 1772 Act).

During the present Act's Second Reading debate, Chris Bryant MP explained the background to the 1772 Act as follows:

> The Act came into being because George III's brother, Henry, Duke of Cumberland, had in 1771 married a woman, Mrs Anne Horton, who was not only a widow but a commoner . . . It was on those lines, broadly speaking, that the King was opposed to his brother's marriage. Once the Act was introduced, he learned that his other brother, William, Duke of Gloucester and Edinburgh, had married Maria Walpole, daughter of Sir Edward Walpole and granddaughter of Sir Robert, who was also a widow and, in addition to all the other problems she might have had, was illegitimate.[82]

The 1772 Act originally consisted of three sections. Section 3, which made it an offence to attend a marriage ceremony when the marriage itself had not been consented to by the monarch, was repealed by the Criminal Law Act 1967.[83] Prior to its repeal, it would seem that although marriages had taken place in contravention of the consent requirement, no one had ever been prosecuted for an offence contrary to section 3.[84] Nevertheless, in at least one case, a 'principal promoter' of a marriage which was null and void by virtue of section 1 of the 1772 Act took the precaution of absenting herself from not one but two marriage ceremonies between her daughter and a royal heir.[85]

Section 1 of the 1772 Act applied to the male and female descendants of George II, other than the issue of princesses who had married, or who may in the future marry into foreign families. It provided that none of these persons was capable of entering into marriage without the prior consent of the monarch, and that if such consent had not first been obtained, the marriage was null and void. The monarch's consent was to be signified under the Great Seal, and declared in Council. It was also to be set out in the licence and register of marriage, and recorded in the books of the Privy Council.

81 See the remarks of Professor Blackburn, n 8 above, Ev 16.
82 HC Deb vol 557 col 23 22 January 2013.
83 Criminal Law Act 1967, Sch 4, Part I.
84 See C. d'O. Farran, 'The Royal Marriages Act 1772' (1951) 14 MLR 53, 56.
85 See T. B. Pugh and A. Samuels, 'The Royal Marriages Act 1772; its Defects and the Case for Repeal' (1994) 15 Stat LR 46, 54–56.

(2013) 76(6) MLR 1070–1093

An exception to what appeared to be the absolute power of the monarch was provided for by section 2 of the 1772 Act. It applied in the case of a royal descendant who was over the age of 25. For such persons, it was possible to marry despite the disapproval of the monarch, provided that 12 months had passed since consent had been refused. The section further required that the Privy Council be notified of the continuing intention to marry, and stipulated that the marriage would be 'good' despite the monarch's opposition, provided that both Houses of Parliament had not expressly declared their own opposition to the marriage during the 12 month period. During the entire life of the 1772 Act it was the case, however, that the notice provision was never invoked.[86] In reality it was something of a sham (a point which had not escaped 18th century politicians) since

> the notice procedure would only be available if the Monarch had in fact formally refused consent, and that decision would have been taken on ministerial advice given by Ministers who would, in all save the most unlikely circumstances, control Parliament and thus be in a position to ensure that the refusal was respected.[87]

From the very beginning, the Royal Marriages Act 1772 was an unpopular piece of legislation. Primarily this was because it was 'seen as alien to English custom and tradition and it was criticised as a tyrannical extension of royal authority'.[88] The passage of the legislation had been 'stormy'. Thus an 'amendment seeking to limit the scope of the legislation to the reign of George III was narrowly defeated in the Commons'. Moreover, it appears that, 'lavish use of royal patronage was necessary to buy support for the measure'.[89]

Despite these contemporary criticisms, the 1772 Act has applied to all subsequent royal marriages, with the exception of the marriage between the former Edward VIII and Mrs Wallis Simpson. Its application to that marriage was expressly excluded by section 1(3) of His Majesty's Declaration of Abdication Act 1936.[90] There were a number of occasions when the monarch's consent to a marriage ought to have been sought but was not. Thus four royal marriages subsequently took place in contravention of the Act, in 1785, 1793, 1831 and 1847 respectively.[91] However, none of these breaches of the Act lead to prosecutions. The marriages in 1793 between Augustus Frederick, Duke of Sussex (sixth son of George III), and Lady Augusta Murray, which took place in Rome and London, were both null and void in English law through want of monarch's consent. Indeed, 'the annulment of the marriage of Prince Augustus and Lady Augusta Murray in 1794 remains the only occasion when the sovereign has used

86 See S. Cretney, 'Royal Marriages: Some Legal and Constitutional Issues' (2008) 124 LQR 218, 234 and fn 105.

87 *ibid*, 234–235.

88 See Pugh and Samuels, n 85 above, 50. Indeed, Farran has described the Act as, 'an emanation from the Royal temper at the moment, rather than a well-considered and well-framed piece of legislation': see n 84 above, 56.

89 See Pugh and Samuels, *ibid*, 50–51.

90 *ibid*, 51.

91 *ibid*, 47.

his power to nullify what would otherwise have been a lawful matrimonial union, but for the absence of royal consent'.[92] The invalidity of the marriage was subsequently confirmed by the courts when it was held that the son which resulted from the union, Sir Augustus d'Este, was not entitled to succeed to his father's titles.[93]

Two unconnected events which occurred in the mid-1950s caused the government of the day to conduct a review of the Royal Marriages Act 1772. They were the decision of the House of Lords in *HRH Prince Augustus of Hanover* v *Attorney-General*;[94] and the fact that it became public knowledge that the Queen's sister, Princess Margaret, may have wished to marry Group Captain Peter Townsend, a divorcée whose first wife was still alive.[95] For present purposes, it is worth noting that a brief was prepared for the then Prime Minister, Sir Anthony Eden, in which an anonymous civil servant examined the flaws in the 1772 Act. These included that the ambit of the Act was 'now far too wide' on account of the fact that it 'extends, or may extend, to classes of persons whose connection with the Throne is very remote'; that although there may be some support in principle for a measure of control over royal marriages, the sanctions under the 1772 Act for a non-consented marriage were 'too strong' because without consent, a marriage was 'void and the offspring of the union bastardized'; and section 2 of the Act was 'contrary to modern ideas of propriety and fair-dealing'.[96]

Although the case for reforming the 1772 Act was therefore very strong, 'by 1964 all enthusiasm for reform seems to have evaporated'.[97] Accordingly, it was left to academics to continue to identify the flaws in the legislation. Their criticisms shared a number of common features.[98] Thus, for example, whilst Professor Bogdanor made the case for removing the anti-Catholic provisions in the Bill of Rights 1688 and the Act of Settlement 1700, as well as the rule of male preference primogeniture, he reserved his most damning criticism for the 1772 Act. In his opinion, there were, 'perhaps, few more absurd pieces of legislation on the statute book'.[99] He saw 'no reason why a marriage made in contravention, perhaps unconscious contravention, of its provisions by someone who was unaware of his or her descent from George II should be void'. Furthermore, Professor Bogdanor contended that

92 *ibid*, 55.

93 See the *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 English Reports.

94 [1956] Ch 188.

95 For a discussion of these two potential catalysts for reform, see Cretney, n 86 above, 227–235.

96 *ibid*, 236–237.

97 *ibid*, 238.

98 Differences of opinion have been expressed, however, over a central issue; the reach of the 1772 Act. Thus whereas Farran was of the view that the Act, 'no longer applies to any member of the Royal family in anything like close proximity to the Crown, if indeed, it now applies to anyone' (n 84 above, 53), Pugh and Samuels dismiss his suggestion that Queen Victoria was a British Princess who married into a foreign family as, 'entertaining but frivolous' (n 85 above, fn 17).

99 *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995) 59. During the second reading debate on the Bill which became the 2013 Act, Jacob Rees-Mogg MP used similar language when he referred to the 1772 Act as 'the most nonsensical Act on the statute book' (HC Deb vol 557 col 249 22 January 2013).

(2013) 76(6) MLR 1070–1093

> [t]he fundamental weakness of the Act, however, is that it applies to many who are quite remote from the throne and who are never likely to succeed. Conversely, someone who may well succeed – for example, an heir presumptive whose mother has married into a foreign family – would fall outside the provisions of the Act.[100]

To some extent, the criticisms levelled at the 1772 Act are addressed by section 3 of the 2013 Act. Thus by virtue of subsection (4), the 1772 Act is repealed and replaced by a rather more circumscribed provision, which retains the requirement of monarch's consent for royal marriages, but which severely limits the number of persons to whom it applies.[101] Thus rather than hundreds of descendants of George II being affected,[102] as was formerly the case, monarch's consent to marry must now only be obtained by a royal heir where they occupy a position which is sixth or less in line to the throne at the relevant time.[103]

It might be assumed that this less widely drawn provision would have been welcomed in Parliament. Whilst this was the case, some criticisms were nevertheless voiced. Unsurprisingly, the retention of the principle of monarch's consent to royal marriages was attacked by several MPs as being at odds with modern society.[104] In response, the Parliamentary Secretary at the Cabinet Office, Chloe Smith MP, observed:

> The role of the sovereign in giving consent to a royal marriage is part of our tradition and is entrenched in law. The Government also consider that there is a public interest in the marriages of those closest to the throne, so we believe that the requirement to seek the sovereign's consent continues to serve a valuable purpose.[105]

Although it is certainly the case that the requirement of monarch's consent to a royal marriage is part of the UK's tradition and is provided for in law, to suggest that it is 'entrenched' is overstating the case. It implies that the requirement could not be removed without some difficulty when, in fact, the reverse is the case. Had the Government (and the Queen) felt that the requirement was no longer needed, it could simply have sought the repeal of the 1772 Act without replacing it. In the absence of a legal requirement to seek monarch's consent, it would then

100 *ibid*, 59.

101 2013 Act, s 3(1).

102 HC Deb vol 557 col 208 22 January 2013.

103 Given the very limited class of persons to whom s 3(1) applies, there is a case for arguing that it is a hybrid provision. However, the stronger argument may be that the effect of s 3 relates to a person's ability to succeed to the throne, which is a matter of public policy, rather than their private right to marry: see House of Commons Library Research Paper 12/81 (19 December 2012), 14.

104 See, for example, the remarks of Angus Brendan MacNeill MP, HC Deb vol 557 col 228 22 January 2013. It should be noted that other European monarchies such as Norway, Sweden, Spain and the Netherlands also require consent for royal marriages to take place: see HC Deb vol 557 col 256 22 January 2013. However, as Chris Bryant MP later explained: 'It is true that, of the constitutional monarchies in Europe, Denmark, Sweden and the Netherlands have similar provisions. However, Norway has no such provision – it just has a simple law of succession . . . It is provided for by the caprice of God, as it were, whereas in two of the three countries that have a similar provision it is a vote of Parliament that decides' (HC Deb vol 557 col 276 22 January 2013).

105 HC Deb vol 557 cols 278–279 22 January 2013.

have become a matter of choice for those directly concerned whether or not they raised the matter of an intended marriage with the monarch. It is also debatable whether the requirement continues to serve a 'valuable purpose'. Although that purpose is to ensure that those closest in line to the throne do not make inappropriate or undesirable marriages, what constitutes an inappropriate or undesirable marriage is by no means clear. With the passage of time, attitudes have changed. Thus in the past, consent either was or would have been denied on the basis that an intended wife was a commoner or an actress. As a result, royal heirs fathered a large number of illegitimate children.[106] More recently, however, a number of marriages have taken place between commoners and members of the Royal Family.[107] Indeed, all of the Queen's four children either have been or are married to commoners, and the spouses of her three married grand-children are also all commoners. Thus not being of royal or aristocratic blood is no longer a basis on which consent to marry is likely to be refused.

The same is true in relation to divorce. A king abdicated because the government of the day would not accept him marrying a divorcée,[108] and as we have already noted, a royal princess who was third in line to the throne at the time was aware that the monarch's consent might not be forthcoming had she sought to marry a divorced man. Although these events both took place within the last 80 years, divorce is now far more commonplace than it was then. It has become more socially acceptable during the intervening years, and its reach has extended to the Royal Family itself. Thus of the Queen's four children, three have seen marriages end in divorce,[109] and one of this number, the Prince of Wales, has subsequently married a divorcée. In the light of these events, it seems highly unlikely that a monarch would now refuse consent to marry on the grounds that an intended spouse has previously been married.[110]

It is thus questionable whether there is a continuing need for the requirement of monarch's consent to marry. The contention that there is a public interest in maintaining the requirement was made by the Government, but not really explained in any detail. Moreover, despite the promptings of MPs, it was reluctant to specify a collection of hypothetical situations when consent might be refused, or to, 'go through a list of the rules that might be applied to the monarch's consent'.[111] Accordingly, with regard to the operation of section 3(1),

106 It has been noted that as a consequence of the 1772 Act, 'only three of George III's fifteen children left surviving legitimate issue': see T. B. Pugh and A. Samuels, n 85 above, 57.

107 The pool of potential royal brides or husbands has of course been small due to the decline in the number of European monarchies, and the bar on marrying a Roman Catholic.

108 For a discussion of the role of the government in the abdication crisis, see S. Cretney, 'The King and the King's Proctor: the Abdication Crisis and the Divorce Laws 1936–1937' (2000) 116 LQR 583.

109 The 2013 Act says nothing about consent to a divorce. Although it remains the case, therefore, that a monarch's consent to divorce is not a legal requirement, it is customary practice for it to be sought: see Pugh and Samuels, n 85 above, 51.

110 If Prince Charles does become King, he would run the risk of being branded a hypocrite were he to refuse consent to a royal marriage falling within the scope of the 2013 Act, s 2 on the ground that one or both parties were divorcées.

111 Per Chloe Smith MP, HC Deb vol 557 col 262 22 January 2013.

much will depend upon the circumstances at the time, in particular the Government's perception of what the general public thinks of a proposed royal marriage. This is because in making a decision, the monarch will, as previously, act on the advice of his or her Ministers.[112] Thus as the Minister explained with the aid of a precedent:

> In 1967, when there was a question about the marriage – in that case, marriage following a divorce – of a member of the royal family, the then Prime Minister, Harold Wilson, devised a formula that ran along these lines: 'The Cabinet had advised the Queen to give her consent and Her Majesty has signified her intention to do so'.[113]

In addition to objections raised about the principle of monarch's consent, a number of MPs wanted to know why the number six had been chosen for the purposes of section 3(1). The flames of dissent may perhaps have been fanned by the Deputy Prime Minister who stated, in response to MPs questioning: 'I accept that there is a certain arbitrariness about the figure of six; it could be seven or five'.[114] He also explained that the present section, 'seeks to confine what had become a sprawling requirement to a much more limited and pragmatic one'.[115] However, when pressed further as to the rationale behind the number six, he appeared either unwilling or unable to explain. Chris Bryant MP later commented that it was, 'bizarre to insist on six members of the royal family in the line of succession, rather than two, five, 25 or whatever'.[116] And Christopher Pincher MP asked: 'Where did the number six come from? Why not three, five or 12? Six is not a prime number, a biblical number or a lucky number'. He then set out what he perceived to be the unfair consequences of the new requirement as follows:

> if we put in place a rule which says that the monarch can and must give consent to the marrying of the six persons nearest in line to the throne, imagine a scenario where a monarch has three children, who each have two or three children. The monarch will soon be in the invidious position where grandchild No.4 who is fifth in line to the throne, must seek consent of the monarch to marry, but grandchild No.6, who is seventh in line to the throne, need not seek that consent. That does not seem fair.[117]

During the Committee Stage, the Deputy Prime Minister's ministerial colleague, Chloe Smith MP, returned to the issue at the invitation of MPs. Thus she explained:

112 It has been contended that acting on the advice of ministers in contexts such as the present is advantageous to a monarch in that, 'ministers would have the responsibility for the decision, rather than the Sovereign, and ministers would have to justify it if called upon to do so': see R. Brazier, n 8 above, 569–570.

113 HC Deb vol 557 col 260 22 January 2013.

114 HC Deb vol 557 col 209 22 January 2013.

115 HC Deb vol 557 col 208 22 January 2013.

116 HC Deb vol 557 col 234 22 January 2013.

117 HC Deb vol 557 col 235 22 January 2013.

> The Government believe that the consent of the monarch for the marriages of the first six people in the line of succession provides a measure of reasonable proximity. Indeed, since the 1772 Act was enacted, the throne has never passed to anybody who was more than six steps away in line of succession.[118]

It would seem, therefore, that historical precedent was the basis on which the number six was arrived at by the Government. In seeking to elaborate further, the Minister made reference to her understanding that, 'Queen Victoria was the most extreme example, at No.5'.[119] There is a case for arguing, however, that the better precedent on which to defend the choice of the number six is not Queen Victoria, who became fifth in line to succession on her birth rather than at the time of her marriage, but King William IV, who was third in line to the throne when he sought and was given consent to marry pursuant to the 1772 Act.[120] In seeking to explain the rationale behind the Government's choice, Lord Wallace of Tankerness noted that a balance needed to 'be found between mitigating against catastrophic but remote hypothetical events of a line being wiped out and the risk of impinging unnecessarily upon the lives of those who are distant from the Throne'.[121] In the House of Commons, the Minister may have muddied the waters with the following observation:

> I suggest that it would not be beyond the realms of possibility for a person who is No.7 or No.8 to be careful in such matters. That is perhaps as far as I ought to go on that, but I do not think that that is beyond the bounds of reasonableness.[122]

Not surprisingly, these remarks were seized upon by several MPs who wanted to know what being 'careful' meant in the present context. Thus, for example, Chris Bryant MP commented that the Minister had added a further category, 'which is that No.7 and No.8 in the line of succession have to be careful', with the result that the legal position was 'just a mess'.[123] Mark Durkan MP offered his own interpretation of what being careful meant: 'Get married quickly before anything happens that means that you become No.6 and therefore have to get the monarch's consent'.[124] Perhaps, however, rather than meaning 'marry in haste', the Minister's words may suggest that a royal heir who is so close to being caught by the operation of section 3(1) ought to take the precaution of seeking the monarch's consent to marry. Although not under a legal duty to do so, such a course of action would ensure that their place in the line of royal succession was not lost, even if it subsequently came to light that they had in fact been within the scope of section 3(1) at the relevant time.

118 HC Deb vol 557 col 278 22 January 2013.

119 Jacob Rees-Mogg MP later explained to the House who had preceded Queen Victoria in the line of succession: see HC Deb vol 557 col 279 22 January 2013.

120 See the remarks of Lord Wallace of Tankerness, HL Deb vol 743 col 1243 28 February 2013.

121 The Government therefore secured the withdrawal of an amendment during the Bill's Committee Stage in the House of Lords which would have seen six replaced by 12: see HL Deb vol 743 col 1246 28 February 2013.

122 HC Deb vol 557 col 279 22 January 2013.

123 HC Deb vol 557 col 280 22 January 2013.

124 HC Deb vol 557 col 281 22 January 2013.

(2013) 76(6) MLR 1070–1093

Section 3(3) of the 2013 Act is less draconian than section 1 of the Royal Marriages Act 1772, which rendered un-consented marriages null and void, with the result that any children produced by the union were illegitimate. The present provision is only concerned with the impact of an un-consented marriage on a person's entitlement to succeed to the throne. It thus reflects a position which others had previously advocated.[125] Legally, therefore, a royal marriage made in contravention of section 3(1) would remain valid and any issue from the union would be legitimate; it is only the matter of succession which is affected by the lack of monarch's consent.

A related issue to the foregoing concerns the fact that the 2013 Act does not provide for an equivalent to section 2 of the 1772 Act. In other words, the monarch's decision to refuse consent to a royal marriage is final; there is no mechanism by which consent may alternatively be sought from Parliament. In practice, as was noted previously, the ability to 'appeal' to Parliament was illusory. Accordingly, its absence from the 2013 Act is not significant.[126] More significant, however, is the fact that if the monarch were to refuse consent,[127] an aggrieved royal heir would not have any means of redress before the Administrative Court because the decisions of the sovereign are not subject to judicial review.[128] Furthermore, although the European Convention on Human Rights recognises a right to marry,[129] it is not an unqualified right. It is to be exercised 'according to the national laws governing the exercise of this right'.[130] National laws relating to the royal succession may therefore provide an appropriate basis for limiting an heir's Article 12 rights. Moreover, the present section does not prevent an heir to the throne from marrying the person of their choice, or render their marriage void in the absence of royal consent. It merely provides that the consequence of an un-consented marriage is that they will lose their place in the line of succession. Accordingly, any impact on the right to marry arising by virtue of section 3 is rather limited. Thus in the highly unlikely event of a royal heir taking a case to Strasbourg, their application would be doomed to fail. Even if such an application were to proceed to a substantive hearing on the basis that Article 12 was engaged, the Government would be likely to succeed with the argument that section 3 pursues a legitimate aim, the public interest in

125 See, for example, the view of Bogdanor, n 99 above, 60.

126 For a contrasting view, see the remarks of Chris Bryant MP who felt that allowing the monarch to have the final decision in the present context provided no safeguard against a monarch acting capriciously in the future: see HC Deb vol 557 col 737 28 January 2013.

127 Although theoretically possible, in practice this would be a highly improbable event. If a royal heir wished to marry a person who was regarded as unsuitable, it is far more likely that the matter would have been addressed before any request for consent had been made.

128 See the remarks of Lord Wallace of Tankerness, HL Deb vol 743 col 835 14 February 2013.

129 Article 12 of the Convention states: 'Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right'.

130 White and Ovey note, however, that the exercise of the Article 12 right to marry cannot be completely governed by national law since if this were the case, the protection afforded by the Article would only extend to cases where the national law had been breached. As they rightly point out, this would be at odds with the purpose of the Convention, which is, 'to guarantee certain human rights irrespective of the provisions of national law': see R. White and C. Ovey *The European Convention on Human Rights* (Oxford: OUP, 5th ed, 2010) 353.

the need for consent, and that the legal consequence of failing to obtain consent, removal from the line of succession, was proportionate to that aim.

It also seems likely that the rules relating to royal succession would be regarded by the European Court of Human Rights as matters exclusively for the UK. A rule which precludes a royal heir from remaining in the line of succession where they have married without the monarch's consent would be regarded, in all probability, as falling within the UK's margin of appreciation. Were it not, the Strasbourg court would be open to claims that it was acting beyond its remit by interfering in matters of national sovereignty.

It will be noted that where the monarch's consent to a proposed royal marriage has been obtained in compliance with section 3(1), the requirements of subsection (2) must also be satisfied. The arrangements specified are broadly similar to those previously found in section 1 of the 1772 Act.[131] The only difference is that under the new provisions, there is no requirement that the monarch's consent be, 'set out in the licence and register of marriage'.

Section 3(5) of the 2013 Act applies retrospectively in relation to marriages made void under the Royal Marriages Act 1772. It stipulates that such marriages are not to be treated as ever having been void, provided that each of the four conditions set out in paragraphs (a) – (d) are satisfied. These include that consent had not been sought under section 1 of the 1772 Act, nor notice given under section 2 of the same Act, and that, 'in all the circumstances it was reasonable not to have been aware at the time of the marriage that the Act applied to it'. Subsection (5) therefore affirms the legal validity of marriages which, unbeknown to the parties involved, fell within the scope of section 1 of the 1772 Act and which were accordingly void. It is unclear exactly how many marriages are affected by this provision. It is clear, however, that the operation of the provision is limited by the terms of subsection (6). Thus it applies for all purposes, other than succession to the throne. This is an important proviso. By reason of its inclusion, it ensures that the descent of the Crown from George II to the present Queen is not affected by the retrospective validating of what was previously a void marriage. Subsection (6) therefore provides a safeguard against a descendant of George II now claiming a prominent place in the line of succession on the strength of the changes made by subsection (5).

CONCLUSION

The Succession to the Crown Act 2013 brings to an end Parliament's legislative silence over the monarchy during Queen Elizabeth II's reign.[132] The focus of the 2013 Act is narrow; in no way does it represent a comprehensive Monarchy Act.[133] This was, as we have seen, a deliberate decision taken by the coalition Government since it did not want the legislation to become the vehicle for wider

131 See above.

132 Parliament's legislative inertia in relation to the monarchy was highlighted by Brazier, n 2 above, 92–100.

133 An all-embracing statute on the monarchy was argued for by Hames and Leonard in *Modernising the Monarchy*, n 48 above, 22–34.

(2013) 76(6) MLR 1070–1093

constitutional reforms, such as removing male preference primogeniture in relation to hereditary peerages as well as the throne.[134]

A further deliberate omission from the Act relates to the issue of a Roman Catholic succeeding to the throne. The cumulative effect of the Bill of Rights 1688, the Act of Settlement 1700, the Act of Union 1707 and the Accession Declaration Act 1910, is that a monarch cannot be a Roman Catholic.[135] Thus on accession to the throne, the sovereign is required to state the following:

> I [*here insert the name of the Sovereign*] do solemnly and sincerely in the presence of God profess, testify, and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the Protestant succession to the Throne of my Realm, uphold and maintain the said enactments to the best of my powers according to law.[136]

In seeking to explain its decision to leave in place the bar on a Roman Catholic being monarch, the coalition Government drew attention to the views of the Church of England and the Roman Catholic Church, both of which gave support for the end of the disqualification on marrying a Roman Catholic, whilst recognising the continuing importance of the established Church.[137] However, removing one piece of religious discrimination whilst leaving another in place betrays an inconsistent approach. The point may be developed by borrowing a 'thought experiment' conceived by Bonney and Morris. They ask: 'if it were ever proposed to move from the virtual republic we already have to an explicit republic, is it conceivable that exclusionary religious tests would be imposed on a new head of state?'[138] The answer to this question must inevitably be 'No'. If a written constitution were drawn up in order to establish the UK as a republic, its framers would undoubtedly refrain from imposing a bar on a Roman Catholic or a person of any other faith or no faith from becoming head of state. To do otherwise would be to enshrine religious discrimination in the fundamental law of the state, a position which could not be justified on any reasonable ground.

It should not be forgotten either that when the Institute for Public Policy Research drafted a written constitution for the UK, it provided for a constitutional monarchy rather than a republic with the Queen and her heirs and

134 In part this was because it was felt that there was no uniform view on the issue across the other 15 Commonwealth Realms who were to follow Westminster's lead: see the remarks of the Deputy Prime Minister, Nick Clegg MP, HC Deb vol 557 col 212 22 January 2013.

135 For present purposes, the anti-Catholic nature of the restriction is considered because that is how the matter was generally discussed in Parliament. In fact, the need for a monarch to be a 'faithful Protestant' also rules out royal heirs of other faiths or no faith.

136 Accession Declaration Act 1910, Sch.

137 HC Deb vol 557 cols 214 and 723 22 January 2013 and 28 January 2013, respectively. See also the remarks of the Bishop of Worcester, HL Deb vol 743 cols 794–795 14 February 2013. Importantly, although he regarded the prohibition on an heir to the throne marrying a Roman Catholic as being, 'somewhat out of time', he stressed that the Church of England remained of the view that the monarch, as its Supreme Governor, ought to be a member of the established Church: see HL Deb vol 743 col 795 14 February 2013.

138 Bonney and Morris, n 2 above, 373.

successors as head of state.[139] For present purposes, it is significant that the succession was to be, 'in order of primogeniture without regard to gender or religion'.[140] In other words, therefore, an end to the bar on a non-Protestant succeeding to the throne (and the establishment of gender equality in the succession) was to be achieved by a few brief words.

It might be counter-argued that in seeking the enactment of the 2013 Act, the coalition Government was engaged in a relatively modest enterprise. It was not endeavouring to put in place a raft of new constitutional arrangements. Instead, it was attempting to amend or repeal outdated provisions[141] relating to the monarchy for which there was little if any support throughout the Commonwealth Realms. The position of the monarch vis-a-vis the established Church is something rather different. It is a unique feature of the UK's brand of constitutional monarchy.[142] The crucial first question in any reform debate must be, 'Should the established Church remain?' If the answer is 'Yes', then the case for the Supreme Governor (the monarch) necessarily being an Anglican is strong. If, however, the Church were to be disestablished, then it follows that the current religious tests which apply to the monarch could be dispensed with. Disestablishment of the Church of England is not the policy of the coalition Government, and it has no intention of legislating on the matter.[143] If it were to become the policy of a future government, its importance would dictate that it receive its own separate enactment, as happened in the case of Wales[144] and Ireland,[145] rather than treatment in an Act which addresses other constitutional issues relating to the monarchy.

Although the 2013 Act brings to an end the common law rule of male preference primogeniture in relation to succession to the throne, it has not dispensed with primogeniture altogether. Thus, as has been noted, in the event that a King or Queen has several sons or daughters, section 1 ensures that the heir apparent will be the eldest child, regardless of gender. There is no provision in the 2013 Act for something more radical, such as the selection of the most suitable royal heir to inherit the throne on the death of the reigning monarch,[146]

139 IPPR, *A Written Constitution for the United Kingdom* (London: Mansell Publishing Ltd, 1993) Article 34(1), 53.

140 *ibid*, Article 34(2), 53.

141 In addition to those already mentioned, the 2013 Act amends the Treason Act 1351 and the Regency Act 1937. It also requires that provisions in the Acts of Union are read as being subject to the terms of the present Act: 2013 Act, s 4(1) and (3), Sch.

142 See Hames and Leonard, n 48 above, 15. During the Bill's Report Stage Jacob Rees-Mogg MP noted: 'many countries in the world have a Crown that is only temporal; they do not have a Crown that is spiritual as well', HC Deb vol 557 col 696 28 January 2013.

143 HC Deb vol 557 col 721 28 January 2013.

144 Welsh Church Act 1914. This was passed without the consent of the House of Lords under the Parliament Act 1911.

145 Irish Church Act 1869. The validity of the monarch's assent to the Act was later unsuccessfully challenged in *Ex p Canon Selwyn* (1872) 36 JP 54.

146 In Hames and Leonard, n 48 above, it is argued, amongst other things, that the legitimacy of the monarchy would be enhanced by the holding of, 'an affirmative referendum to take place in the period between succession and coronation' (22). In the event of a negative outcome, it is suggested that there ought to be a further referendum on the next in line to the throne (22–23). Of course, as the authors recognise, a further negative outcome in the second referendum would raise questions about the continuation of the monarchy.

(2013) 76(6) MLR 1070–1093

or for the succession to skip a generation[147] in appropriate circumstances. Had such provision been made, the hereditary principle would have been significantly undermined if not irreparably damaged,[148] thus strengthening the arguments of those who would like to see an elected head of state in the UK.

The 2013 Act can be described as a modernising measure, even if the reforms which it will make are modest both in number and scale, and long overdue. They are, however, complimentary to other, non-legislative reforms, which have been made in more recent times, such as the monarch volunteering to pay income tax and capital gains tax, and the gates of Buckingham Palace being opened to receive visits from members of the public. As we have seen, the cross-party support for the Act in Parliament does not hide the fact that for a number of parliamentarians, the measure does not go far enough. Nevertheless, it is clear that further, more radical, modernising measures will have to wait for other days. It is well known, for example, that Prince Charles is uncomfortable with the title 'Defender of the Faith' and would prefer, on becoming King, to be styled 'Defender of Faith' to reflect the broad range of faiths and religions practised in the UK. If this change is made, there may at the same time be an opportunity for a wider consideration and consultation on the role of the monarch in relation to the Church of England in the 21st century. Only then might it be possible to gauge the level of public support for disestablishment or, short of that, separating the role of the Supreme Governor of the Church of England from the role of monarch.[149]

147 For a discussion of the process by which this might be achieved, see Brazier, n 8 above, 570–572.

148 As Professor Brazier notes, the hereditary principle has previously been 'sullied' by the events of 1688 and 1936, *ibid*, 571.

149 A clause to bring this about was moved by Jacob Rees-Mogg MP at the Bill's Report Stage. It would have retained the position of the Church of England as the established Church, whilst providing that an heir would not be disqualified from succeeding to the throne by reason of not joining in Communion with that Church. In the event of a non-Church of England monarch, the next in the line of succession would perform the functions of Supreme Governor. What the Minster described as, 'a perhaps rather ingenious solution' was defeated by 371 votes to 38: see HC Deb vol 557 col 724 28 January 2013.