Monarchy in the Democratic Age:

The Head of State Debate in Britain: A Constitutional and Comparative Analysis

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Abstract

The thesis has two interdependent objectives: to determine whether Britain could transform its monarchical constitution into a republican one in normal times; and to discuss what form that new dispensation might take.

Public opinion remains overwhelmingly in favour of monarchy, but dissenting opinion, once a fringe view, has become a feature of mainstream discourse; and disquiet is increasingly expressed at the ability of the executive to by-pass parliamentary control through resort to prerogative powers exercised in the name of the monarchy. Debate is, therefore, opportune. The thesis acknowledges the strength of the view that the political and legal difficulties in replacing the monarchy are immense, illustrating the magnitude of the task with a case study analysing the 1999 Australian republican project's failure despite apparently favourable circumstances. The difficulties begin to look less formidable, however, when the transformation is viewed as a step-by-step process and not as a one-off operation. In developing this contention the thesis examines the political roles and symbolic functions that remain with the monarchy, traces how these have emerged from the historical legacy and discusses their interrelation with other elements of the political process.

Agreement to end the monarchy would not bring the debate to an end. Republicanism, for which there is no universally accepted definition, is a label applicable to a broad range of political philosophies and regimes, including even hereditary monarchies provided certain conditions are met. An important sector of republican sentiment is motivated less by distaste for the hereditary principle than by a positive aspiration for transparent, pluralist governance which, it considers, is not compatible with Britain's existing monarchical constitution. The thesis enquires into a selection of models, illustrating their characteristics by reference to the constitutional texts of the states that operate them and extends the typography to include some theoretical models proposed by contemporary thinkers. In

advancing tentative proposals for a reformed dispensation, it is argued that a British republic emerging from the gradualist process would be of the 'ceremonial' (or formal) variety. Proposals are advanced in relation to the method of election, and the powers that might be held by a British president.

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Introduction

Britain's head of state arrangement is not a first order political question but since certain residual powers reside with the monarch in person and many more, those wielded by the executive but in the name of the monarchy, are effectively beyond parliamentary scrutiny, it is of legitimate public concern. The monarchy is not in imminent danger but there has been enough questioning of its role in the late twentieth/early twenty-first centuries to justify speculation on the circumstances in which it might eventually succumb (or undergo fundamental change) and on what might conceivably replace it. The practical difficulties in the way of plausible alternatives are not underestimated but it is argued in these pages that many of them become more manageable when the transition is viewed as a gradual process rather than as a single operation. The foregoing is, however, not meaningful unless it is accompanied by an understanding of what is meant by republican government. The thesis therefore looks closely at available models, both in general terms and what the constitutional texts of state elsewhere in the world say about the role of the head of state. Inevitably, the discussion encroaches upon diverse aspects of Britain's governmental structures and public life.

The British monarchy developed as an institution in parallel with territorial aggrandisement by post-Roman petty states, a process culminating in the merging of English and Scottish sovereignties. Amongst its characteristics is the notion of the priest-king, once underpinning the doctrine of Divine Right, which survives to the present day in nominal headship of the state church and the religious nature of certain state rituals which, for some, imparts a vague air of sacrilege to the prospect of abolition. While the British monarchy seldom exercised the arbitrary and whimsical powers of oriental and some continental counterparts it had, by the early seventeenth-century become markedly personal, just at that juncture at which growing complexity of the state and religious differences had made highly centralised system unwieldy, a tension manifesting itself in civil wars, regicide and a premature and short-lived republic. Despite the aspirations of some of its

supporters, the subsequent Restoration did not fully succeed in re-establishing the status quo ante; and a further decisive step away from personal dynastic rule was taken when the next king was deposed for attempting to impose a religious settlement not conforming to popular taste. Chapter 1 identifies some of the highlights in the incremental migration of power over the following three centuries from the person of the monarch to the political classes. It is emphasised that the absence of major national catastrophe – defeat in war, violent revolution, economic collapse - brought Britain constitutional stability but also deprived it of the opportunity to regularise its constitutional arrangements:

> Although Britain happily escaped the convulsion that frequently attended the coming of democracy elsewhere in Europe, it would not be the first time that what is an asset in one historical era can turn into a liability in another.[1]

In practical terms, this means that Britain has, (i) an uncodified constitution, a state of affairs traditionally celebrated as marking a triumphant exceptionalism, but, the consensus having weakened, lately the cause of growing concern to observers uneasy about ambiguity of interpretation; and (ii) an executive which has inherited a battery of powers formerly held by the monarchy (the royal prerogative) which it can wield subject to little formal restraint. The Chapter addresses the nature of the prerogative – including the debate on whether it should be brought within parliamentary scrutiny - and reviews attempts to compile a definitive schedule by, for example, Graham Allen MP,[2] Mr Tony Benn[3] and the Department of Constitutional Affairs.[4] Residual public functions at the heart of constitutional life still exercised by the monarch (presiding over government formation, dissolution of the legislature) are discussed, as well as more personal acts such as bestowal of certain honours.

Chapter 2 concerns itself with challenges to the orthodox idea of British monarchy, specifically with the idea of republicanism and the strength of anti-monarchism in the twenty-first century. This part of the discussion begins with a survey of definitions of the word 'republic' (or 'republicanism') in a variety of registers, that is, in popular usage, by lexicographers, by scholars in various disciplines and at various times in history, and by politicians. It is noted that the

most popular understanding, *viz*, simple absence of monarchy, is not favoured by political philosophers (e.g. Pocock,[5] Pettit,[6] and citing Zagorin,[7] Tomkins[8]) who prefer to view the concept in broader terms, ones incorporating notions of civic virtue, active citizenship, self-government, and 'non-domination' (signifying something more positive than traditionally understood civil liberties). For some, such as Quentin Skinner,[9] these recipes constitute an alternative to liberalism. Notably, some of the definitions go beyond absence-of-monarchy allowing the label to be applied to polities with an hereditary head of state, provided that certain other conditions are met. There is another, quite different, ambiguity in the understanding of what republicanism means, namely the cleavage between constitutional republicans concerned with ending what they see as abuses perpetrated under cover of monarchy by the executive, such as exercise of arbitrary power inherited under the prerogative,[10] and cultural republicans whose chief objective is elimination of the hereditary principle at the centre of the State.[11]

The Chapter proceeds to offer a selective account of republicanism (in the anti-monarchy sense) in Britain. It touches on discussion of the extent to which the Commonwealth and Protectorate of the 1640s were motivated by positive republican ideology, the attitudes of the Chartists and other nineteenth-century progressive movements, the sudden eruption (and equally sudden disappearance) of 'Republican Clubs' in the 1870s (drawing on the work of Antony Taylor[12] and Christopher Rumsey[13]); and the apparent invincibility of popular monarchism of the first three-quarters or thereabouts of the twentieth-century. It then relates the cautious stirrings, starting in the nineteen-fifties, of a rival vision. As recounted by, *inter alia*, Anthony Holden[14] and Piers Brendon,[15] mildest criticisms of royal individuals or of the concept of monarchy were in that era greeted with irrational defensiveness; the treatment of Malcolm Muggeridge in 1955 and John Grigg in 1957 are illustrative. But, it is argued (citing Nairn,[16] Hall,[17] Haseler,[18] and Holden[19]) that, with the decline of deference, proliferation of media outlets and less than model behaviour by some younger royals, public support for radical reform of the institution or for an avowedly republican agenda grew appreciably to the extent that criticism is no longer being met with hysteria. After setting out the

essence of the cases for monarchy and for presidential republicanism, the thesis explores contemporary attitudes to the debate. Topics in this section are public attitudes as measured by opinion polls, the ambiguous stance of the press and its proprietors and the related subject of entanglement of monarchy with the cult of celebrity. After a brief look at organised republicanism in the early twenty-first century and a reference to the public debate, it is concluded that republicanism remains very much a minority view but that support for the monarchy, while still strong, has declined to the extent that republicanism (or non-monarchism) has become a normal subject of debate rather than a great unmentionable. There are, therefore, rational grounds for exploring alternative structures.

Addressing the problems of transition to a republic, Chapter 3 catalogues the demise of other European monarchies, all of them in the wake of some kind of national trauma, and addresses the potential vulnerability of the monarchy at the time of the accession. It goes on to look at routes, of varying probability, by which the end-state could, conceivably, be reached in Britain. Those considered are: a crisis arising from disputed exercise of the monarch's residual prerogative in connection with central constitutional functions; discontent arising from scandalous behaviour by the monarch or a close relative; a crisis erupting in the wake of a decisive political separation of components of the United Kingdom; one arising from incompatibility with some as yet unanticipated development of the European Union; and , as conjectured by Hari[20] and Fernandez-Armesto,[21] growing demoralisation within the royal family leading to reluctance of the heir to accept the crown. It is argued that each of the foregoing is improbable or seriously flawed in some way, but it is further argued that the same charge cannot be placed against the 'gradualist scenario'. This concept is engendered by numerous projects advanced in recent years to reform (or 'modernise') the monarchy. These vary in detail but - whether the authors are, like Bogdanor,[22] Douglas-Home,[23] Vibert (IEA),[24] monarchists intent on salvaging a kernel of royalty or possibly closet republicans wishing "to 'modernise' the monarchy into oblivion"[25] (*The Fabian Society*,[26] and *Demos*[27]) – argue alike for making the monarchy less ostentatious, removing egregious archaisms such as the anti-Catholic parts of the

Act of Settlement and revisiting ecclesiastical establishment. The gradualist scenario envisages two possible long-term outcomes as these and other changes take effect: the process comes to a halt (or a long pause) with the monarchy reduced to a cypher, with that condition accepted as meeting the conditions of a 'republic', or continues to final extinction of the institution. It is argued that the piecemeal and comparatively minor legislative action required along the gradualist route would be less hazardous, given the significantly shorter step that would be required, than the very big one (signposted by Hennessy[28]) that would be necessitated by any of the other scenarios.

In order to test the feasibility of a British republic, the thesis looks at a list of characteristics it might possess. The methodology applied is primarily to examine working examples of polities in the real world in order to establish how they cope with the problems that arise. In Chapter 4 a quadripartite typology of 'presidencies' is proposed comprising (i) constitutional monarchy, (ii) ceremonial (or formal) presidency, (iii) the dual executive (adopting Derbyshire & Derbyshire's[29] schema: also known as the semi-presidential system), of which France is the best known example, and (iv) orthodox executive presidency conforming to the American model. Some features of constitutional monarchy and ceremonial presidency are described and the functional similarities between the two remarked on. Direct election of the prime minister as practiced in Israel in the nineteen-nineties is also discussed. The Chapter then embarks upon analyses of real world examples of states in the two 'ceremonial' categories (constitutional monarchy and formal presidency). Drawing on the text of the relevant constitutions, the head of state functions of a selection of constitutional monarchies (three Scandinavian, Spain and The Netherlands) are explored observing how each is, to a greater of lesser extent, regulated within constitutional law or practice. Included in this part of the study is a description of the arrangements in force in Australia where, as in some other Commonwealth countries, a Governor General acts as a local agent for the British monarchy but, unlike in Britain, acts within the structure of a codified constitution. Similar analyses are offered in respect of a selection of countries regarded as having

formal presidencies, that is, where the president exercises certain functions mainly of a 'refereeing' nature as well as ceremonial and representational ones at the heart of the constitution but has few, if any, executive powers. Eleven states are discussed: Germany, Austria, Italy, Ireland, Iceland, India, Greece, Israel, Hungary, the Czech Republic and Bulgaria.

Chapter 5 treats in a similar manner states where a president exercises executive power, either as a sole agent or in tandem with a prime minister. A discussion of perceived positive and negative aspects of the United States constitution is presented; some published opinions are summarised, namely those advanced by Freedland,[30] Barnett,[31] Scrivener,[32] Parris[33]; and the uneven records of national systems based on it (to which attention is drawn by Ackerman[34]) are noted. The periodically revived charge that British prime ministers have aspired to presidential ambitions is reviewed. A defence of the typology in which the dual-executive (or semi-presidentialism) is recognised as a discrete category is presented and its advantages and disadvantages are analysed. It is argued that the category is fluid having a tendency to evolve into ceremonial presidency and has usually been adopted for contingent reasons arising from specific historical events or situations so is not readily transferable elsewhere. Description of the relationships between heads of state and heads of government are outlined for Turkey, Portugal, France, Finland, Poland and Estonia.

The Chapter ends with constitutional analyses of two executive presidencies. The first is the best known exemplar, the United States of America, which can stand for numerous near (often dysfunctional) clones, mainly in Latin America. The other is the very different case of South Africa where, effectively, an assembly-sustained prime minister has assumed the role of head of state and title of President.

The part of the thesis addressing problems of transition through comparative analysis is concluded (Chapter 6) with a case study of the Australian republic referendum of 1999. The purpose of the account is to illustrate the difficulty of

effecting the necessary transition even, or perhaps particularly, in a country with a political culture similar to Britain's; the proposition was defeated despite significant secular trends in public opinion favouring a republic.

The origin of republicanism in Australia's colonial past is recounted, including that strand deriving from Irish nationalism. The thesis contrasts overwhelming monarchism of the 1950s with comparative indifference to the institution at the end of the century in a country where developing national consciousness and increasingly cosmopolitan immigration had transformed attitudes beyond recognition. Steady constitutional developments over a century-and-a-half had left Australia with one monarchical institution, namely the Governor General system.[35] The constitutional crisis of 1975 in which the Governor General dismissed the Prime Minister, the symbolic boost given to nationalist sentiment by the 1988 bicentennial commemorations and the progressive social policies of the Keating administrations of the early nineteen-nineties conspired to elevate the issue of republicanism to the active political agenda.[36] A Constitutional Convention which met in 1998 recommended the holding of a referendum before the end of the millennium to endorse election of a president nominated by the Prime Minister, approved by the opposition leader and endorsed by a two-thirds majority in parliament ('the bipartisan model').[37] A second question was to approve a new preamble to the Constitution affirming a list of normative aspirations which, in the form eventually agreed to by the government, included honouring of indigenous peoples in national life, but was rendered anodyne by omission (contrary to the wishes of the Convention's majority) of mention of custodianship of the land. The campaign was notable for the scant attention paid to the monarchy *v.* republic issue and for the light it threw on disunity between republicans regarding the system of election of a president (the 'presidential model'), a split exploited by monarchists who formed a tactical alliance with direct-electionists. The thesis presents that debate in the context of the widely-held fear that a directly-elected president might consider him/herself as possessing sufficient legitimacy to assume unintended powers within a Constitution couched in broad-brush terms.

A post-mortem to the referendum discusses explanations for its outcome advanced by journalists, academics and politicians: analyses include those by Irving,[38] Charnock,[39] McAllister,[40] McKerras & Maley,[41] Mitchell,[42] and Warhurst.[43] The thesis does not reject, but treats with caution, the widely disseminated speculation that a direct-election model would necessarily have succeeded; it is observed that an alliance between monarchists and republican opponents of direct election is an entirely possible outcome. The Chapter ends with a survey of developments in Australia subsequent to the referendum and speculates about the future.

Chapter 7 resumes the argument put on hold at the end of Chapter 3, reiterating the greater probability of the gradualist route to a republic and postulating that, if it were followed, a complex of decision-junctions would have to be negotiated. It would be necessary to make a choice between allowing a modified monarchy to act as what would effectively be an hereditary presidency or to carry on to abolition. In either event, but especially in the latter, a question would arise as to whether the institution of a presidency without other constitutional safeguards would be sufficient to satisfy genuine republican aspirations.

The mode of transition would influence the eventual form of a republic. The model emerging in the wake of a national trauma cannot be safely predicted, but in the gradualist scenario only a narrow range of options is conceivable. Gradualism is ill-suited to accommodate the step change implicit in an executive presidency; process informs outcome. The line of enquiry stimulates a brief survey of the case for and against a 'strong republic' (so designated by Fraser[44]) and a 'weak republic', the former defined as a polity in which the executive is constrained in its freedom of action by pluralistic institutional and legal controls, and the latter being one in which an executive, once elected, is subject to few formal limitations on its actions. The issue is illustrated by reference to the debate on separation of powers in the United States constitution. It is argued that, whatever the merits of a strong republic, to bring one into being would make the project infinitely more vulnerable. A risk therefore exists that something called a

republic might inherit a raft of monarchical characteristics that would certainly fail to satisfy the objectives of an important strand of republican thought. A short discussion of the role of tradition and ceremonial suggests that both can make a positive contribution provided that their original purpose remains valid, and 'ceremony' is not allowed to degenerate into mass hysteria, and that republics are as able as monarchies to satisfy the public need for them. Reference is made here to commentary by Cannadine,[45] Wilson,[46] and Craig.[47]

Continuing investigation of potential characteristics of a republican system, a survey of the debate on the desirability of a codified constitution concludes that, whatever the intrinsic merits, practical difficulties of implementation, possibly equal to those attendant on institution of a republic in one step, rule out the proposal as an adjunct to a republican project; this discussion comments on proposals and arguments expounded by: Charter 88,[48] IPPR,[49] Mount,[50] Benn[51] Hutton[52] and Bogdanor.[53] Remaining within the spirit of gradualism it is suggested that ordinary legislation could be used to implement those features of codification generally considered as the most important; a foremost objective here would be to bring the prerogative under parliamentary control. The question of entrenchment of constitutional provisions leads on to comment on the possible role of referendums in legitimising a new dispensation at its inception and in constitution-amendment procedure thereafter. Reasons for caution about the consequences of referendums are expressed, but it is observed that political pressure in their favour might be strong. The Chapter then looks at the case for establishing a specialist branch of the judiciary to pronounce upon constitutional matters. Such a body would almost certainly follow in the train of a codified constitution but it is observed that, even in its absence, the existing judiciary has, to the dismay of politicians, become increasingly interventionist in fundamental issues, in some cases placing normative concepts (natural justice etc.) above the letter of statute law. Views on these developments expressed by Beloff,[54] Oliver,[55] Jowell[56] and Woolf C.J.[57] are referred to.

In the final substantive section the typography of republican models supplied in Chapter 4 is extended to encompass theoretical (or utopian) models. The consolidated list is: the 'crowned republic' (Scandinavia and Benelux being real world examples which come close to this notion), the Fabian Society's proposal of placing the monarchy within a legal framework (but without introducing a separate corpus of constitutional law) and removing residual political functions from the monarchy,[58] the model proposed by Graham Allen[59] which retains a ceremonial monarchy to work in tandem with a 'presidency', the 1990s Israeli structure, the South African 'parliamentary presidency', the orthodox (US-style) executive presidency, French-style dual executive, German-style ceremonial presidency, transfer of the title and constitutional functions of the head of state to the Speaker (as proposed by Scrivener[60] and Freedland[61]) and retention of a 'dignified' monarchy with the Speaker taking on the attendant political functions. Before selecting from this list another dimension of presidency is considered, that is, whether a president should be directly elected by the electorate as a whole or chosen indirectly by a representative body. Conscious of Australian precedent, attention is drawn to the politically important consequences of this issue, and it is contended that, notwithstanding theoretical considerations, public opinion, even when not necessarily well informed, cannot be disregarded.

In discussing the precise powers that might be exercised by a head of state, the thesis looks at the core constitutional functions, primarily the role played at the time of a change of government (also dissolutions, dismissal of administrations). Within the ceremonial presidency (including constitutional monarchy) three options are identified, namely: delegation to the Speaker – though possibly acting in the name of the head of state; maximised automaticity, that is, government formation according to a corpus of rules set down in a code of parliamentary procedure (as proposed by Tony Benn[62]); and intelligent contribution by a head of state acting within clear rules, but permitted to use sensible discretion. Hitchens[63] and Bogdanor[64] have observed that politicisation of that office of Speaker is a risk inherent in the first option, and it is open to the charge that no code can anticipate every eventuality. The analysis of real world constitutions has recorded the

widespread existence of legislative veto or delay within head of states' armouries. Having observed that absolute right of veto over legislation (or other governmental action), or even short delay to give the opportunity for reconsideration, can be seen as inconsistent with the objective of denying executive functions to the head of state, the thesis discusses proposals to equip a formal presidency with the power to refer measures to scrutiny by the judiciary or a constitutional tribunal. The thesis considers whether a largely formal head of state should have a discretionary role at the time of assumption of emergency powers, whether the incumbent should have an active (as opposed to symbolic) military functions and discusses whether an elected presidency might play a more active part in the honours system. It is observed that institution of an elected head of state would necessitate review of the relationship of the state with the established church. An elected presidency would also entail a fundamental reappraisal of intra-Commonwealth relations. It is unlikely that the Governor General system would survive and, assuming the Commonwealth itself survived, it would be necessary to reconsider the British head of state's role as its perpetual nominal head.

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[1] Waltman, 1998, p. 98
[2] 2001, *passim*
[3] Benn & Hood, 1993, *passim*
[4] United Kingdom Parliament (Public Administration Select Committee) website; Bibliography - Miscellaneous
[5] 1975, *passim*
[6] 1997, *passim*
[7] 2003, *passim*
[8] 2005, *passim*
[9] 2005, *passim*
[10] Wainwright, cited at Barnett(ed.),1994, p. 147
[11] Meadows, 2003, *passim*
[12] 1999, *passim*
[13] 2000, *passim*
[14] 1993, pp. 200-203
[15] 1988, pp. 17, 161, 163, 164
[16] 1988, *passim*
[17] 1992, *passim*
[18] 1993, *passim*
[19] 1993, *passim*
[20] 2002, *passim*
[21] 2005, pp. 50-51
[22] 1995, *passim*
[23] 2000, *passim*
[24] Harris, *Sunday Times*, 7 October 1990
[25] Prochaska, 2000, p. 219
[26] 1996 & 2003, *passim*

[27] 1998, *passim*
[28] 1995, p. 71
[29] 1996, *passim*
[30] 1998, Chapter 2 & 2000, pp. 61-92
[31] 1997, pp. 46-47; 59; 84
[32] 2000
[33] 2002
[34] 2000, *passim*
[35] Warhurst, 2002 ("*Steps towards an Australian Republic*" Section)
[36] Warhurst, 2003(b).
[37] Turnbull, 1998 (a)
[38] 2000, *passim*
[39] 2001
[40] 2001
[41] 2002
[42] 2002
[43] 2003 (b)
[44] 1993, pp. 36-60
[45] 1993
[46] 1989, p. 129
[47] 2003
[48] see Bibliography-Miscellaneous
[49] 1991
[50] 1992, *passim*
[51] Benn & Hood, 1993
[52] 1995, *passim*
[53] 1997, *passim*
[54] 2000
[55] 2003, Ch. 18
[56] 2003
[57] 2004
[58] *Fabian Society*, 1996
[59] 2001, p. 71
[60] 2000
[61] 2000 (b)
[62] Benn & Hood, 1993
[63] 2000, pp. 96-97
[64] 1995, p. 174

Chapter 1: Historical Development of the British Monarchy

> The Monarchy is the oldest secular institution in Britain going back at least to the ninth century. Queen Elizabeth II can trace her descent from King Egbert, who united all England under his sovereignty in 829. The monarchy thus antedates Parliament by some four centuries, and the law courts by some three centuries. Its continuity has been broken only once in the last eleven centuries (during the republic under Cromwell from 1649 to 1660); there have been some interruptions in the direct line of succession, but the hereditary principle has always been preserved.[1]

So begins an anonymous HMSO pamphlet (published, presumably, with Palace approval) entitled *The Monarchy in Britain.* Thus, if inheritance confers legitimacy, and a handful of diversions along collateral tracks[a] can be overlooked (and perhaps the benefit of the doubt extended to a few dubious paternities along the way?), the legitimacy of the House of Windsor is assured.

--- until 1688

The antiquity of the British monarchy is unquestioned though the office held by Elizabeth II has little in common with that of her supposed ancestor, Egbert, over a dozen centuries and some sixty monarchs earlier. To credit the establishment of the English crown to Egbert (or 'Ecgberht') is arbitrary.[b] The effectiveness of the ascendancy he was able to establish over regions beyond Wessex might be viewed as falling short of 'sovereignty'; Mercia reasserted its independence in 830 and still had another forty years of existence before finally collapsing under Viking assault. Furthermore, the long years of division of the land between English and Danish rulers lay in the future. But it could equally be held that eleven hundred years

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[a] Matilda, granddaughter of Edward the Aelthing linked, by her marriage to Henry I, the Anglo-Saxon dynasties to the Normans and thence subsequent houses; and Sofia, granddaughter of James I performed a similar service at the juncture of Stuart and Hanover. George I was fifty-eighth in line to the throne when, in 1701, the Act of Settlement paved the way for his eventual succession.

[b] Fletcher dismisses the claim that Egbert was the first King of England as 'absurd'. [1989, p. 113]. Plausible claims could be made on behalf of various Anglo-Saxon rulers; for example, Athelstan of Wessex (*d. 939*), victor over Britons and Vikings at *Brunaburh* in 937.

places a modest claim on antiquity. Egbert, after all, had 'royal blood' (if such a fluid be known to medical science), and rulers of other parts of England had in earlier times been credited with the *primus inter pares* honorific of *bretwalda.*[a] The House of Wessex was by then venerable.[b] Saxon kings, their 'celtic' contemporaries and early post-conquest successors, recognising the perils of an heir in his minority subscribed only conditionally to (male) primogeniture. An imperfect device for minimising uncertainty of succession, and for promoting stability of the state and of the dynasty, it does not seem to have achieved unconditional acceptance until the thirteenth century[c] but under the influence of the church had, by the time of James I, evolved into the controversial doctrine of the divine right of kings.[d]

British kingship can be assumed to derive its ultimate origins in the governance of the tribes, tribal confederations and petty statelets which scrambled for power or mere survival on the islands after the Roman withdrawal in the early 5th century. Wales and Ireland were destined to remain patchwork quilts of mini-realms until subdued, at different times in different ways and with different end results by English power. But in the lands that were to become England and Scotland local wars, and 'foreign' depredation (or outright invasion) led to a slow, laborious, and far from preordained merging of sovereignties and the eventual emergence of two kingdoms, one of which claimed the allegiance - sometimes grudgingly acknowledged and other times violently resisted - of the other. Dynastic failure in the larger territory led (in 1603) to unification of the crowns in, paradoxically, the person of the ruler of its smaller neighbour, though full and permanent political unity had to wait for another century.

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[a] Egbert is the eighth-named *bretwalda* listed by Bede or in the Anglo-Saxon Chronicle, and both sources exclude plausible 8th century Mercian candidates, not least Offa. [Williams, 1999, p. 11]

[b] Bede dated the foundation of Wessex to the invasion of S Hampshire and the Isle of Wight by Caedwalla, King of Gewisse, in the 680s.

[c] Henry III was 9 years old at accession in 1216

[d] 'The King is above the law, is both the author and giver of strength thereto.' *Trew Law of Free Monarchies: Or the Reciprock and Mutual Duetie Betwixt a Free King, and his Naturall Subjects,* by King James VI of Scotland, c. 1598

The ideology of kingship evolved in parallel with territorial aggrandisement:

> In Tacitus's day, Germanic peoples were led by noble men of great valour and it is reasonable to suppose that those who led the migrations within and to the British Isles were of similar calibre. So too would have been the leaders who resisted such invaders. If some of these leaders or warlords established dynasties of kings in the territories they conquered and occupied, as later pedigrees and genealogies claim, this is more likely to have been the result of opportunities grasped, the resources available, and perhaps too a belief that military ability could run in families, rather than of any attachment to ideas of dynastic or hereditary succession . . .[2]

The quasi-religious role of the early chieftains / kings – pre-Christian Anglo-Saxon kings claimed descent from Woden – was reinforced first by the advent of militant Christianity, insistent on conversion of heathen enemies, and later by the Tudor monarchs' take-over of the national church. It is visible in the eccentric sacerdotalism of the Coronation ceremony (anointing with holy oil, crowning by the 'professional' head of the Church of England, the intoning of '*Zadok the Priest*') and the 'established' status of the Church of England.[a] No surprise then that: 'In 1956, four years after the queen's accession, an opinion poll showed that 35 per cent of the population believed that the sovereign had been chosen by God,'[3] and Westminster Abbey tour guides can describe the coronation throne, a secular artefact in an ostensibly sacred building, as 'the "holiest" spot in the Abbey'.[4] Elizabeth II is frequently proclaimed Queen 'by the grace of God'. The accompanying mindset, described by John Grigg as 'something akin to Japanese Shintoism',[5] can be viewed as harmless flummery but it also played a part in the ideological underpinning of one side in the civil wars of the seventeenth century. The doctrine of divine right, demolished intellectually by Locke and denounced as blasphemous by Bolingbroke in 1745,[6] no longer props up royal authority, but

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[a] The Church of Scotland: 'does not have the same theological or ecclesiological stake in the monarchy that the Church of England has. Indeed our rejection of what is seen as an Erastian model at least demonstrates the possibility of other ways of being a national, or even established church. There is no reason why even the complete end of the monarchy would shake the constitution of the Kirk.' [Blount, 2002, pp. 53-53] 'Few things will irritate good Presbyterians more than the assertion the Queen is head of the Church of Scotland, and the assertion of Christ as the sole King and Head of the Church is more than a theological nicety. [*ibid.*, pp. 52-53]

survives as a legitimation of royal office. Whether the residual conflation of the secular and sacred (a) genuinely reinforces the dignity of the crown, (b) is an example of mild blasphemy, or (c) is merely ridiculous, is a matter of personal taste.

The notion that early kings were absolute rulers with an active role in all aspects of civil society and economic life is, at the very least, open to doubt. The view[7] that their rule was founded on reinforcement of the existing customs rather than on intrinsic royal authority looks plausible. Alfred's '*Laws*' (late 9th Century) was more a codification of existing Wessex practice than an enactment of new legislation - a policy adopted by his successors, English or Danish, as they absorbed former Mercian and Northumbrian territory. A shift to more authoritarian kingship became apparent when England was incorporated in wider and unwieldy empires under Cnut, the early Normans and Henry II. From the earliest times, however, law and the royal will have been conceptually different phenomena. The distinction might have been a little difficult to discern from time to time, though the often whimsical rule of, say, the Han, the Romanovs or the Ottomans was seldom paralleled.

Even in the first two or three centuries after the Conquest when kings occupied the pinnacle of the feudal pyramid absolutism could be challenged by a revolt of the baronial class with which the crown was compelled to share power. Magna Carta was the first of a series of concessions that marked later medieval England. The Provisions of Oxford vested Henry III's authority in a council, the barons' Ordinances attempted to constrain Edward II, and in the fourteenth and fifteenth centuries five kings were deposed or met violent ends. But these disturbances reflected dynastic disputes or adjustment of the boundaries of power between the crown and the great magnates; neither the monarchy itself nor its role as the ultimate source of authority was in question. Despite the intermittent presence of proto-Parliaments from the mid-thirteenth century, recognition of the impracticality of imposing taxation without consent and the growing institutional

importance of the king's council, personal power of the monarchy remained largely intact through to the death of Elizabeth I.

Indeed, the Tudors probably came as close to imposing absolutism as any predecessor, though the growing complexity of the state had necessitated steady delegation of administrative functions to a bureaucratic cadre. Thereafter, the Stuarts' chronic inability to balance the books provided favourable conditions for the growth of Parliamentary influence. James I came close to surrendering a large slice of his prerogative under the (abortive) Great Contract,[a] but crisis came to a head with Charles I, at odds with a newly assertive Parliament over religious as well as financial issues. The Commonwealth, an ineffective attempt to establish republican principles, gave way in 1653 to a military dictatorship underpinned by fundamentalist religion, contaminating the republican cause for a couple of centuries. It made little apparent long-term impact on the body politic and, perhaps even less than it seemed even in the short term in the light of: 'the steady drift back to monarchical forms - the emphasis on a single person … and the offer of the throne to Cromwell.'[8] Nevertheless, despite the initial triumphalism of the Restoration, the return of absolutism was never a serious prospect. Charles II who, despite the 'merry monarch' spin put on his reign, presided over one of the more repressive periods in English history, was able, thanks to a French subsidy, to dispense with parliament for the last four years of his reign and probably had the inclination, but neither the energy nor the determination, to carry it through.[9] James II attempted personal rule, but his underestimation of the strength of seventeenth-century England's popular anti-Catholicism ensured his downfall. Whether the 'Glorious' Revolution (as codified by the 1689 Bill of Rights) was quite the central event in establishing British liberties as it is often portrayed, it probably did mark a point after which the crown became just one player, even if

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[a] This ingenious scheme (to pay off accumulated royal debts and to exchange feudal fiscal rights for regular tax income) to some extent anticipated the 1760 deal with George III. "… it was a step towards financial reality, recognising that the old concept of the crown living off its own resources could no longer make sense in a modern world of large navies and standing armies. There was the making of a political compromise." [Cannon & Griffiths, 1998, p. 360-1]

for the time being a very important one, in the game. A significant step away from royal primacy, and towards the 'crowned republic', was represented by the 1701 Act of Settlement which specified that parliamentary legislation, and not the monarch, would determine who occupied the throne.

--- *Rise of parties and Prime Minister; decline of royal prerogative*

The beginning of the age of the independent politician who was not primarily a courtier is easier to detect in retrospect than from the viewpoint of contemporaries. The received view of post-1689 is briefly expressed by Bogdanor:

> During the period between the Glorious Revolution of 1689 and the Reform Act of 1832, the sovereign's powers were gradually diminished, despite a powerful rearguard action by George III; and by the time of the Reform Act, the sovereign's power to determine policy had effectively been reduced to influence.[10]

Decline over that period of royal power and influence was an erratic, stuttering and far from inevitable process. It is true that proto-parties whose descendants can be traced down to the present day became permanent features of the landscape under William III but they were unable to impose anything recognisable as discipline until late in the eighteenth century, and not very effectively then. The office of Prime Minister was to be implanted as an adjunct to the House of Hanover though it took the best part of a century for it to be universally acknowledged as the summit of the political calling. Before 1714, the orthodoxy, as formulated by Anson runs: 'the king or queen governed through the instrumentality of the Crown: now ministers govern through the instrumentality of the Crown.'[11]

But appearances and practical realities, in accordance with Bagehot's celebrated insight, must be carefully disentangled. The royal veto on parliamentary legislation survived the 'Revolution', but its exercise by Queen Anne in 1708 turned out to be the last.[a] Anne also played a role, unwittingly, in erosion of the creation of peers as a personal prerogative through her compliance in the elevation

[a] The subject was the Scotch Militia Bill -- at the time of a threatened Jacobite uprising with French support.

of a dozen anti-Whigs, an act destined to be remembered and seized upon in 1831 and 1910. But it is too easy to see a conveniently identifiable event as a long-term causative factor:

> The crown remained the centre of the executive, and the phrase, much used by eighteenth-century politicians - 'carrying on the king's government' - was a reality. The monarch retained special power over the army, Navy, and the Church, and in foreign affairs his position was strengthened by the fact that his ministers were, in many cases, dealing with his uncles, cousins, and in-laws.[a] He was the fount of honour, distinction, and pension in a period when these things counted for a great deal. Even in that most important of areas, the choice of ministers, though often limited by party pressure, eighteenth-century monarchs retained great power. It was a very brave politician, sure of himself, his friends, and the public, who set out to 'storm the closet' and thrust himself on the monarch.[12]

In Henshall's view, hindsight is here providing us with a distorting mirror rather than clear vision:

> After 1688 … [i]nstead of one political centre there were two. Since parliament now met every year, and historians have assumed that the main focus shifted to Westminster.... The spotlight was beamed on parliamentary parties, elections and anything else with reassuring pre-echoes of modernity. Consequently much work needs to be done on the Hanoverian court, traditionally dismissed as a social and political backwater. Evidence is now accumulating that it remained the political centre where power was won by time-honoured methods - attendance on and manipulation of the monarch … Parliament as a ladder to power seems to have been confused with parliament as a repository of power. Post-Revolution monarchs such as Queen Anne obstinately refused to play the part assigned to then by future-minded historians. She maintained the prerogative of appointment and declined to restrict herself to those with a majority, or even a following, in parliament.[13]

In his influential study of royal finances, Phillip Hall identifies an important milestone on the road away from the royal-executive state:

> The scale of the Napoleonic Wars in the 1790s meant sharply increasing civilian expenditure, even if it did not rise as fast as military expenditure. By 1800, Parliament was responsible for far more of civil government finance than was the King through the Civil List. This, of course, was one of the reasons for the decline of the powers of the monarch, as government ministers became more dependent upon Parliament for finance. More important was the fact that, as a result of the gradual abolition of sinecures and the removal of other abuses, the executive had fewer powers with which to control Parliament. The decline of royal power would have occurred anyway, even if George III's mind

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[a] a factor in the equation, though of declining significance, down to 1914

> had not become so afflicted. The 'limited' monarchy of 1688 had become more limited still.[14]

The 'process' was not teleological, but its general direction was consistent. As Hennessy puts it:

> Once the electorate had roughly doubled in size after 1832, with one in five adult males eligible to vote, it was only a matter of time before monarchical patronage began to seriously decay in the face of electoral power.[15]

Thereafter, Britain passed into that atypical three decades of government-by-Parliament[a] which persuaded Bagehot of the positive virtues of

> the close union, the nearly complete fusion of the executive and legislative powers.'[16] The 'efficient secret', in his view, 'consisted of an outright repudiation of one of the notions of constitutional government that is most sacred to Americans.'[17]

Victoria preserved the illusion of power to her own satisfaction - achieved, *inter alia*, by imposing a handful of vetoes over ministerial appointments.[b] While she certainly made her views known to ministers on major topics of contemporary dispute, not least on Irish home rule,[18] it is less certain that she had much impact on outcomes. By the end of the nineteenth century when Victoria's reign was drawing to an end, she was very close to the 'Sovereign of a Democratic Monarchy'[19] that she vowed never to be. Had, say, Prince Albert survived longer or earlier Hanoverians been possessed of greater brain power, it is not inconceivable that a very different power structure would have emerged. In the event, Britain was spared the fate of developing into a clone of Wilhelmine Germany.

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[a] Between 1852 and 1865 six administrations were brought down by the House of Commons.

[b] Dilke's entry into the Cabinet was, crucially, delayed from 1882 until 1885; in 1892 Gladstone acquiesced to Victoria's dislike of the radical and sometime republican, Henry Labouchère; and, in 1895 Salisbury deferred to the Queen's veto of Henry Matthews (in 1896 the first Catholic to become a British cabinet minister) serving a second spell as Home Secretary. The list is not exhaustive.

--- *Decline of the royal prerogative; 20th century*

Since 1901 examples of royal intervention on 'non-core' issues have been rarer. Edward VII was seen by some as having a part in establishing the *Entente Cordiale.*[a] Historians do not dismiss the notion that George V gave serious consideration to vetoing Irish home rule in 1914.

> Asquith … pinpointed the two significant ways in which the King could intervene. He could refuse the Royal Assent to the Bill, which would be unconstitutional, or he could dismiss his Ministers. It is interesting that as late as 1914 a Prime Minister should have considered this to be a constitutional right of the Sovereign, however difficult to exercise in terms of political reality and that the sovereign should not have altogether disclaimed it.[20]

Thus, the outbreak of war, by quarantining the legislation for the duration, could well have averted a constitutional crisis which would have eclipsed the events of 1909/1911. Thereafter the king seems to have influenced World War I military appointments.[21] Given what is now known about Edward VIII's bizarre views on the Third Reich it is as well that his reign was too short and too overshadowed by personal preoccupations for them to attract public attention. George VI went no further than supporting Chamberlain - perhaps a touch more positively than contemporary constitutional convention required - and making well-intentioned, if ill-judged, offers to put his name to emollient messages to the Axis leaders.[22]

A definitive account of Elizabeth II's interventions must remain, for the time being, veiled by prime ministerial discretion, though reports of rifts with Margaret Thatcher emerged, chiefly in the *Sunday Times,* in 1986. The first concerned reports that the Queen, said to be broadly sympathetic to the post-World War II consensus, indicated disquiet with governmental policies deemed by many as

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[a] 'It is true that Edward VII was not the power in international relations that Esher and his French and German contemporaries, and some historians, have claimed. But the role he played and the influence he had on the European scene was not as negligible as a Balfour, Lansdowne and Grey and various historians have made out. The king may have played no direct part in the formulation of Britain's European policy but that was primarily due to the fact that he agreed with the Entente policy with France and Russia pursued by his ministers as the best way of blocking Germany's expansionist ambitions.' [Douglas-Home, 2000, p. 6]

divisive.[23] The same series of leaks drew attention to an alleged rift over policies relating to sanctions imposed on the apartheid regime in South Africa, a debate conducted very much in the context of Commonwealth unity.[24] A couple of years later there were indications that a clash could have occurred had Gorbachev gone ahead with extending an invitation to a state visit to the Soviet Union.[25] Another two years, and South Africa came up again amidst reports of a difference of opinion over the wisdom of inviting Nelson Mandela (released from detention but not yet President) to the Palace.[26] During the Major administration Elizabeth's views were reported to be influential in the decision not to go ahead with ending the Royal Mail's letter monopoly.[27]

The first oft-cited example of a twentieth-century monarch taking an active part in fundamental constitutional and electoral affairs is Edward VII's insistence (followed up by George V) on a general election before agreeing to Asquith's request to undertake to create peers *en masse* to overcome the Lord's veto of the 1909 Finance Bill.[28] In the inter-war years the King played a part when Baldwin secured the prime ministership over Curzon[29] (1923), and probably exerted pressure on Macdonald to form a 'National' government in 1931.[30] The Palace was involved in Macmillan getting a vital edge over Butler in 1957[31] and Home overcoming all others in 1963;[32] and the leeway given to Heath to try to cobble together a coalition to rescue the Conservative government in 1974[33] is judged by some as over-generous. While some, or all, of the foregoing actions are seen by some commentators as controversial, they can equally be viewed as perfectly legitimate exercises of constitutional 'long-stop' functions by the person holding the relevant responsibility. A democratically elected president acting either purely within his/her discretion or within written guidelines, it might be further argued, could have responded to each of these challenges in exactly the same way. The king or queen might have got it wrong, but not in any recognisably 'monarchical' fashion.

--- *Executive power migrates to the prime minister*

Kings loosened their grip on the reins over three or four centuries - burgeoning population, industrialisation, multiplying functions of government all played their part. The decline of one institution did not, however, leave a vacuum. Executive power was, on the whole, relocated in the person of the Prime Minister, an office having its origins in royal patronage but which, by stages, had come to be identified with leadership of the dominant faction in Parliament; and royal prerogative, where no longer exercised personally by the monarch, passed not to the legislature but to ministers. Not having had a revolution Britain did not get the constitutional spring clean experienced by similar nations.

Functions inherited through this process are a miscellany ranging from the crucial to the trivial; to enumerate them is a labyrinthine task. Numerous authorities have commented at length on the pros, cons and practicalities of bringing the prerogative within the ambit of law and/or parliamentary control. The IPPR '*Constitution*',[34] for example, addresses the topic in an ad hoc manner, assigning various functions to their relevant places (e.g. Article 51 concerns itself with making treaties, Article 122 with declaration of war and Article 115 with the responsibilities of a Public Service Commission[a]). Professor Hennessy[35] has looked in some detail at the mechanics for declaring war/deploying military forces, ratifying public appointments and conferring honours, but is sceptical about tackling the issue comprehensively. Professor Dawn Oliver's discussion of constitutional reform[36] embraces control over the bureaucracy as well as addressing the major personal prerogatives. The report of the Fabian Society's 2002/2003 '*Commission*',[37] characterising the residual non-statutory powers as 'ill-defined', describes them as: 'remnants of those immunities and powers possessed by mediaeval kings', and, declaring them unacceptable, lists: 'the power to conclude treaties, annex and cede territory, recognise foreign states and governments, and – most controversially – to declare war and make peace.' In a commentary on the

[a] It is not comprehensive – nothing for example on the issue of passports.

Fabian report Adrian Harvey[38] advocates parliamentary assent for declaration of war etc., setting up an Appointments Commission to oversee patronage and codification within statute law of the remainder, though the decision-mechanism would remain under the control of the Prime Minister. In a more recent stab at bringing some kind of order to this jungle, the relevant part of Lord Lester's 2003 Private Member's Bill simply states: 'With effect from the end of the relevant period, no executive powers may be exercised unless Parliament has provided appropriate authority.'[39] At the minimalist end of the spectrum, Hames and Leonard's *Demos* pamphlet[40] states baldly that, under their proposals, 'the royal prerogative would lapse', and, at the ambitious end, Tony Benn's 1988 *Royal Prerogative Bill* essayed a comprehensive listing. Further progress was made by the Labour MP, Graham Allen, in '*The Prime Ministership Bill*'[41] published in his 2001 pamphlet which prescribes that use of the prerogative should be endorsed by the House of Commons. Elsewhere in the same work he describes listing the prerogative powers as a 'Herculean task, apparently even beyond the powers of the Prime Ministership itself'.[42] Nevertheless, his own attempt to produce a schedule compares favourably in its coverage with the only one that has so far emerged from official sources (see below). Mr Allen identified the following:

1. To make Orders in Council
2. To declare war or commit U K forces to armed conflict
3. To issue lawful commands to the armed forces
4. To require persons to perform military service or other service to the state in times of armed conflict or emergency
5. To sign or ratify treaties
6. To recognise foreign governments
7. To appoint ambassadors, permanent secretaries of departments, the heads of the security services, members of the Defence Staff, Royal Commissioners and members of public bodies
8. To declare a state of emergency
9. To order the confiscation, forfeiture or seizure of assets
10. To issue pardons and detain felons or the insane during pleasure (i.e. indefinite sentences)
11. To institute or quash legal proceedings
12. To assert Crown immunity in any legal proceedings and to grant public interest immunity certificates
13. Powers in relation to intestacy, the failure of charitable trusts, treasure trove, mineral rights, wreck, sturgeon, swans, whales, territorial waters and the ownership of the foreshore of the United Kingdom.

All the foregoing efforts have, thanks to the unhelpfulness of governments of all complexions, been speculative or creative. In theory (perhaps – as shall be seen -

not altogether so in practice) speculation ended in October 2003 with the publication of a document that purports: 'to describe as fully as possible the extent of the prerogative.'[a] Publication has its genesis in an exchange, looking scripted, the previous July between the Chairman of the House of Commons Public Administration Select Committee (PASC) and the Permanent Secretary at the newly formed Department of Constitutional Affairs[b] (DCA). In the course of evidence-taking in the Committee's investigation into the prerogative, precedent was overturned when, to the Chairman's remark/question:

> ... we have never got the government to tell us what they think the range of prerogative powers is; parliamentary questions have never yielded an answer...I wonder now whether...you might be able to summon up a note that you could send to us[.][43]

the response was affirmative.

The subsequently emerging document, given wider currency in the form of a Press Notice[44] with a commentary by Dr Wright, received modest press coverage (e.g. page 22 of the *Daily Mail*[45]) despite the potentially historic nature of the government's action. First, the list:

- Domestic affairs
- The appointment and dismissal of Ministers;
- The summoning, prorogation and dissolution of Parliament;
- The commissioning of officers in the armed forces;
- Directing the disposition of the armed forces in the United Kingdom;
- The appointment of Queen's Counsel;
- The prerogative of mercy;
- The issue and withdrawal of United Kingdom passports;
- The granting of honours;
- The creation of corporations by Charter;
- The King (and Queen) can do no wrong (for example the Queen cannot be prosecuted in her own Courts)
- Foreign Affairs
- The making of treaties;
- The declaration of war;
- The deployment of the armed forces in operations overseas;
- The recognition of foreign states;
- The accreditation and reception of diplomats.

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[a] The author is indebted to Professor Peter Hennessy for drawing his attention to this event.
[b] Successor to the Lord Chancellor's Department.

The simple fact that a list was issued under the government's imprimatur endows the event with importance that transcends its content but scrutiny of its composition, together with the accompanying commentary by the DCA, brings out its limitations. Although, according to the *Daily Mail*,[46] Sir Sydney Chapman MP, a Conservative member of the PASC, expressed surprise at the extent of ministerial powers under the royal prerogative, it is difficult to imagine what features of a predictable list surprised him. Further perspective is provided by the DCA's health warning: 'as will become clear, the exact limits of the prerogative cannot be categorically defined ... there is no exhaustive list of prerogative powers.'[47] With the comment that the list is based on:

> 'those powers which have been consistently recognised by the courts in the past, mindful of the encroachment into the prerogative as a result of the control exercised by Parliament and the courts'

it is implied that all significant and non-moribund[a] manifestations are included. However, by way of qualification to the assertion that 'The Crown cannot invent new prerogative powers,' the authors concede that old, and unexpected, ones can nevertheless be discovered, quoting for instance a 1989 Court of Appeal judgment[b] to the effect that, quite apart from statutory authority, the Crown prerogative to keep the peace within the realm[c] permitted the issue of baton rounds to the police without the consent of the relevant police authority. Similar considerations could apply in a wide range of grave national emergencies. A further qualification, relevant to this study, is that the DCA's memorandum purportedly concerns itself with the prerogative as exercised by ministers, but nonetheless strays into residual

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[a] 'Some may have fallen out of use altogether, probably forever - such as the power to press men into the Navy.' (paragraph 3 of DCA note: UK Parliament website- Bibliography; Miscellaneous)

[b] R v S of S for Home Department, ex parte Northumberland Police Authority (1989): 1 QB 26 (CA)

[c] this construction seems to interpret the prerogative as a duty rather than as a right or privilege, but it could also mean that prerogative powers flow from the overriding necessity to ensure the peace is kept.

personal prerogative. Reluctance, or inability, to list all the prerogatives might seem unimportant, particularly if it is assumed that the ones overlooked are trivia (for instance, such arcana as swans on the Thames), but could acquire some significance in the event of an attempt to follow the advice of the numerous think-tanks and individuals for them to be put on a statutory footing. It is straightforward enough to envisage a bill to, for example, impose parliamentary control over a specific competence, e g. declaration of war, but it might prove impractical to bring unknown or unsuspected powers into the net.

The boundary between the scope of executive prerogative and parliamentary authority is not fixed. In giving evidence to the PASC, former Conservative Party leader, William Hague said:

> We did have a vote on a substantive motion … about military conflict in Iraq, but this was given to the House of Commons as a kind of act of generosity by the Government for which we had to be grateful at the time. … We also had a substantive motion about the first Gulf War in 1990-1, but we did not have such a motion over Kosovo, for instance.[48]

> One could take the view that they should become stronger and stronger conventions over time, and that now we have had a substantive motion on a major military event then it will be harder for governments to avoid that in the future.[49]

Nonetheless, he held to his view that formal codification was required, opining that the precedent would not necessarily hold if a future government had a smaller majority or the event took place in 'more uncertain times'.[a] He might well be right, but it is difficult to conceive of future military operations being launched without parliamentary sanction. It would be premature to conclude that the war prerogative has become moribund but it is reasonable to suppose that it is weaker than it was, or generally considered to be.[b]

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[a] Parliamentary control over the prerogative was one of the questions referred to the 'Democracy Task Force' set up by a later Conservative leader, David Cameron, in 2006. [Conservative Party website]

[b] In his 'minority report' to the Fabian Commission, Sir Michael Wheeler-Booth, former Clerk to the Parliaments, wrote: The recent choice taken to submit the decision whether to go to war with Iraq to debate and vote in the Commons was a significant evolutionary reform to the relationship between the executive and 'Parliament. [Fabian Commission Report, 2003, p. 152]

The British monarchy has transformed itself over the centuries. Leadership founded on tribal allegiance and group custom gave way to military leadership. As the state grew more complex and bureaucratised and long before democratic forces were felt, notionally autocratic kings were, in practice, obliged to share power with the nobility, territorial magnates and the owners of other kinds of wealth. Meanwhile, in a process of steady attrition, real power slipped away to professional politicians leaving but a residuum and the symbolism of state dignity. The scope and function of the institution has seldom been fixed for extended periods; there is no reason to suppose that the one in which we are living is an exception.

--- *Residual royal powers and functions*

What then, remains with the monarch – the personal prerogative? Most important are what can be called the core constitutional functions. Stripped to essentials, these are two-fold: (a) choosing, formally appointing and accepting the resignation of, the prime minister, and (b) granting or withholding a dissolution. These residual functions are those exercised by the monarch following a general election, or when the administration's majority in the House of Commons is threatened. On those occasions:

(i) The leader of a party having won a majority at a general election presents him/herself at the Palace the next day, is asked to form a government and promptly does so; this is what has happened at 16 of Britain's 17 post-World War II general elections. As for the sole exception, February 1974 which produced the only completely hung parliament, a weekend of fruitless negotiations separated the first from the last stage.

(ii) At some point 'decently' towards the end of a five-year parliament, the Prime Minister asks for, and is granted, a dissolution to precipitate a general election; or at any point in the parliament a prime minister who has been defeated on a vote of confidence in the House of Commons submits his/her resignation. Here, the role of the monarch is to ascertain whether construction of an alternative

government is a reasonable prospect on the basis of existing parliamentary composition; the Callaghan government's loss of a confidence motion in 1979 fits the bill, though the parliament was also within seven months of its legal expiry.

It follows that, since the Conservatives have followed the other political parties in choosing their leader, irrespective of whether the party is in government, rather little discretion is left to the monarch in selecting a Prime Minister. But that does not mean that the prerogative is totally moribund; it is not beyond imagination that an as yet unknown Flatearther party would decline to nominate its prime ministerial candidate. Some of the recent essays in freelance constitution drafting, e.g. IPPR [1991, (36.1)], Tony Benn [Benn & Hood, 1993, (17(1))] and the Fabian Society have attempted to eliminate the element of choice on the part of the sovereign by including a provision that the prime minister shall be elected by the House of Commons. As Bogdanor[50] points out, in making a case for intelligent personal supervision of the process, the recipe pays rather little regard to the possibility of a hung parliament producing a minority government. The IPPR proposes that: 'the Head of State shall, on the report of the Speaker of the House of Commons, appoint as the prime minister the person elected to the office by the House of Commons.'[51] The difficulty here, as with the similar existing arrangement used in Sweden where responsibility for identification of a prime minister is delegated to the Speaker,[52] is that the selection of an intermediary could become as politically charged as that of a prime minister, hence, the risk of politicisation of what should be a disinterested office (see also Chapter 7, *Presidential Powers: exercise of core constitutional functions*). Leaving aside the probable efficacy of such tinkering, for as long as constitutional practice requires the executive to be sustained (or at least not positively hampered) by the legislature there will be a finite possibility that parliamentary arithmetic will necessitate human intervention.

As for the dissolution function, there would appear to be something like a consensus, sometimes grudging, that British monarchs retain the power to refuse a

dissolution *in extremis*. A group of Labour MPs writing to the press in 1974 thought not:

> In our opinion, the Prime Minister of the day has an absolute right to decide the date of the election following discussion with his Cabinet colleagues. In such circumstances, we believe, the Queen is both morally and constitutionally obliged to accept the advice given.[53]

Bogdanor's challenge to this view[54] is based partly on the opinions of a raft of largely legal opinion (Wade & Bradley, de Smith & Brazier, Robert Blake, Geoffrey Marshall), and on the argument that desuetude has not been established for the simple reason that in Britain (experience is a bit more ambiguous in the monarchical Commonwealth), no Prime Minister has, in actuality, improperly sought a dissolution; the point has not been tested. It does not follow, Bogdanor has it, that the sovereign would be bound by negative precedent should a Prime Minister attempt to abuse an assumed privilege. In other words, it is still there until it shown to be absent. In a jointly authored work the same writer concedes that there might be a scintilla of doubt about the issue:

> The very passion with which the contrary has been argued ... suggests that the view that these prerogative powers of the Crown are in desuetude (a concept which is unknown in English law, in any case) is, to put it at its lowest, contestable.[55]

Just how exceptional the circumstances are in which the notional prerogative might be exercised becomes clearer when thought is given to scenarios:

> Does the Queen automatically assent to a dissolution on advice of her Prime Minister? Suppose he went mad? Or passed legislation increasing his term of office? Or had, in fact, lost the confidence of his Party, and was threatening, like Samson, to bring them down with him by calling an election he knew would be lost?[56]

In trying to devise something plausible the author (Andrew Duncan) seems to imply that the Prime Minister could have his legislation 'passed' without the co-operation of the parliament he was seeking to dissolve, or that the parliamentarians of a governing party had not noticed their leader's deteriorating mental condition. If the Samson Agonistes simile has any relevance to the real world, its closest parallel is with the dissolution granted to Ramsay Macdonald which led to the

October 1931 election - a course of events the King did more to bring about than seek to prevent. The question is one which might benefit from in-depth exploration centring on such questions as whether the passage of time has made a difference: and whether there is an analogy with the royal veto on legislation rendered largely redundant by three centuries of disuse.[a] In the meantime, the probable answer, in Lord Armstrong's words, is that it is:

> common sense that the Sovereign should have the right to withhold consent for a dissolution, if only as a check upon the irresponsible exercise of the prime minister's right to request one, however improbable such a contingency may seem to be.[57]

Finer, Bogdanor and Rudden opine that two further areas exist where personal prerogative could be invoked; *viz* dismissal of the prime minister and refusal to accept the prime minister's advice to create peers.

> The Queen has the theoretical right to dismiss a Prime Minister. It was last exercised in 1834,[b] to be sure, but it is possible to imagine circumstances in which she might legitimately still use it.[58]

The authors go on to concede that the power 'would be exercisable – if at all – only in bizarre, one might almost say revolutionary, circumstances,'[59] but decline to speculate on what those circumstances might be. Attempts to recreate the kind of scenario they have in mind tend to dwell on such eventualities as misconduct of a Prime Minister (for which the interaction of the political process might well be the preferred remedy), or ones so offbeat as to be tantamount to a royal coup. The precedent offered by the Kerr/Whitlam affair of 1975 in Australia-when the Governor General dismissed the Prime Minister after the Budget had been defeated in the Senate - is not transferable in its precise form for as long as the upper house remains powerless to refuse supply.

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[a] An under-investigated topic is the propriety of the 1955 general election, held 3 years 5 months into the parliament when there was no question that the assembly remained 'vital, viable and capable of doing its job' [as Sir Alan Lascelles had written to *The Times* on 2 May 1950 when the Atlee administration found itself with a minimal majority], but when it was merely politically expedient for Sir Anthony Eden to obtain early public endorsement of his newly formed government.

[b] William IV dismissed Melbourne to avoid accepting Lord John Russell as Leader of the House of Commons; Melbourne was back in office in five months.

There is a view that a third power, assenting to legislation, exists to the extent that its converse, exercise of veto, is believed to survive. Harvey,[60] for example, lists the power to assent to legislation amongst the 'real powers of the sovereign', speculating on what might happen if legislation conflicted with a monarch's deeply held moral conviction (legalisation of human cloning is posited as a hypothetical example)[a]; or if a Bill to facilitate Scottish independence were interpreted as violating the Coronation Oath.[61] [b] Bradley's (see Chapter 3, *Legislative Hurdles*) suggestion that refusal of assent to a monarchy-abolition Bill is, at some level, conceivable enters into serious constitutional crisis territory, if not civil disorder. Whatever imaginative scenarios can be devised, the passage of three centuries since the last exercise of the legislative veto is strongly suggestive of atrophy.

The contention that the option of refusal to create peers is still available[62] to the monarch rests on a scenario in which a Prime Minister requests creations to force a measure through the Lords in order to circumvent the delay available under the 1949 Parliament Act. Finer *et al.* do not overstate the case observing that 'depending upon the precise circumstances which generated the Prime Minister's request … it might be impolitic for the Crown to refuse.'[63] But even against the most bizarre of imaginable backgrounds it might be wondered whether the pass has not been sold. It is difficult to imagine that celebrated precedents have not taken the matter beyond royal control; these range from Queen Anne's action in

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[a] A dilemma of this type arose in Belgium when the observant Roman Catholic King Baudouin felt constrained by his conscience from signing a (fairly restrictive) abortion Bill. The compromise solution – of limited exportability – was to 'abdicate' to give the government the opportunity to process the legislation under emergency procedures. He 'unabdicated' forty-eight hours later. *[Independent*, 5 April 1990; *Guardian* 5 April 1990; *UPI*, 5 April 1990]

[b] It is not entirely clear how a dilemma might arise. The 1953 version of the relevant passage runs: "*Archbishop*. Will you solemnly promise and swear to govern the Peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand, the Union of South Africa, Pakistan, and Ceylon, and of your Possessions and the other Territories to any of them belonging or pertaining, according to their respective laws and customs?
Queen. I solemnly promise so to do." Three of these territories have subsequently been deleted (and others added) without accusation of oath-breaking.

1712, William IV's reluctant undertaking[a] (to Grey) to create fifty or more peers in 1831 to see the first Reform Bill on its way, or George V's rather similar provision of "contingent guarantees" to Asquith in 1910, paving the way to the 1911 Parliament Act.

Traces of former substantive royal authority over the whole range of governance survives in ritualised form, for example in appointments made in the name of the Crown – including accreditation of diplomats (and formally receiving foreign Ambassadors), commissioning of armed forces officers, appointing judges and in ceremonies that often go with the appointments; presiding over ceremonial opening of the legislature might be included here. Arising from the historical legacy the British monarch is 'Supreme Governor' of the Church of England,[b] the attendant responsibilities of which office are now nugatory, but still provides the ideological motivation for the discriminatory anti-Catholic provisions of the Act of Settlement. And, quite apart from being titular head of the Commonwealth and imperial monarch of the residual colonial possessions, the Queen is absentee head of state of some fifteen overseas members of that body (ranging from Canada to Tuvalu), but in whose domestic affairs she is spared the potential embarrassment of involvement through the instrumentality of a Governor-General nominated by the government in question, nowadays invariably a local citizen. The monarch has a residual role in the honours system: the Order of Merit and the Garter and the Royal Victorian Order are personal rather than government-recommended decorations.

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[a] As in 1910 the threat was enough. Wellington was able to persuade his Tory colleagues that further resistance would be self-defeating.

[b] The local Lutheran church is recognised as the official religion in Denmark, Norway, Iceland and Finland (where the Finnish Orthodox Church has equal status); in 2000 the Swedish Lutheran Church was redesignated as the national church, but the respective heads of state have no personal role in ecclesiastical governance. In Norway (Art 16 of Constitution) 'The King' (as personification of the State) regulates worship and religious teaching. In Denmark the national parliament is the legislative authority for the church. The Danish and Norwegian churches are administered through a government department.

Occupying a middle ground between the monarch's formal powers and ceremonial functions can be found Bagehot's celebrated rights, - to be consulted, to encourage and to warn[64] - presumably exercised during Prime Ministers' weekly audiences.

Other, technically optional, royal functions arise from the symbolic role of monarchy. They include ceremonial openings (motorways, hospitals, schools, old peoples' homes, launching ships etc.) and stately progresses to various parts of the realm and state visits overseas and receiving foreign heads of state. Self-portrayal as an idealised family was successful only when, to Bagehot's puzzlement, it was first tried in the last years of Prince Albert's life and again from the accession of George VI to the 1980s. A conspicuous function of which much is made by royalists is acting as the fountainhead of charitable activity and patronage.[65] Whether there is any net advantage in putting a royal name on a charity's letterhead is however not certain; it remains to be proven whether wealthy donors are more likely to put their hands in their pockets because a Windsor presides at the annual dinner.[a] It might be noted that social welfare activists are not unanimous in expressing gratitude for royal patronage; a Glasgow voluntary worker writing in a professional journal has commented on the anomaly of excessively wealthy individuals making a symbolic commitment to the disadvantaged:

> Identification with the unelected monarchy is at odds with some of the values implicit in social welfare. . . It is wrong, in my view, if members of the royal family have several huge residences in a society where 500,000 people are homeless or in adequate accommodation. Yet how can charities in this field criticise them if the same royals are their patrons?[66]

Doubtless, many worthy causes and deserving individuals have benefited from the activities of such initiatives as the Prince's Trust. Trustees inevitably enjoy more flexibility in awarding grants than does a Treasury-regulated, parliament-accountable government department, but much the same applies to National

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[a] Anthony Holden is distinctly unimpressed: That such a lightweight [the then Duchess of York] should by virtue of marriage become patron of more than a dozen charities, not to mention the Chancellor of Salford University, is a mark of the absurd self-expectation of monarchy. [Holden, 1993, p. 88]

Lottery funding, and the recycled funds are in no real sense gifts from privately earned surpluses but are effectively public property on which a 'private' label has, anomalously, been attached.

Edward VII was probably the last monarch to be thought of as a leader of 'society' (in the tradition of the Prince Regent/George IV).[a] What then remains is not so much a function, but the unenviable fate, of taking leading roles in an unending tabloid soap opera. This insight, supplied by Malcolm Muggeridge[67] half a century ago leads on to the concept of celebrity in relation to the monarchy; it is explored further in Chapter 2 (--- *Public attitudes; the media and the cult of celebrity*).

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1 Central Office of Information, 1974, p. 1
2 Cannon & Griffiths, 1998, p. 34
3 Dimbleby, 1994, p. 9
4 Blount, 2002, p. 53
5 cited by Holden, 1993, p. 200
6 Wilson, 1989, p. 125
7 Cannon & Griffiths, 1988, p. 56
8 *ibid.*, p. 401
9 Harris, *History Today*, Vol 55 (06), pp. 40-45
10 Bogdanor, 1995, p. 10
11 Anson, 1922, p. 54
12 Cannon & Grifiths, 1998, p. 444-445
13 Henshall, 1992, p. 86
14 Hall, 1992, pp. 7-8
15 Hennessy, 2000, p. 41
16 Bagehot, 1990, p. 8
17 Tomkins, 2002, p. 747
18 Hardie, 1970, pp. 17-18
19 Letters, vi, 523; cited in Hardie, 1970, p. 34
20 Hardie, 1970, p. 138
21 *ibid.*, p. 43
22 *ibid.*, pp. 136, 137, 139-40
23 *Sunday Times* (Freeman & Jones), 20 July 1986; *Tie Tmes*, 27 July 1986
24 *The Times* (Evans & Webster), 16 July 1986; *The Times* (Hill), 16 July 1986; *Sunday Times* (Freeman), 20 July 1986; *Sunday Times* (Jones), 20 July 1986
25 *The Times*, 27 November 1988
26 *Sunday Times*, 8 April 1990
27 *Sunday Times*, 16 December 90
28 Dangerfield, 1997, p. 45; Hattersley, 2004, pp. 168-170; Pearce, 1999, p. 285
29 Bogdanor, 1995, pp. 90-93; Holden, 1993, p. 165

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[a] Charles Douglas-Home dates the final demise of royal influence in this area precisely to September 1968, when the Lord Chamberlain's licensing of stage plays was abolished! [2000, p. 194]

[30] Prochaska, 2000, p. 185; Hamilton, 1975, p.106, Bogdanor, 1995, p. 90
[31] Hennessy, 1995, p. 56
[32] Horne, 1998 (Vol. 2), pp. 556-566
[33] Bogdanor, 1995, p. 149
[34] IPPR, 1991, *passim*
[35] Hennessy, 1997, pp. 16-33
[36] Oliver, 2003, pp. 203-206
[37] Fabian Society, 2003, pp. 53-54
[38] Harvey, 2004, p. 39
[39] Executive Powers and Civil Service Bill, Section 2(1) [later renamed Civil Service (No 2) Bill]
[40] Hames & Leonard, 1998, p. 25
[41] Allen, 2001, p. 86-7
[42] *ibid*, p. 65
[43] Select Committee on Public Administration, Minutes of Evidence, 7 July 2003, Q 184 (United Kingdom Parliament website)
[44] PASC, Press Notice No. 19, 20 October 2003
[45] Chapman, *Daily Mail*, 21 October 2002
[46] *ibid.*
[47] PASC Press Notice No. 19, 2002-3, paragraph 7: United Kingdom Parliament website
[48] Select Committee on Public Administration, Minutes of Evidence, 10 April 2003, Q 2 (United Kingdom Parliament website)
[49] *ibid.*, Q 5
[50] 1995, p. 175-177
[51] IPPR, 1991, p. 33 of *Constitution* text
[52] *Swedish Constitution Ch. 6, Art. (2) (1) and (2); Art. (3)*
[53] *The Times*, 8 April 1974, cited at Bogdanor, 1995, p. 80
[54] *ibid.*
[55] Finer, Bogdanor & Rudden, 1995, p. 73
[56] Duncan, 1970, p. 160
[57] cited in Hennessy, 1997, p. 42-3
[58] *op. cit.*, p. 73
[59] *ibid.*, p. 76
[60] Harvey, 2004, p. 35
[61] *ibid.*, p. 41
[62] Hennessy, 1997, p. 74
[63] *ibid.*
[64] Bagehot, 1990, p. 42
[65] Prochaska, 1995, *passim*
[66] Holman, 17 November 2005
[67] *New Statesman*, 22 October 1955, pp. 499-500

Chapter 2: The Debate

The first Chapter of this thesis has attempted to sketch out how the British monarchy has evolved into its present condition and to itemise its residual powers and functions. In Chapter 2 attention is switched to dissenting views on how the state might be presided over.

--- Republicanism

Given that all but a handful of the world's non-monarchies have the word 'republic' in their official designation, it might be supposed that the word signifies little more than 'absence of monarchy'. In popular usage that is just what it does mean, and that has held good since at least 1721 when Montesquieu[1] used it in that sense. Formal legal and academic usage is unhelpfully inconsistent with different disciplines and sub-disciplines observing different conventions. Philip Pettit's presentation of republicanism as an alternative to liberalism and communitarianism[2] engages with issues such as the principle of non-domination, a concept which other scholars struggle to distinguish from classical (or neo-) liberalism's ideal of 'non-coercion'.[a] He expands on, for example, 'the empire-of-law',[b] 'dispersal-of-power' and constraint on the majority, but does not find it necessary to discuss monarchy – even as an antithetical concept. Specialised usage allows formal monarchies to qualify as 'republics'. Kant,[3] for example, argued that a constitutional monarchy had a better claim to the label 'republic' than pure democracy (which he viewed as majoritarian despotism). John Adams wrote:

> The British constitution is nothing more or less than a republic, in which the king is first magistrate. This office being hereditary, and being possessed of such ample and splendid prerogatives, is no objection to the government's being a

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[a] As pointed out by, for example, Tomkins [2005,p. 47] the contention of 'republican' writers such as Pettit and Quentin Skinner that *the very possibility* of domination (even if it not be exercised) constitutes servitude illustrates where this school of thought parts company from classical liberalism. Zagorin [2003, p. 705] views this distinction as unworldly hair-splitting: 'if this were true, then liberty surely would not exist', and suggests that the writers in question were not familiar with Hayek's exposition of the liberal concept of freedom.

[b] a concept formulated by James Harrrington. (*Oceana*, publ. 1656)

> republic, as long as it is bound by fixed laws, which the people have a voice in making, and a right to defend.[4]

Fuller's[5] inclusion of Whig Britain as a post-classical exemplar of a republic follows in those footsteps. Bagehot's famous (notorious?) remark (see next paragraph) is also in that tradition, as is Tennyson's "crown'd Republic's crowning common sense" which was picked up by H.G.Wells and constitutes a central argument of Dr. Prochaska's work.[6]

Prochaska also identifies the difficulty of pinning it down:

> It remained a slippery and contentious concept among contemporary theorists. At its most basic, it could simply be a tag for anti-authoritarianism. In America, a parallel school of political commentary had mutated republicanism into a host of modish interpretations.[7]

Leaving aside whether Prochaska has himself defined republicanism (reading his text suggests something akin to Adams's understanding) the rationale for his irritation is apparent. A work he cites as authority for this view, Daniel T Rogers's article '*Career of a Concept*', provides a blow-by-blow account of in-fighting between American academics in the course of which 'republicanism' came to be recognised as an academic sub-discipline, one which views the concept variously in terms of, *inter alia*, 'Americanisation' of Locke, of the incorporation of the English puritan ideology into American politics, a protective mechanism of the antebellum South against real or imagined corruption from the industrialised North, an inspiration for the resistance of sundry groups of have-nots against their oppressors, an accommodation of classical liberalism, or a response of eighteenth-century Americans to: 'the fragility of their experiment in a kingless republic'.[8] All of these are interesting enough in their own terms but are exclusively American preoccupations, not all readily universalised, though Fuller goes some of the way in:

> Republicanism's new lease of life largely reflects the need to find a justification for the state's existence after the decline of socialism, given that liberalism and communitarianism justify social cohesion in non-statist terms (i.e. self-interest and cultural identity, respectively).[9]

Some scholars have taken note of the anomaly. David Craig in a historiographical review of the monarchy/anti-monarchy debate wrote:

> The most avid reformers generally consider that republicanism is an essential feature of any truly modern state. What they mean by republicanism, however, is rarely explored satisfactorily. In particular, these popular political writings are rarely aligned with work on republicanism in early modern history, which had been of growing significance ever since the publication of J.G.A. Pocock's *Machiavellian Moment* in 1975.[10]

Zagorin makes the reasonable observation that a reader might suppose that:

> [R]epublicanism, whatever else it might entail, has historically signified the belief in a form of government that excludes monarchy or the rule of a single person,[11]

an understanding that would have been considered a truism in ancient Rome. He further observes, however, that less restrictive definitions prevailed in, for example, early modern Poland and the Netherlands (see also Chapter 4, *Netherlands*).

Adam Tomkins (here discussing the work of F. Michelman) freely acknowledges the ambiguity:

> There is more to republicanism than worrying about one's head of state. … [N]otions of civic virtue, self-government, the promotion of public good, active citizenship, deliberation and participatory politics are all, rightly, acknowledged to be key themes in republican thinking.[12]

Despite the title: '*Our Republican Constitution*', the minutiae of Tomkins's (radical) programme for reform[a] suggests that he is far from convinced by the republican credentials of existing arrangements, but he identifies republican influences in the historical development of the unwritten constitution and, through enthusiastic endorsement of the mechanisms of political accountability, implies recognition of a surviving republican tradition:

> The republican approach to constitutionalism is not an import, constructed out of ideas borrowed and transplanted from

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[a] i) abolition of prerogative ; ii) strengthening Freedom of Information legislation; iii) Parliamentary reform, including an elected Upper House and abolition of party whipping (!); iv) Removal of the 'Crown', both as a legal device and as a personal office.

> elsewhere, but is one that derives from an analysis of the values inherent within the British constitutional order.[13]

It is clear that terminological ambiguity requires modern readers to check on an author's assumptions. An illustration is provided by Chapter 2 of Hennessy's '*The Hidden Wiring*', in which the author sets out to refute Bagehot:

> It is altogether ironic … to have to say baldly that Bagehot in his second most famous line on the British monarchy was plain wrong. 'It has not been sufficiently remarked,' he opined in the mid-1860s, 'that a change has taken place in the structure of our society … A republic has insinuated itself beneath the folds of a monarchy.'[14]

To illustrate his case, Prof. Hennessy proceeds with a forensic critique of the Victorian sage, but without revealing what he, Hennessy, understands by 'republic'. From his methodology – copious citation of examples of intervention in the political process by twentieth-century monarchs (a similar list to that recited in Chapter 1, *Decline of royal prerogative; 20th Century*) – it might be inferred that he interprets 'disguised republic' as a state in which the monarch has been divested of all discretionary powers. Hence, where some powers (beyond the purely formal) survive, such as in contemporary Britain, 'republic' is an inapplicable label. The proposition is defensible, but it might be asked, if a largely formal presidency can retain a limited armoury of reserve powers, why should the label 'disguised republic' be withheld from a similarly equipped monarchy? Prochaska, for example, [*op cit., passim*] uses much the same evidence to come to a diametrically opposite conclusion. Tracing the impact of familiar events such as the Reform Acts and the 1911 Parliament Act, drawing attention to the steady attrition of royal powers as they have migrated to elected representatives, he concludes that a 'republic' exists.

Spokesmen for the most articulate coherent republican movement, '*Republic*', have no truck with such equivocation, firmly identifying absence of monarchy as a *sine qua non*:

> The cynical assertion that Britain is in effect a republic is calculated to make republicans wonder whether they are not making much ado about nothing. It is sophistry to define 'republic' in such a way as to make it applicable to Britain in 2003. By any

> normal criteria a republic must have an elected Head of State, popular sovereignty, and general acceptance of the equal worth of all its citizens. Britain currently satisfies none of these criteria.[15]

Another variant is expressed by the journalist Nick Cohen writing at the time of the Prince of Wales / Parker-Bowles marriage:

> I used to lose my temper when people said that the Queen had no political power, because they wilfully missed how the monarchical powers of the sovereign have passed to the executive and left the British with a prime minister who could declare war, sign treaties and stuff the quangocracy with his appointees[,][16]

- all of which is quite correct, but might be over-optimistic in its implication that abolition of the monarchy would automatically provide a remedy.

--- towards a definition

'There is not a more unintelligible word in the English language than republicanism,'[17] wrote John Adams. A satisfactory definition, therefore, is likely to prove elusive. Despite its liberal use in numerous basic documents, such as Article IV of the US Constitution, by which 'The United States shall guarantee to every State in this Union a Republican Form of Government,'[a] legal pronouncements on just what is being guaranteed are few and far between, and none is conspicuously satisfactory. As long ago as 1793 the US Supreme Court held that a republic was a state 'constructed on this principle, that the Supreme Power resides in the body of the people.' Many calling themselves republicans would go along with that formulation, but would remain conscious that it is not incompatible with a constitutional monarchy. Subsequently, the South Carolina justices defined it simply as 'the state', and their counterparts in Oregon as: 'government by representatives chosen by the people' – which many will find difficult to distinguish from democracy.[18] Such an understanding has a distinguished history, being, for example, enshrined by Noah Webster in his

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[a] This and all subsequent citations of constitutional texts in this thesis refer to the on-line version listed in the bibliography.

dictionary in 1828 citing as his authority James Madison's *Federalist 10* of 23 November 1787. The distinction between classical direct democracy (Athenian-style) and modern representational democracy –which is what Madison equated with republicanism – is not useful in the modern world. It might be questioned whether broader definitions of republicanism are relevant if they add nothing to 'democracy', a concept not without its own problems, but commanding a greater shared understanding and still carrying a core message consistent with its origins and recognisable from its etymology, despite decades of abuse.

Lexicography also offers, from Samuel Johnson[19] (citing Addison), 'a government of more than one person'. More recently, 'Collins' defines it as: 'a form of government in which the people or their elected representatives possess the supreme power',[20] and the Oxford English Dictionary goes a little further by bringing out the contrast to monarchy with:

> a state in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a king or similar ruler; a commonwealth. Now also applied to any state which claims this designation.[21]

Ambrose Bierce's: 'a nation in which, the thing governing and the thing governed being the same, there is only a permitted authority to enforce an optional obedience'[22] adds another, important, nuance.[a] Fuller illustrates the notion by reference to: 'the US Constitution's rule by countervailing forces'.[23]

In his discussion of what is, and has been, conveyed by the word 'republic' over a span of centuries, William Everdell concludes:

> The word still means primarily, in every European language, the absence of kings and tyrants, dictators and despots, and one-man rule of every description, even the unlimited power of a democratically elected executive.[24]

The formulation is beguiling, though it might be noted that it disregards those polities that insist on attaching the label to outrageous tyrannies; and the notion

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[a] An unusually 'straight' observation by a normally (sardonically) humorous writer; his definition of 'Republic', more typically, *begins*: 'A form of government in which equal justice is administered to all who can afford to pay for it.'

that Britain is already, in some sense, a republic does not sit easily with the last clause. Furthermore, it does not deal explicitly with the king who is not a tyrant, dictator or despot and who does not exercise one-man rule.

If simple equivalence with democracy is to be discarded on grounds of tautology and identification with non-monarchy makes the term too imprecise to be useful, what then remains of this elusive idea? There is no completely satisfactory *table d'hôte* definition, and no *à la carte* version meets everyone's requirements.

The motivations of 'republicans' who base their critique on such considerations as the absence of democratic oversight of the royal prerogative and the pervasiveness of the executive-driven state (a phenomenon having its roots in Britain's past as an executive-monarchy) contrast with those primarily offended by ostentation, media-encouraged mawkishness and the irrationality of the hereditary principle. Serviceable, if not strikingly satisfactory, shorthand labels might be 'constitutional republicans' and 'cultural republicans'; the two categories overlap, but have separate progeneses. The distinction is significant to the extent that the former could be content with putting the monarchy into a sturdy legal box - which, it can be argued, is precisely what has happened in the surviving continental European monarchies. That many objections to monarchy expressed by 'constitutionalists' can be addressed within the framework of a nominally monarchical state is illustrated by (most conspicuously but not exclusively) Sweden which, as will be seen in Chapter 4, is an extensively 'constitutionalised' state while remaining a monarchy. Mere abolition of the monarchy would not satisfy true constitutional republicans who, taking the view that only a cosmetic issue had been dealt with, might prefer to keep existing arrangements. 'Cultural republicans' will normally sympathise with constitutionalists' goals, but would be prepared to accept piecemeal reform if the alternative was none; failure to reconcile these positions is a partial interpretation for the failure of the 1999 Australian republican project. What is meant when a state is classified as a 'republic' therefore has significance beyond the semantic; what might look like an over-fine distinction could disguise a real difference. Furthermore, terminology can be the occasion of muddled

thinking and obfuscation, sometimes deliberate. This debate is revisited from time to time in this thesis and is intertwined with the notions or the 'strong' *versus* 'weak'[a] republic, and the concept of constitutional density.

Despite these difficulties, it might be possible to hazard a rough outline of what is meant by 'republic' on the following lines. It would be a polity where; (i) citizens owe allegiance to an institution and not to an individual; (ii) those who administer the state are answerable to the people; and (iii) the rule of law is applied equally. It would, in the modern world, (iv) probably be a liberal democracy (placing a question mark over the oligarchies of the classical world and renaissance Italy that went by the name of 'republic'[b]); could (v), if certain conditions were met, be nominally a monarchy; would (vi) possess an accessible and legally enforceable constitution in which a degree of separation of powers applies and basic rights are observed even if not formally entrenched; would (vii) be a haven for 'republican virtues', and would (viii) be inhabited by citizens, not subjects. It would, (ix), entail wider dispersal of power than that offered by the doctrine of parliamentary sovereignty under which the leader of a majority in a non-proportional assembly enjoys near-absolute authority, unchecked by a strong second chamber, a formalised constitution or a head of state with the democratic legitimacy to exercise true minatory influence. Power would not be in the hands of one individual. It would not be expected that heredity would normally be a qualification for public office, but if it were to be accepted that a monarchy operating firmly within the rule of law and within the constraints of unambiguous and transparent constitutional arrangements were to qualify for the title of 'republic' it could still play a limited role. It should be fairly clear that while anti-monarchism and republicanism often coincide they are not necessarily identical concepts.

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[a] As used in this thesis, a 'strong' republic is not one where the executive exercises power with little or no check. On the contrary, a 'strong' republic means one where the *institutions* are strong, e g. a prime minister cannot bypass the requirement for democratic consent through such devices as royal prerogative.

[b] Webster recognised that his definition seemed to exclude celebrated classical exemplars.

--- *History of Republicanism in UK*

In Britain the cause of 'presidential' (or anti-royal) republicanism might have a distinguished intellectual history, but a patchy one as a political movement enjoying mass support. Whether the one practical, premature, experiment in home-grown republicanism, coming about more or less by accident, had much ideological underpinning before the event, as opposed to improvised rationalisation, for example, during the Putney debates, is a topic of scholarly debate. Blair Worden argues that:

> few of the regicides and those who supported the king's removal were republicans, and that the creation of the English commonwealth in place of the monarchy was much more the result of a commitment to parliamentary sovereignty than to republican government[25]

and:

> republicanism as an ideology barely existed before 1649,[a] and the objective of the regicides was 'to remove a particular king, not kingship. They cut off the king's head and wondered what to do next'[26]

Tomkins comments on the disassociation of theory and practice:

> The period between the execution of Charles I in 1649 and the restoration of Charles II in 1660 witnessed both an explosion of republican writing and a series of constitutional experiments. There was little connection between the two, however. Certainly Cromwell's Instruments of Government - the constitution of the Protectorate - contained little of which a republican could approve, elevating as it did the authority (including the law making authority) of one man over that of the representatives.[27]

A dissenting view is advanced by Norbrook[28] who identifies a flourishing republican literary culture as early as the 1620s, and by Richard Tuck:

'willingness to contemplate some kind of republican government ... from an early date and amongst a surprisingly wide range of people.'[29]

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[a] The Levellers' *Agreement of the People* (1647) aspired to parliamentary sovereignty but was not avowedly republican.

Republican ideas have been detected in the work J S Mill,[30] is openly expressed by Bentham;[a] Tom Paine[b] can be claimed as one of its more distinguished theoreticians, even if more honoured in France and America than in his homeland and Locke inspired American republicanism.[c] Typically, abolition of the monarchy was absent from the celebrated wish-list of the Chartists who had other priorities.[d] Closer to the present time, a series of thoughtful studies by respected reformist institutions has opted for continuation of the monarchy, at least for the time being, though in a very much scaled-down form and with the ending of residual political functions. Charter 88's original *Charter* avoided the issue of 'republicanism' (in the 'absence of monarchy' sense), though its call for, *inter alia*, a constitutional settlement to: 'subject executive power and prerogatives, by whomsoever exercised, to the rule of law' leaves the question open. Other demands, *viz*, to: 'place the executive under the power of a democratically renewed parliament and all agencies of the state under the rule of law', and to: 'draw up a written constitution'[31] are very much within republican modes of thought. The IPPR's draft constitution retains the monarch, specifically 'Queen Elizabeth II and her Heirs and Successors', as Head of State[32] but within a strict legal framework, and allows 'no remaining prerogative powers of political significance.' The commentary smacks of a compromise between abolitionists and retentionists:

> The replacement of the Sovereign by an appointed or elected official, should it ever be thought desirable, could be achieved by a constitutional amendment replacing this Article, but

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[a] Bentham wrote: 'Every Monarch is a slave-holder upon the largest scale' [Schofield (ed.), 1989, p. 171] & 'at any given period the fate of all its members will be in the hands of a madman' [*ibid.*, p. 161]

[b] a recurrent theme in his work, particularly '*The Rights of Man*' (1791), written partly in response to Burkes's attack on the French Revolution, and '*Common Sense*' (1776)

[c] Locke's influence on Jefferson's thinking is considered self-evident by the authors of the US National Archives website page on the Declaration of Independence. [US National Archives website]. Parts of the Declaration are clearly based on Locke's Second Treatise. [Locke, 1690]

[d] Republicanism (of one kind or another) was certainly a common private belief of individual Chartists – approving references to Oliver Cromwell were widespread in Chartist literature – but: 'The Chartist Movement', wrote Kingsley Martin in 1962, 'did not include the abolition of the Monarchy in its six points only because it assumed that monarchy, like other medieval relics, would disappear when the working class attained political power.' [Pickering, 2003, p. 228]

> without alteration to the structure of the Constitution as a whole.[33]

Similarly, the Fabian Society's 2002/3 self-appointed '*Commission*' on the '*Future of the Monarchy*' recommended, *inter alia*, ending of the sovereign's residual constitutional powers and placing the prerogative exercised by ministers on a statutory basis, but avoided direct discussion of the merits and demerits of outright abolition.[a] 'Our aim was to define the office of Head of State appropriate to modern Britain – whether that office was filled by an hereditary monarch or an elected president.'[34] The motivation behind the prescriptions of these centre-left bodies is not, it would appear, any great affection for monarchical forms but a pragmatic calculation that abolition would be troublesome and distract attention from higher priorities.

A notable historical exception to the rule of popular indifference was the sudden blooming and equally rapid decline, of the 'republican club' movement between circa 1871 and 1874.[35] Whether the movement strictly merited the designation 'republican' can, with the benefit of hindsight, be questioned. In what has the characteristics of constitutional republican critique of cultural republicanism, Antony Taylor writes:

> Throughout the campaign, its leaders described themselves as 'republicans'. Despite their frequent use of the term, however, they never put forward an effective model for a non-monarchical constitution, and their concerns were overwhelmingly those of an older generation of anti-monarchists.[36]

> Ultimately, the movement that emerged in Britain in the period 1870-71 was an agitation that might best be described as anti-monarchism or 'crude republicanism'. It is not alien to the English radical tradition but, on the contrary, integral to it. This set of ideas is distinct from the experience of contemporary European counterparts; it was never characterised by a declaration of rights of citizenship nor did its adherents espouse a republican project rooted in classical precedent.[37]

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[a] Not the first time the Society has turned its corporate mind to the topic. The then General-Secretary authored a pamphlet in 1996 and, as long ago as 1952, Michael Stewart, later Harold Wilson's Foreign Secretary, prescribed some mildly reformist measures in an article in the house journal [*Fabian Journal* (1952) viii, pp. 17-21; cited extensively in – (*Edgar*) *Wilson, 1989, pp. 171-173*]

The phenomenon had its roots in Victoria's withdrawal from public visibility following Albert's death in 1861. As Piers Brendon comments: 'the republican movement, which reached its apogee in the early 1870s, was stimulated by too little rather than too much monarchy',[38] but birth of the French Third Republic in September 1870[a] had a catalytic effect and impetus was provided by suspicions, later proved well-founded, that the Queen was salting away surpluses from the Civil List[b] while demanding publicly funded settlements on her younger children as they reached majority or marriageable age.[c] The Land and Labour League[d] and the National Secular Society[e] first served as vehicles for radical opinion opposed to the monarchy but the movement quickly acquired an independent momentum with over one hundred clubs[f] coming into existence between February 1871 and May 1874.[39] Since approximately half the clubs were formed at a later date, the movement certainly *survived* the 'mawkish climate of pro-monarchist and anti-republican sentiment'[40] occasioned in the press by the Prince of Wales's serious illness (started November 1871), subsequent recovery and government-organised 'Thanksgiving' (March 1872) – often identified as the proximate cause of its decline (by, amongst others, Prochaska[41] and Hardie[42]).

In the end, it fell victim to association whipped up by the popular press with violence (excesses in France identified as inevitable consequences of

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[a] other contributory factors were the Prince of Wales's sybaritic life style as exemplified by his being cited as co-respondent in the Mordaunt divorce case in 1870; and the Queen's ambiguous relationship with John Brown. Taylor also detects some backwash from the deposition of Queen Isabella of Spain in 1868 and the subsequent experiments with republican government. [Taylor, 1999, p. 87]

[b] see, for example, Hall, 1992, p. 17-18

[c] Princess Alice, born 1843, married 1862; Prince Alfred, born 1844; Princess Helena, born 1846, married 1872; Princess Louise, born 1848, married 1872 to the Marquis of Lorne, heir to the extremely wealthy Duke of Argyll – but parliament (in 1871) granted a dowry of £30,000 and annuity of £6,000; Prince Arthur, born 1850, granted annuity of £15,000 in 1871 – opposed by 54 MPs

[d] Founded October 1871

[e] founded in 1866 when pre-existing London and provincial societies were federated with Charles Bradlaugh (1837-1891) as President. It served in the early days as a vehicle for his views. The NSS remains active, campaigning on such issues as C of E bishops in the House of Lords, disestablishment, the blasphemy law, and the religious elements of the Coronation ceremony.

[f] Rumsey has traced the existence of 103, with memberships ranging from up to 500 in Leicester, 250 in London (excluding branches) and Bolton and numerous others of 40 or 50: possibly five or six thousand nationally at the peak. [*op cit.*, p. 78]

republicanism), milking of middle-class opinion by the leadership of the main political parties, the Conservatives' general election victory of February 1874, cooling of middle-class radicals (Dilke, Joseph Chamberlain) on republicanism and the pusillanimity of the leadership supplied by national leaders such as Charles Bradlaugh and Odger[a] for whom republicanism took second place to other causes (secularism and socio-economic reform respectively).

Notwithstanding sporadic outbursts of reluctance of groups of ratepayers and local authorities to pick up the tab for local celebrations of Victoria's two jubilees,[b] for the next century the crown was, for the most part, protected by a strange taboo which categorised any criticism, however mild, as beyond the bounds of acceptable behaviour. Moderate republicans and, for that matter, monarchist reformers, were anathemised for the mildest of criticisms – or even helpful suggestions for burnishing the royal image. Thanks to a compliant press, state-monopoly radio (few other media existed) and some smart foot-work by Stanley Baldwin, the 1936 abdication crisis passed with deference intact, though not without some wobbles on the way. A proto-opinion poll, according to Anthony Holden, recorded support for the monarchy, briefly, down to fifty per-cent,[43] and Brendon records that: 'a Tory MP, Sir Arnold Wilson, said that in a free vote at least a hundred members of the Commons would have plumped for a republic.'[44]

Any anti-monarchist polemic appearing in the first three-quarters of the twentieth-century was discounted as extremist ranting, probably inspired by Bolshevism. In his biography of Queen Elizabeth, Ben Pimlott describes the mood:

> The right found the subject embarrassing, like sex. The left regarded it as irrelevant. There were marginal objectors - Irish Republicans, for instance and British Communists. The Royal Family occasionally offended opponents of field sports, or Protestant sects with a firm view on Sunday observance. Such

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[a] George Odger (1820-77); Trade Union activist, first president of the International Working Men's Association (until he clashed with Marx), co-founder of the Land and Labour League

[b] Antony Taylor cites Congleton, St George's in the East (E London), Briereley Hill, Audenshaw (Manchester), Neath and Cardiff. According to Taylor, *Reynold's News* reported mildly violent protests at Oldham, Walton-on-the-Naze, Frinton (? these last two hardly hotbeds of radicalism – and close enough to each other to arouse suspicion of double counting), and Cleve Hill, Gloucs. [Taylor, 1999, pp. 137-138]

> 'conscientious' opposition tended to confirm the identification of anti-monarchism with extremism and eccentricity.[45]

In 1957, still in the age of uncritical reverence, the then Lord Altrincham (pending reversion to John Grigg when it became possible to renounce the title), writing in a small circulation Conservative journal, opined that the Queen was cut off from the majority of her subjects by 'tweedy,' 'out of touch' and 'complacent' courtiers. For these remarks, directed against royal functionaries rather than the monarch, royalists could bring themselves to forgive the author. His offence was to characterise the Queen as coming over as a 'priggish schoolgirl' with a speaking style that was a 'pain in the neck'. Wrath fell upon his head. Altrincham was pilloried by the press, threatened physically by a British heavyweight champion boxer, assaulted by a militant Empire Loyalist, described as 'very silly' by the Archbishop of Canterbury, dropped from the panel of *Any Questions* by the BBC, and had excrement pushed through his letterbox.[46] It might be surmised that the intemperance of the reaction owed something to the perception of class treachery by a member of the establishment.

Two years earlier, the journalist, Malcolm Muggeridge, writing in the *New Statesman*, identified with what now looks like prescience, the real life soap opera the media had constructed out of the domestic doings of the royal family – and that in an era before the notion of 'soap opera' had gained wide currency in Britain. Like Altrincham, Muggeridge was at first treated with little worse than condescension; he was a mere radical (at the time) journalist of whom nothing better could be expected - not the editor of a Conservative ideological journal or the son of a Conservative MP - and had directed his fire mainly at a third party, namely sycophantic journalists. But his 1957 attribution (in New York's *Saturday Evening Post*) to unnamed duchesses of the view of the Queen as 'frumpy and banal' was seen as personalised:

> his punishment was even more vicious than Altrincham's. His letterbox was fouled but his house was also vandalised, his life threatened; and his journalistic contracts, with newspapers and the BBC, ripped up. He was spat on in the street, and among his hate mail, there were letters expressing pleasure at the death

> of his son who had been killed in an accident. Royalist worship clearly contained a primal rage.[47]

In the 1970s the chief quarry of the royalist attack pack was the MP for West Fife, Willie Hamilton. From time to time he denied that he was a republican, claiming to be more of an egalitarian, having prescribed "sack the royals, except the Queen, her husband and Charles; pay them properly and take over the two Duchies", but he was not slow in unambiguously expressing his low opinion of royalty:

> My own view of the British Monarchy is that it is our only living museum - a human equivalent of London Zoo, but giving much less pleasure than the chimpanzees' tea party, and running at much greater cost.[48]

He concentrated on the costs of royalty describing Princess Margaret as 'an expensive kept woman' and the royal family as 'the loftiest symbol of wealth and privilege.' His book, *My Queen and I*, attracting enhanced attention for its publication coinciding with a controversial request of a Civil List increase, was seized upon by opponents who derided him as an obsessive and by other MPs who heckled him as a crank. *The Times Literary Supplement* dismissed the work as a 'monstrous irrelevance'.[49] Fifteen years later some of the same attitude lingered in a condescending obituary in the *The Times*:

> The work proved in the long run rather an embarrassment to Hamilton's cause: his view of the monarchy, when presented in full in one place, was very obviously one-dimensional. Thus it was less provocative than the impact made by a single topical quip. It was clearly not a view of the British monarchy in the round - nor, indeed, of the alternatives to it.[50 a]

Pimlott identifies the mid-1970s as a staging post on the road to freeing-up of public discourse:

> The capacity of such remarks to cause outrage was one reason why his [Hamilton's] book received wider coverage that any attack on the Monarchy since Muggeridge. Another reason, however, was that the Monarchy had slipped almost imperceptibly from being an issue on the fringes of, or above politics, to being one within it.[51]

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[a] There must be a suspicion that the author of this travesty had not read the book.

Probably the last notable manifestation of the 'death to blasphemers' mentality was as late as 1986 when Piers Brendon, author of *Our Own Dear Queen*, was booed by the studio audience when appearing as guest in the '*Wogan*' television programme.[52]

A change of climate can, with the benefit of hindsight, be detected in the reaction in 1988 to Tom Nairn's *The Enchanted Glass,* an anti-monarchical polemic, but one which eschewed the usual 'soft' targets of extravagance and democratic deficit, concentrating instead on a vision of Britain as a nation obsessed with romanticised nostalgia for a distant imperial past and the conservatism that goes with it: 'the glamour of backwardness'.[53] The British media's specialists in vicious attacks, wrong-footed by the dry, ironic and distinctly non-populist tone and perhaps nervous that the argument might be above their heads, held off. Nairn was also knocking on a door just beginning to edge open; issues over which veils had been drawn were exposed to publicity. Pimlott relates that:

> There was a sequence to the rapid change in the public perception of royalty that occurred in the mid and late 1980s. Criticism of 'frivolity' - largely confined to the younger royals - came first. Then came the suggestion that the Royal Family was overpaid and undertaxed, and did not give value for money. Finally - after 'frivolity' and tax complaints had eroded much of what was left of traditional respect - the idea took root that the central myth of royalty was, indeed, no more than that. The Royal Family, it came to be said, was not a model of domestic virtue and private happiness but, in the modern jargon, dysfunctional.[54]

Britain was no longer the unquestioning deferential society of the fifties. Within the next few years a series of broken royal marriages, reports of which often surrounded by salacious details, ham-fisted PR (e.g., *It's a Royal Knockout*), and, shades of the 1870s, public disquiet about perceived extravagance - but now reinforced with scepticism about royal tax exemption - all conspired to transform attitudes. The passing of another milestone was recorded retrospectively in 1994 by Peter Riddell under the telling headline: '*Reason is not Treason in Monarchy Debate*':

> Serious politicians are not supposed to discuss the monarchy. It is thought to smack of a lack of soundness and good judgment … The wise-beards say, don't talk about the monarchy and risk

> being thought irresponsible. Successive leaders of the opposition have played safe to appear as loyal as any courtier. Such caution is understandable in view of the excitable reaction of Tory MPs, and much of the tabloid press, to even the mildest questioning of the role of the Crown. This is portrayed as near treasonable as Tories try to portray themselves as the party of the monarchy, as they used to be the party of the Church of England .... The Liberal Democrats' decision even to hold a debate on the monarchy at their conference … has been condemned as ''extreme socialism'' by Jeremy Hanley, the ready-with-a-soundbite new Tory chairman. ... This reaction is short-sighted and muddled .... In the Crown's own long-term interests, the fog over its political role needs to be lifted. That is an overdue subject for political debate. Contrary to Bagehot's view 125 years ago, its mystery is no longer its life.[55]

A succession of well-publicised events served to keep the pot simmering. Conspicuous among them was the Palace's response to the Princess of Wales's death, judged pusillanimous not only by the usual suspects in the popular media, always on the look out for a free ride on the back of an outbreak of public sentimentality, but by a detached observer like Anthony Barnett who discerned genuine popular feeling, perhaps encouraged by the media but not instigated by them:

> In 1997, more people than ever before at a single moment in Britain's history interpreted the meaning of the nation through its relationship to the royals. And the Queen was very definitely not the one who was doing the interpreting.[56]

An analysis of those strange September days in 1997 prompted a sociologist (McGuigan) to speculate:

> What if New Labour had decided to seize the opportunity to ditch the monarchy? Might they have succeeded? At the very least, one can say that an historic opportunity to really test the institution of monarchy in Britain was missed.[57 a]

Thereafter, prospects of avoiding unwelcome attention were sabotaged by the 'Sophiegate' affair[58] of April 2001 when a newspaper stunt entrapped the Queen's daughter-in-law into making indiscreet remarks about public figures and, more seriously, into appearing to use royal connections to further the commercial interests of a public relations company with which she was connected. In the

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[a] A central argument of this thesis is that no such project could have succeeded; public irritation with the Palace would not have survived the long-haul of republican legislation.

following year an upsurge in monarchist sentiment, triggered by the death of the dowager queen and the jubilee commemoration, seemed to have restored the position, but in the autumn a convoluted affair involving a former butler disposing of the property of the deceased ex-wife to the heir to the throne put the institution into further disrepute: this time with the Queen herself heavily involved.

--- Monarchism v. (Presidential) Republicanism

For its apologists, monarchy sustains the legitimacy of the state, disinterested mechanisms of heredity ensuring that the office of head of state is undisputed and not the object of undignified political squabble. Since it carries no party political baggage, monarchy can, Bogdanor maintains: 'represent the whole nation in an emotionally satisfying way; it alone is in a position to interpret the nation to itself,'[59] and can allow all strata of society to be reconciled to otherwise controversial measures. According to Hames & Leonard:

> [a]nthropologists tell us that societies look for a figure that can act as a focal point for the community: to live out their hopes and fears and to represent them. In Britain, this is fulfilled by the monarchy.[60]

Raj Persaud, a psychologist, writing in the same compilation of essays, advances a similar idea arising from his field:

> [T]here might be a basic human need for an 'upwardly directed' relationship in which a superior figure is looked up to. This would explain the universality of God figures in cultures around the world, perhaps filling a need created by the earlier parent-child relationship.[61]

Others suggest that the trait might be even more fundamental in nature.

According to Webb:

> Notions of status and hierarchy are commonplace in social creatures. The pursuit of wealth is normal, and riches maybe signalled by displays of conspicuous consumption. Status brings power and sexual advantage; *droit de seigneur* is rampant.[62]

The lesson is that it is futile to attempt to resist nature, but a republican will respond firstly, that mankind might hope to be judged differently from chickens,

chimpanzees, dolphins and wild dogs cited by the last author, and, secondly, any residual subservience to the pack leader or dominant male has translated to democratically-elected leaders.

A version of the monarchist case is set out with some eloquence by Piers Brendon, albeit as an Aunt Sally at which he proceeds to take shies, in an anti-monarchist polemic:

> No doubt the hereditary principle is archaic and unfair, but any other system will have its built-in disadvantages and inequities. To elect a head of state, for example, would cause division and instability. An astoundingly high proportion of the population favour the present regime, and in a democracy that should be enough to ensure its continuation. Republicanism in Britain is a caprice of cranks, sectarians and subversives. At best it is a shallow, mechanistic philosophy which ignores the subtle, organic nature of the body politic. At worst it is a dangerous, revolutionary creed, a form of atheism in politics which flies in the face of the crystallised wisdom of the ages and lays irreverent hands on the delicate fabric of society. It is a type of modern Jacobinism, excoriated by Matthew Arnold as a 'violent indignation with the past, abstract systems of renovation applied wholesale, a new doctrine drawn up in black and white for elaborating down to the smallest details a rational society of the future'.[63]

Geoffrey Wheatcroft put forward a minimalist, utilitarian defence:

> And yet constitutional monarchy is a convenience. If we must have states, then there must be heads of state. There's everything to be said for one who is chosen at random, who is above politics, and who can be admired as an abstraction in a way that no politician can be.[64]

Prochaska concedes: 'few people would opt for a system which turns on an accident of birth if they were devising a constitution from scratch,'[65] and one might search in vain for advocacy of introducing new monarchy where none previously existed. But since there can be no *tabula rasa,* it is argued, we must live with the history we inherit; it is practically impossible to envisage a mechanism which would bring about a generally acceptable alternative structure to Britain's existing monarchy without undue disruption. Allied to this argument, scepticism is expressed as to whether an elective process would produce an acceptable substitute; retired and/or failed politicians are easily mocked and deliberate

exclusion of politicians opens the door for undignified candidates from the world of entertainment.

For anti-monarchists the crown which: 'thrives in our deferential, class-conscious, irrational society - a society laden with snobbery, humbug and hypocrisy'[66] - represents a divisive rather than a unifying force. From this viewpoint the institution is overblown, inordinately expensive, operating on a scale quite disproportionate to its residual political significance,[a] and symbolises a demeaning infantilism which rests on the implication that the people are not to be trusted to chose their head of state and that some people are, by birth, 'better' than others. An irreconcilable anti-monarchist harbours: 'a hatred of the media grovellers, the anti-critical court slobberers, the palace-yard gossips, the peddlers of quack history cures and the bogus heritage hawkers.'[67] This visceral anti-monarchism is often presented in unsubtle terms, manufacturing its ammunition from two rather primordial materials, sex and money. As Craig puts it: 'These sentiments formed a basic tool-kit for anyone wishing to generate popular hostility to the royal family, and even pure republicans found it necessary to draw upon them.'[68]

An *Observer* leader made the case as follows:

> The monarchy remains a symbol of privilege over people, of chance over endeavour, of being something, rather than doing something. We elevate to the apex of our society someone selected not on the basis of talent or achievement, but because of genes. For all the lip-service that politicians of all parties pay to meritocracy, for so long as we have a hereditary monarchy, Britain enthrones and glorifies the exact opposite.[69]

The other strand of republican thought contends that the interests of the body politic would be better served by a thoroughgoing reform of institutions, of which replacement of a hereditary head of state by an elected one would be a beginning. The overriding objective would be to moderate the powers of an executive-driven

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[a] 'When King Olav of Norway visited Brazil officially, the previous year, he took a retinue of eight. The Queen [for 1968 State Visit] needed five aeroplanes, a yacht with 230 ratings and 21 officers … , two frigates, fourteen members of the Household, two plain-clothes police officers, seven officials, 24 staff including the Royal Pastry chef and a Page of the Presence, and a 22-piece orchestra.' [Duncan, 1970, p. 28]

state founded on a heavily whipped House of Commons majority which is only infrequently mandated by an increasingly apathetic electorate and inevitably, in the absence of effective institutional checks and balances, having a tendency to collude with an executive with which it has an unhealthily symbiotic relationship.

It could be argued that a 'third way' compromise exists in the form of a heavily scaled-down, 'modernised' monarchy perhaps on the Benelux 'bicycling' model. Naturally, ultras on both sides find the prospect unsatisfactory but it has some interesting features which are discussed elsewhere in this study (e.g. Chapter 4, *'Scaled-down' monarchy*)

The debate is notable for the propensity of each side to disregard the arguments of the other. Anti-monarchists argue [e.g., Nairn, 1988, pp. 246-250; Haseler, 1993, p. 91-2] that the institution has had a corrosive effect on industrial and commercial enterprise through its symbolisation of an archaic social system in which 'trade', engineering and science are held in contempt, but without making a particularly compelling case that a republic would cure the condition. Monarchists, e.g., Bogdanor, [1995, pp. 300-301] respond by denying correlation between republican government and economic success and overall progressiveness of societies citing comparisons between, say, monarchical Scandinavia and republican Italy or republican Portugal and monarchical Spain, but make no allowances for other factors having an impact on these societies or the nature of the surviving continental monarchies. For their part, republicans do not respond to the counter-argument; even *Republic*'s pamphlet purporting to respond to all monarchist arguments disregards this one.[70] Republicans take little account of the symbolic power of an ancient institution, and monarchists are inclined to muddy the waters by ascribing systematic causes to fortuitous mishaps in foreign republics. Preference for one side of the argument rather than the other appears to have more to do with temperament and psychology than with objective weighing of the evidence.

--- *Republicanism and Party Politics*

Republicanism owes nothing to the major political parties. It is hardly to be expected to appeal to Conservatives, save the occasional maverick[a] individual, but Liberals / Liberal Democrats, in other fields noted for constitutional innovation, have also left the issue alone. Even the Labour Party which might be expected to be the most temperamentally inclined to republicanism has a circumspect record. The last republican motion at the party conference was, in 1923, famously defeated[b] by 3.6 million votes to 386,000, while a House of Commons motion in 1936, in the wake of the abdication, attracted only five supporters. Labour Prime Ministers from Macdonald to Blair have given every indication of being seduced by the Bagehotian magic, although calculation of the potential political dividends has doubtless been a factor. Though there are reasonable grounds for supposing that a good number, possibly even a majority, of members of post-1997 cabinet leaned towards republicanism, few dared to break cover.[71] Those that showed signs of doing so, in some cases when remarks they had made in opposition days were recycled, received no encouragement from the Prime Minister. For example, Marjorie ('Mo') Mowlam's[c] admission to *Saga* magazine that she was 'not a great friend of the monarchy' and her suggestion that palaces might be made into public museums were quickly followed with denial and an 'apology' on her part.[72] A few years later, republicans reading Tom Utley's commentary on the announcement of

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[a] The neo-liberal, free market wing (often 'Conservative', but not 'conservative') is ideologically indifferent to monarchism, though individuals will have personal predilections.

[b] Peter Hitchens, the rightist commentator, sees layers of meaning: 'The 1923 debate came a few months before elections which were even then expected to put Labour in office for the first time since its foundation. It was a dangerous moment, the Party spent much of the conference noisily distancing itself from the wilder parts of socialism. Much of the time was spent rejecting an application for affiliation from the Communist Party. The platform knew that this subject would attract plenty of press attention, and that they could lose the next election in a matter of hours if they failed to handle it correctly. Speakers from the floor urged an open republicanism. The platform, knowing perfectly well what was the mood of the delegates and those who had sent them, responded tactically. Some of the leadership were undoubtedly monarchists, but chose not to make protestations of loyalty. Instead they pleaded with the membership to lay this issue to one side while Labour got on with the business of obtaining power.' [2000, p. 98]

[c] Secretary of State for Northern Ireland, 1997-1999; Chancellor of the Duchy of Lancaster (Cabinet co-ordination minister), 1999-2001

the Prince Charles / Parker Bowles marriage ("Any threat to the monarchy comes from Labour")[73] were likely to respond with a bemused 'were it so'.

--- *Public attitudes: polling & press*

Evolution of support for republicanism as measured by opinion poll evidence is broadly consistent with the decline in universal reverence for the crown, though the monarchist lead has remained substantial. Typically, until the early 1980s (when the MORI series began) 5 per cent of respondents answered that they would be 'better off' if the monarchy were to be abolished, but *circa* 20 per cent declared themselves in favour of a 'republic' (form unspecified) throughout the 1990s;[74] and, in late 2001, 25 per cent of respondents to a one-off (*Observer*) poll expressed the preference of 'an elected president' to succeed Elizabeth II over her son or grandson.[75] Though heavily publicised events can cause a short-term lurch, often quickly reversed, long-term trends are glacial. In the MORI series the 'republican' score was 18 per cent in both 1992 and 2006, its highest point being 22 per cent in 2005. Over the same period 'monarchy' preference has ranged from 65-75 per cent (72 per cent in April 2006).[76] Anti-monarchists take a crumb of comfort from polls which, from the early nineties, have shown a broadly equal numbers of respondents of the opinion that the monarchy would or would not exist fifty years thereafter (April 2006 – 'would' 41 per cent, 'would not' 40 per cent).[77] But all poll-based arguments must be accompanied by a prominent health warning drawing attention to the susceptibility of 'soft' public opinion to quotidian events. Hence, ICM's 34 per cent for "better off without the royal family" came in the wake of the Wessex business-links affair of April 2001,[78] an anti-monarchist score down to 12 per cent was recorded in NOP's April 2002 poll just after the Queen Mother's death but ICM's "better off without" rating back up to 43 per cent in the wake of the ignominious collapse of the Burrell trial in November 2002.[79] As with all polling, the precise wording of the question is vital. Thus, when ICM offered respondents a choice between 'someone who is elected' and 'a monarch' the

former came out in the lead (by 50 per cent to 47 per cent) – and that when the field work was carried out in May 2002, just before the jubilee.

The broad thrust of the foregoing findings is confirmed by a private poll[a] carried out in April / May 2004 (not contaminated by proximity to a royal celebration or public scandal) by MORI. To the central question[b] 71 per cent of respondents expressed a preference to 'retain the monarchy' against 20 per cent preferring an elected head of state (9 per cent 'don't knows' etc). The latter figure disguises a significant age variation, with support for an elected head of state ranging from 31 per cent in the 16-24 group to 12 per cent for the over-65s; what is not clear is the extent to which the variation represents a comparatively fixed cohort effect, or the acquisition of conservative attitudes (in the sense of increasing predilection for the status quo) with the onset of age. Interestingly, the 'elect head of state' preference rises to 31 per cent (for all ages and other categories) when the alternative is expressed as Charles becoming King (55 per cent for Charles and 14 per cent 'don't knows').[c] Here, the age gradient is less dramatic but still significant with support for an elected head of state at 40 per cent for the 16-24s and 25-26 per cent for the 55-plus age groups; for this question 'Charles to become King' scores 49 per cent. The lead of 9 per cent looks conceivably overturnable, but is illusory unless the cohort effect is the dominant explanation for the age variation. Anti-monarchism of a similar order of magnitude was confirmed by a *YouGov* poll in February 2005 (contemporary with broadly negative publicity on the heels of the announcement of the marriage of Prince Charles to Camilla Parker Bowles) in which 23 per cent were recorded as agreeing that 'there should be no monarchy after Queen Elizabeth II.'[80] Furthermore, Australian experience in 1999 illustrates the dangers of confusing a generalised preference with approval of a detailed project.

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[a] Commissioned by the Marylebone Charitable Trust
[b] "Do you favour Britain electing its head of state or do you favour Britain retaining the monarchy?"
[c] see Ch. 6-post mortem, for the 'Charles effect' in Australia

The popular press has played an active part in this evolution of attitudes: 'In 1953, it was 'not done' to repeat what was said to you by a Royal Personage, let alone reprint it in the newspapers.'[81] Also, in the fifties and sixties the mildest criticism of royalty was execrated, and as late as 1984 an organ as reputably liberal as the *Observer* declined to print an article (despite having commissioned it) by Piers Brendon advocating the republican case. However, 'by 1992, members of the Royal Family were themselves 'leaking' the most intimate details of their private lives to the Press.'[82]

In roughly the same time frame rational discussion of the constitutional position of the crown ceased to be a forbidden topic - *vide* the *Guardian* campaign referred to below in this Chapter under *Republicanism today*). The change in attitudes is not solely attributable to the evolution of editorial policies; newspapers reflect public attitudes as well as lead them, though the arrival, in A N Wilson's words, of a '*republican newspaper proprietor*'[83] probably had an impact, though an ambiguous one. Speculation on Rupert Murdoch's personal attitude to the monarchy has spawned a minor cottage industry encouraged by absence of rebuttal of scattered media references to his views. Ben Pimlott found the case not proven, but with the balance of probability favouring opportunism:

> While there is no conclusive evidence of Rupert Murdoch's republican sympathies, there was plenty of the … proprietor's indifference to the Monarchy's fate; or, alternatively, of his willingness to give the editors of his British papers their head on a circulation-boosting topic.[84]

The *Daily Telegraph*'s diarist, writing after the award of a knighthood to former *Times* editor, Peter Stothard, had little time for such fine distinctions: 'I can only assume that Rupert Murdoch set aside his trenchant republican opposition to titles and gave his consent to "Sir Peter".'[85] A *Daily Mail* columnist observed: 'I wonder if untitled republican Rupert Murdoch ever feels contempt for his gongchasing minions?'[86] Personal conviction is, however, not the same as an editorial policy; for the *Sun*, as well as the other mass circulation titles, the royal family is too rich a

source of saleable copy for abolition to be an editorial option. Taking a more censorious line than Pimlott, Peregrine Worsthorne scorned absence of principle:

> …if the editor of *The Sun* says that he likes to keep the monarchy there because by attacking them he can get a good story which puts on readers, if that is the cynical attitude of the editor of *The Sun* to the monarchy - it says more eloquently than any words of mine that part of the media is rotten, corrupt … the fact that as a nation our fate should be in their hands fills me with horror.[87]

The real answer to the conundrum might have been identified by Anthony Holden writing as early as 1993:

> Rupert Murdoch, although well-known as an iconoclast on an international scale, liked to be thought of as a monarchist. As an Australian by birth, if not longer by citizenship, he is in favour of abolishing the monarchy in his native land; as the owner of vast British newspaper and satellite broadcasting companies, it is not in his interests to be perceived as anti-royal in the United Kingdom. In the words of Knight, overseer of his British operations, Murdoch 'may have been a republican in his youth' but he is now a convert: 'For all his suspicion of the British establishment, he believes strongly in the institution of monarchy here.'[88]

The subsequent (1999) referendum episode (see Chapter 6) bears out the Australian element of this interpretation. In his homeland, where different profit and loss factors prevail, Murdoch's organs provided solid and consistent support to the republican side, as indeed did most of the rest of the press - though without noticeable effect. Whatever his fundamental conviction, there seems little doubt that he has always been less inhibited from treating the royals with disrespect than would a British born proprietor of his generation.

Brendon is satisfied that media coverage makes a difference to public perceptions: 'A sustained advertising campaign lasting over several generations, and seldom if ever challenged by disinterested voices, must have its effect on public opinion,'[89] citing in support Philip Ziegler ('*Crown and People*' 1978) who demonstrated that enthusiasm for royal rites of passage seldom takes off until the media gets heavily

involved.[a] Drawing on the work of Douglas Keay [*Royal Pursuit: The Media and Monarchy in Conflict and Compromise,* 1984], Brendon argues that:

> if - a big if - the press were ever to make a concerted effort to denigrate the royal family the very existence of the monarchy might be threatened. It might be more plausibly suggested that, as the logic of democracy works itself out in Britain, the press and television may gradually abandon their role as royal corgis, yapping loyally in their mistress's praise and administering sharp nips to anyone impertinent enough to commit lèse-majesté. If the media begin to operate more as the people's watchdog, take their duties as the fourth estate seriously, and adopt an objective tone towards the monarchy, its mystique might gradually start to disappear.[90]

--- *Public attitudes; the media and the cult of celebrity*

Gamble and Wright observe:

> Many of the current problems of the monarchy stem from the decision in the 1960s to make a further adaptation: to attempt to create a more open monarchy, rather than trying to keep it closed, mysterious and inaccessible, like the Japanese. This was the beginning of the celebrity monarchy … But real celebrity cannot be inherited. Heredity is no better a way of producing natural celebrities than it is of producing good rulers.[91]

Irrespective of ideological stance, media proprietors are bound by commercial imperative; coverage of royalty sells newspapers (and magazines and books, and boosts television audiences); a member of the royal family is regarded as a 'celebrity', a condition defined by the OED as: 'The condition of being much extolled or talked about; famousness, notoriety'.[92] The definition does not address the characteristics which endow an individual with celebrity status, or acknowledge that it might be manufactured. Modern, media-driven, celebrity is a complex phenomenon. Customarily, there is, at some level, something just about tangible, often connected with the output of the entertainment industries, to justify the status being conferred; but there is also Daniel Boorstin's notorious category of persons who are '*known for their wellknownness*'. Royals are not *quite* in this box, but very nearly so; a member of the royal family, however unprepossessing,

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[a] Reaction to 2002 Jubilee supplies collateral– indifference at the beginning of the year evolving into quasi-hysteria whipped up by saturation coverage in the Spring and Summer.

is distinguished from the common herd by being related to the head of state, but the condition of celebrity is unconnected to identifiable achievement. Numerous commentators have identified the broadcast of the 1969 television film, *Royal Family*, as the beginning of this process of vulgarisation. One of them, Anthony Holden, wrote:

> It...promoted the public perception that the royals are just another branch of show business, famous merely for being famous, and dutifully using that fame to raise money for charities of their choice. Since Princess Michael of Kent officially opened a motorway café, all the royals have been regarded as fair game for exploitation in board-rooms throughout the land.[93]

Fabrication of royal celebrities is not new, and nor is the ambiguous response to the invasion of privacy that is the inevitable downside of a Faustian pact; nor is the dichotomy between the public image and the reality. The early years of Victoria's reign were notable for the volume of royal trivia to appear in newspapers, prints, periodicals and street ballads:

> Although the subjective investment poured into Victoria promoted a sense of intimate connection and empathy, the greater the degree of investment, the more Victoria risked being turned into a wholly fabricated figure.[94]

Victoria's well-known Whig partisanship in the early part of the reign[a] was misconstrued as evidence of her being 'positioned firmly on the side of the People.'[95] She was portrayed as: 'innocently outside the oppressive corruption of government, while, through her prerogative, simultaneously using the most autocratic power of all to reform it from within,'[96] – a perception that sits uneasily with her well-documented reactionary attitudes.

The media in the twenty-first century, as in the nineteenth, having created an appetite for royal trivia, are doomed to feed it. Hence, when confronted with a royal possessing even limited personal charisma, the temptation to play up the opportunity for all it is worth is irresistible, and if the subject responds with a hint of willingness to play the same game, the conditions are ripe for exponential

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[a] In 1841 she provided the Whigs with £15,000 for electioneering from the Privy Purse: almost certainly the last act of this kind. [Hall, 1992, p. 8]

inflation of 'famousness'. The late Diana, Princess of Wales became one of the best 'known' (in the sense of recognised) people in the world, ahead of presidents, prime ministers and popes, all thanks to the skill of the celebrity-fabrication industry. In their analysis of the relationship between the media and the monarchy, Blain and O'Donnell advise that:

> we should do better to remain very sceptical over claims by media professionals and professional politicians that there is really a strong emotional, psychological or political bond between nation and royal family. An alternative possibility is that much of the apparent energy in this relationship is produced by massive quantities of manufacture.[97]

Other royals with the potential to generate a comparable level of interest are thin on the ground, but the unwillingness of some parts of the media to be deprived of an opportunity of finding one is not to be underestimated. The obvious candidate is Diana's elder son when he enters public life:

> Thus William is not only the next but one in line: he is the marketing future for the family firm. He has to be a dream prince, the wooer of his disillusioned contemporaries. Sweet William, to be sold, and sold successfully,[98]

Blain & O'Donnell take a similar line: 'the media will do as much as possible to reconstitute William as a Diana-variant as soon as the time is judged right, and any woman with whom he forms a long-term relationship will need to be strong in character,'[99] which, of course, suggests how the image-makers could get over the inherently less glamorous raw material provided by a male, however personable.[a] Taken as a whole, the state of affairs illustrates undignified descent from glorious indifference to public opinion of earlier generations. As Felipe Fernandez-Armesto puts it: 'Celebrity has replaced noblesse oblige as the nearest thing to an aristocratic ideal.'[100]

A hard working and scandal-free president without political ambition does not sell newspapers. The probability is, therefore, that the popular media would have a

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[a] The negative reaction to the January 2005 Afrika Korps stupidity seemed likely to result in Prince Henry ('Harry') being regarded as damaged goods – at least for a while.

vested interest in seeing the monarchy preserved until royal unpopularity shifted the balance of advantage.

--- *Republicanism today*

Despite the passing of the age of uncritical monarchism when opposing views were just not heard in polite society it would be misleading to suggest that (anti-monarchical) republicanism is more than a minority preoccupation in early 21st century Britain. There are several pressure groups operating at different levels. The broadly based '*Republic*' appears to be the most coherently organised and can perhaps claim the intellectual heritage of the 1870s republican clubs. There is a centre ground inhabited by shadowy groups such as the Centre for Citizenship (authors of some well-thought-out polemic, but not forthcoming about its membership). Others - '*Throneout*', *The Republican Alliance, British Republic, Abolish the Monarchy, Democratic Reform,* apparently little more than web sites, exist marginally, or did exist fleetingly, in recent years; '*Ma'm*' (Movement against Monarchy) is (?was) in the anarchist two-fingers-up-to-authority tradition with a largely student age group membership.[a] None of these can claim to be mass movements, and republicanism is not an issue likely to garner many votes. Edgar Wilson observed:

> Career politicians of any established party are in general unlikely to pursue policies, however worthy, that they perceive to be widely unpopular and so potentially detrimental to their own prospects of achieving power. It is for that quite general reason unsurprising that in the 1980s no British political party treats the status of the Monarchy as a live or pressing issue.[101]

Blain & O'Donnell opine:

> in the United Kingdom monarchy is so ideologically embedded that republicanism…is not really a British phenomenon at all, but always itself heard as ideological, extremist or foreign[102]

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[a] twenty-three members enjoyed a famous, and probably unexpected, victory in February 2004 on receiving an ex gratia payment of £3,500 each from the Metropolitan Police in compensation for wrongful arrest on the day of the Queen's golden jubilee in June 2002 when they had been quarantined in various police stations despite the totally peaceful nature of a demonstration at Tower Hill. Despite this triumph, the group suspended its activities in late 2005.

and (in 1995) Hodson wrote: 'Mr Benn wants a referendum on doing away with the monarchy: no political forecast could be more confident than that the vote would be an overwhelming "No".'[103] The prognostication sounds broadly correct a decade later, though the arithmetic has moved on since the nineteen-fifties. Broadsheet newspapers have become able to discuss the issue without the sky falling in. The *Guardian*'s campaign waged intermittently from 2000 urging, *inter alia*, review of the Act of Settlement and exercise of ministerial power through crown prerogative [e.g., *Guardian*, 6 December 2000] is a case in point. A libertarian, free-market case was also beginning to emerge. Robert Harris, of that persuasion, commenting on the IEA's 1990 reform proposals (in the event timidly withdrawn), went well beyond his text:

> How can one have an intelligent, responsive modern citizenry in a nation where men and women are subjects of the crown, without any rights or duties which are written down; where the political system divides the nation between the fiefdom of two big parties; where unelected, titled boobies can have a voice in the legislature by accident of birth; and where a prime minister, sustained by patronage, enjoys almost untrammelled power?[104]

By the autumn of 2003, against the background of the publication of unflattering memoirs by a former royal (domestic) servant and of another scandal in the making - this time concerning allegations of irregular behaviour in a royal household – even the pro-royalist, pro-Conservative *Daily Mail* felt able to give space to the expression of republican sentiments ("*The Republic of Britain*",[a] by Anthony Holden), even if stopping short of giving it editorial endorsement. Belief in the House of Windsor's capacity to bring about its own destruction became persistent, even (or especially?) amongst its keenest supporters.

Republicanism had become a *significant* and admitted minority interest (no longer viewed as little better than paedophilia), enjoying a level of support comparable to that enjoyed by, say, the Liberal Democrat Party throughout most of the second half of the twentieth century. Its mention was, in the next decade, to be met with

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[a]Three days earlier the same newspaper published a minatory piece 'Why Britain could soon become a republic' by a former public relations adviser to the Prince of Wales [Mark Bolland, *Daily Mail*, 22 October 2003, p. 11]. Its gist was to warn the royals of the consequences of not mending their ways.

interested curiosity and more often countered with polite scepticism over practicalities (e.g., concerning the selection of satisfactory presidential candidates) than dismissed out of hand: not leaped upon with enthusiasm in most circles, but no longer the obsession that dares not speak its name. Towards the end to his account of the history of British anti-monarchism, published 1999, Antony Taylor opines that:

> Events of recent years have placed the issue of the monarchy back on the political agenda for the first time since the Abdication Crisis of 1936. Republicanism is now fashionable.[105]

No republican project is going to come to fruition in the foreseeable future, but the prospect is ceasing to be a total fantasy. The time might therefore be ripe to assess scenarios which could conceivable lead to that consummation, and to examine specific structures which would be appropriate for Britain.

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[1] Persian Letters, particularly Letter CXXX1
[2] Pettit, 1997, *passim*
[3] Kant, 1795, First Definitive Article, 3rd paragraph.
[4] Adams, in *Boston Globe*, 6 March 1775, Adams Papers, V II, p. 314
[5] 1999, p750
[6] Prochaska, 2000
[7] *ibid.*, p. 215
[8] Rogers, 1992, p. 14
[9] Fuller, 1999, p. 751
[10] Craig, 2003, p. 168
[11] Zagorin, 2003, p. 707
[12] Tomkins, 2005, p. 44
[13] *op cit.*, p. *viii*
[14] *op cit.* p. 52
[15] Meadows (ed.), 2003, p. 44
[16] Cohen, *New Statesman*, 11 April 2005
[17] letter to Mercy Otis Warren, 8 August 1807, widely cited, e.g. by Cornell, 1999
[18] cited at Everdell, 1987, p.1 & 21-2
[19] from 'Dictionary', 1755, cited by Everdell, part IX
[20] Collins, 1990, p. 1287
[21] OED, 1989, Volume XIII, p. 673
[22] Bierce, 1996, p. 208
[23] cited in Scruton, 1983, p. 402.
[24] Everdell, 1987, p. 21
[25] paraphrased in Zagorin, 2003, p. 711
[26] '*Milton's Republicanism and the tyranny of heaven*', in, Machiavelli and Republicanism (1990); G Block & Q Skinner (eds.), C.U.P., Cambridge, p. 226: cited by Chernaik, 2005, p. 77
[27] Tomkins, 2005, p. 94
[28] Norbrook, 1993, pp. 299-378
[29] Tuck, 1993, p. 22

[30] Mill, 1869, Ch. 1, *Introductory*.
[31] Charter 88 Website
[32] IPPR, 1991, draft *Constitution*; Art 34.1
[33] *ibid.*, p. 26
[34] Fabian Society, 2003, p. 5
[35] Rumsey, 2000, *passim*
[36] Taylor, 1999, p. 63
[37] *ibid.*, p. 91
[38] Brendon, 1986, p. 64
[39] *ibid.*, pp. 100-105
[40] *ibid.*, p. 32
[41] 1995, p. 105
[42] 1938, p. 214
[43] Holden, 1993, p. 180
[44] Brendon, 1986, p. 131
[45] Pimlott, 1997, p. 276
[46] Pimlott, 1997, pp. 276-278; Brendon, 1986, pp. 163-164; *Daily Telegraph* (obituary), 2 January 2002
[47] Simpson, (Glasgow) *Herald*, 2 August 1995
[48] Hamilton, 1975, p. 193
[49] cited by Prochaska, 2000, p. 207
[50] *The Times*, 27 January 1990
[51] Pimlott, 1997, p. 425
[52] Haseler, 1993, p. 19
[53] Nairn, 1988, Ch. 3, *passim*
[54] *ibid.*, p. 519
[55] *Times*, 7 September 1994
[56] Barnett, 1997, p. 116
[57] McGuigan, 2000, p10
[58] *Guardian*, 9 April 2001; Hames, *The Times*, 10 April 2001
[59] Bogdanor, 1995, p. 301
[60] Hames & Leonard, 1998, p. 10
[61] Persaud, 2002, p. 101
[62] Webb, 2002, p. 86
[63] Brendon, 1986, p. 221
[64] Wheatcroft, *Observer*, 10 July 2000
[65] Prochaska, 2000, p. 227
[66] Hamilton, 1975, p. 12
[67] Aaronovitch, *Independent*, 31 May 2002
[68] Craig, 2003, p. 179
[69] *Observer*, 30 July, 2000
[70] Meadows (ed.), 2003, *passim*
[71] Riddell, *The Times*, 6 April 2001, p. 9; Baldwin & Price, *The Times*, 10 April 2001, p. 6
[72] *Independent*, 27 June 2000, p. 8
[73] *Daily Telegraph*, 11 February 2005
[74] source; MORI website: http://www.mori.com/polls/indroyal.shtml
[75] *Observer*, 30 December 2001 & *Observer* website
[76] http://www.mori.com/polls/monarchy/republic.shtml
[77] http://www.ipsos-mori.com/polls/monarchy/future.shtml
[78] Travis, *Guardian*, 25 April 2001
[79] Travis, *Guardian*, 20 November 2002
[80] Pook, *Daily Telegraph*, 26 February 2005;& http://www.telegraph.co.uk/news/graphics/2005/02/nchar126big.gif
[81] Wilson, 1993, p.2
[82] *ibid.*
[83] *ibid.*, p. 200

[84] Pimlott, 1997, p. 566
[85] 'The Minx', *Daily Telegraph*, 17 January 2003
[86] Hardcastle, *Daily Mail*, 7 Mail 2003
[87] Blain & O'Donnell, 2003, p. 179 (citing transcript of interview in *Frontline* US PBS TV programme; 18 Nov 1997)
[88] Holden, 1993, pp. 100-101
[89] Brendon, 1986, p. 214
[90] *ibid.*, p. 215
[91] Gamble & Wright, 2003, p. 2
[92] Oxford English Dictionary, 1989, Vol. II, p. 1019
[93] Holden, 1993, p. 107
[94] Plunkett, 2001, p. 8
[95] *ibid.* p. 12
[96] *ibid.*
[97] Blain & O'Donnell, 2003, p. 60
[98] Preston, *Observer*, 18 June 2000
[99] *op. cit.*, p. 177
[100] 2005, p. 50
[101] Wilson, 1989, p. 187
[102] Blain & O'Donnell, 2003, p. 43
[103] Hodson, 1995, p. 90
[104] Harris, *Sunday Times*, 7 October 1990
[105] Taylor, 1999, p. 239

Chapter 3: Transition Scenarios

> [F]ew have taken on board the sheer complexity of turning ourselves into a republic. That great swathe of governmental activity which takes place under the Royal Prerogative would have to be put on a statutory basis. An Abolition of Monarchy Bill, as a constitutional measure, would by convention have to be taken on to the floor of the House of Commons at every stage. It would paralyse the legislature for at least two years and it would split the country from top to bottom. And would it be worth it?[1] [Peter Hennessy]

> 1. Could the human eye have arisen directly from no eye at all, in a single step?
> 2. Could the human eye have arisen from something slightly different from itself, something that we may call X?
> The answer to Question 1 is clearly no - - -The answer to Question 2 is clearly yes.[2] [Richard Dawkins]

In the preceding Chapter it is noted that only a minority (but perhaps a significant minority) of the British public favours a 'republic'. A larger proportion, within some parameters a majority, is less sure about the survival of the monarchy into the indefinite future, a finding reflecting respondents' perceptions of probability rather than preferences; it says nothing about how the predicted outcome could be arrived at. A selection of transition scenarios – a central concern of this study – is presented in this Chapter.

When monarchies disappear, it is generally as a consequence of social revolution, defeat in war, economic collapse or a combination. The historian, John Casey, has observed that a throne with a pedigree of more than a millennium is not likely to be under threat 'unless something has gone really wrong'.[3] History bears him out; the French crown first fell in the course of a classic revolutionary upheaval, and a later version of monarchy collapsed in the aftermath of a lost war (in 1870). Russian Tsardom came to an end in the next classic European revolution, one made possible by a world war, the very same conflict that was directly or indirectly responsible for terminating the three grand imperial monarchies that found themselves on the losing side: Germany, Austria-Hungary and Ottoman Turkey. World War II and its post-bellum settlement put paid to the crowns of Italy, Bulgaria, Yugoslavia, Romania and Albania. The Portuguese monarchy succumbed (in 1910), rapidly and tamely, to a combination of middle-class

revolution and a military coup (events hastened by economic collapse); and Greece finally became a republic in 1974 when a referendum rejected restoration following a period of military rule. Something *had* gone really wrong in all these instances; nowhere has monarchy come to an end simply through legislative and administrative process without prior destabilisation. If history is any guide,[a] therefore, a safe, but unhelpful, prediction is that the British monarchy could come to an end in a single operation as a consequence of a catastrophic upheaval. Since such events are, by their very nature, improbable, unrepeatable and unpredictable, this study explores the feasibility of a less dramatic transformation.[b]

--- constitutional crisis scenario

Hypothetical scenarios commonly start with the blithe assumption that a republican project would first form part of the programme of a political party in a position to initiate the necessary legislation. A rider to this is that, given the highly focused pragmatism of the modern political process, the issue would arise when the monarchy had made itself sufficiently unpopular for abolition to have political mileage. How might this come about? A possible trigger event might be perceived abuse of the prerogative. For example, in a rerun of February 1974 a generous measure of negotiating space allowed to an outgoing Prime Minister who had lost control of a hung Parliament might lend plausibility to the charge of partiality. If the latter-day Heath and the latter-day Thorpe successfully formed a coalition the accusation could, justifiably or not, gain credibility - and would be reinforced if the resulting administration then plumbed the depths of popularity. Similar scenarios can be constructed around other constitutional controversies of the twentieth century, though now that all the major political parties have

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[a] The examples are all European, but a cursory glance at the Middle and Far East does not suggest any contra-indications.

[b] Writing in the late 1980s, Edgar Wilson speculated on the possibility of a crisis being triggered by the economic and social tensions arising from Thatcherism [1989, pp. 162-3]. While some features of that era have become permanent in the political landscape, the rough edges are no longer so abrasive and their potential for significant disruption, if it ever existed, has probably passed.

unambiguous methods of selecting a leader, in office as well as in opposition, the crown should be less exposed to the embarrassments of 1957 or 1963.

--- *'disrepute' scenario*

> The mood for a republic increases at a creep. It is not fired by constitutional iniquities, such as the Act of Settlement, which decrees that only Protestant heirs of Princess Sophia may have the British throne. The Countess of Wessex taking tea with a bogus sheikh, or Prince Andrew sailing with topless sunbathers are more likely to propel opinion in the direction of President Branson, but only briefly.[4]

Late twentieth-century experience suggests that the House of Windsor's own capacity to bring itself into disrepute is as potent a factor as political miscalculation. An apparently endless litany of royal gaffes, public infidelities, failed marriages and misjudgments in the year 1992 alone (the notorious *annus horribilis*) provided most of the ammunition for Anthony Holden's broadside.[a] Within two years of (Mary) Riddell's (2001) piece quoted above the public was entertained to the spectacle of abandonment of legal proceedings when the Queen 'remembered' that she had authorised a butler to take charge of some of her deceased daughter-in-law's property. A little later, came the unedifying spectacle of an injunction being taken out to prevent publication of salacious allegations involving the Prince of Wales.[5] And, just when it seemed safe ... the third in line of succession thought it an amusing notion to appear at a fancy-dress party in a Nazi costume.[b] Whether this kind of publicity has the potential to develop fatal consequences should become more evident with the departure of Elizabeth II when any self-denial by the tabloids in rooting out scandal relating directly to the occupant of the throne might well weaken. Even her position is not as unassailable

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[a] *The Tarnished Crown*. The same series of events brought forth 'imaginative' proposals from monarchists despairing of the Windsor dynasty. Simon Courtauld, writing in the *Spectator* (2 January 1993), argued for the crown passing to the Duke of Buccleuch (as descendant of the Duke of Monmouth); this would require retrospective recognition that a legal marriage had been contracted between Charles II and Monmouth's mother, Lucy Walter, in 1648 or thereabouts: a tall order after such an interval. A N Wilson advocated the case of Richard, Duke of Gloucester, grandson of George V *via* his third son, Henry (and also a Monmouth descendant through his mother). [Wilson, 1993, pp. 198-9]

[b] 'Prince's Nazi gaffe: Renegade royal flouts the rules: Scandals; Harry still big problem for PR machine' [this headline from the *Guardian* (13 January 2005) can stand for numerous others in the same vein]

as it once was. The standard tactic of monarchists of condemning any criticism of the institution of monarchy as a personal attack on the Queen who, it is held, cannot defend herself is losing its effectiveness. Hence, popular media criticism of Buckingham Palace's failure to fly flags at half mast (for good symbolic reasons) on the death of Diana, Princess of Wales and for the Queen's tardy intervention in the Burrell court case in 2002 was uninhibited; and her decision not to attend her eldest son's (civil) second wedding ceremony (April 2005) did not attract universal sympathy.

Whether these events illustrate the 'decline of deference', or a fundamental shift of attitudes to the monarchy, is debatable. Blain & O'Donnell are sceptical about the received wisdom: '*Sun* columnists being rude about Diana or the Prince of Wales have never provided much of a measurement of "loss of deference" or "changing attitudes" in the UK. These phrases are too readily used in relation to a cultural landscape with little consistency',[6] and go on to comment that 'the Queen's Golden Jubilee produced deference in superabundance.'[7] It is for others to discuss whether there has been a real change in underlying sentiment; for the purposes of this study, it suffices to note that there has been a change in what it is acceptable to put in print. To the extent that she has not demonstrably placed the institution in disrepute Elizabeth II is likely to remain relatively safe; but it is open to speculation, should Prince Charles succeed to the throne, whether the media would treat him half as tenderly.

This line of thought encourages some republicans to view the succession as a time of royal vulnerability; it is suggested that public opinion would, like the media, be disinclined to accept the probable successor unquestioningly. Irreverent treatment is predictable, but whether negative reaction would have any practical significance is debatable. Few seriously doubt that, in reality, '*la reine est morte, vive le roi*' would prevail – so long as the succession is not disputed the ancient process operates automatically and instantaneously.[a] A critical passage might come later,

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[a] Since the enactment of the 1701 Act of Settlement succession has not depended on, or required to wait, for proclamation by the Privy Council.

in the hiatus between accession and coronation, when a monarch less circumspect than Elizabeth II might compromise the position of the crown:

> There is, however, no reason to believe her heir would be so coy. The recent high court case over the publication of Prince Charles's personal travel journals revealed that he sees himself, in the words of one former adviser, as a political dissident. The Prince's legal action against the *Mail on Sunday* confirmed that he writes regularly to government ministers, attempting to influence policy on pet subjects such as the environment, new technology and education.[8]

Provided, however, that discretion is maintained for the period of about a year when the ceremonial magic will have cemented his position in the public consciousness, it is hard to envisage anything short of a crass political intervention bringing about a crisis. Bad behaviour on the part of a royal personage instigating a wave of popular disgust *could* be a short-term catalytic mechanism - certainly more predictable and probable than a surge in positive support for republicanism *per se*. There is a constitutional dimension to Piers Brendon's speculation (see also Chapter 2, *Public attitudes-press*) that a more robust stance by the media would help dissolve the myth:

> Conditions would then be ripe for a more rational approach towards constitutional reform. Assisted by one or other of the royal scandals which are doubtless germinating in the womb of time, a British Republic might somehow struggle to be born.[9]

Only a 'weak' republic - one brought into existence after minimal enabling legislation and accompanied by few, if any, further constitutional safeguards - could conceivably be implemented with sufficient rapidity to exploit a transient phase of public mood (whether triggered by political or behavioural factors), and even that would be problematic. Sentiment could easily undergo a one-hundred-and-eighty degree turn in less time than that required for a constituent assembly to hammer out an agreed modus vivendi. Whether the 'quick fix' option would necessarily leave behind a state sufficiently endowed with republican virtues to satisfy its proponents is questionable.

--- devolution scenario; 'downward' devolution

Some consideration might be given to the possible consequential impact on the monarchy of changes in Britain's constitutional arrangements, arising from either top-down devolution to Edinburgh and Cardiff, or to wider pooling of sovereignty, i.e., within the European Union. If, say, Scotland (or, *pari passu*, Wales – Northern Ireland is a somewhat different case) were to succeed from the United Kingdom it would be reasonable to assume (though not unchallengeably) that the polity north of Berwick was a new (or reawakened) state; but what of the residuum? Would a combination consisting of England, Wales and Northern Ireland be viewed legally as the continuation of the pre-existing United Kingdom; or would it also be a new state? Precedents (e.g. from East/Central Europe) are inconsistent. In 1991 the Russian Federation for practical purposes inherited the mantle of the former Soviet Union, taking over for example most of its strategic and diplomatic assets including the permanent seat on the UN Security Council, whereas Moldova, to name but one, emerged as a 'new' state. The 1993 break-up of Czechoslovakia, however, led in legal terms to the birth of two new states – despite the widely held view of the Czech Republic as the continuing entity and Slovakia as secessionist.

In the case of Britain, the larger residue would, presumably, preserve existing constitutional arrangements, making only such unavoidable consequential adjustments such as adjusting representation in the legislature (*cf.* 1921[a]). If, however, it were deemed that <u>two</u> new successor states had come into existence each would need to consider its constitutional status separately. It is evident that, in these circumstances, Scotland would need to decide whether to stay a monarchy and whether, should that decision be in the affirmative, the services of the House of Windsor would be retained. But 'England plus', in the capacity of a 'new' state, would then be faced with the same choice. Could England assume that it 'owned' the British monarchy? Possible permutations include two legally independent states sharing a single monarch (rather as they did in most of the seventeenth century) or more exotic, and improbable, outcomes such as a republic in England

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[a] 1921 can be viewed as the date of the formation of the modern British state – unusual, but in some ways as logical as taking 1707

and the return of the Stuarts to Scotland. None of these outcomes is postulated as being particularly plausible, but it is sufficient to observe that, in certain circumstances, a break-up of the United Kingdom could entail a successor state being obliged, or deeming it expedient, to review its monarchical status.

A crucial factor could be the stance taken by the European Union. The SNP's policy of 'independence within Europe' while making economic sense, is posited on an amicable divorce in which a compliant 'Britain' (effectively, England) acquiesces to an independent Scotland's right to inherit membership of the Union. It is possible to envisage a scenario in which an exasperated European Union demanded that two squabbling parties declared themselves new states which would, in turn, oblige both to consider their constitutional status.

--- devolution scenario ('upward' devolution); role of EU as putative 'superstate'

In broader terms, the conventional view (here expressed by Bogdanor) is that: 'the European Union … is unlikely to alter the constitutional position of the sovereign'.[10] Up to a point this is undoubtedly true; no institution of the EU would relish challenging the domestic constitutional arrangements of what was nearly half its pre-May 2004 membership, though the more modest continental monarchies might find it easier to reconcile their scale of operation as nominal heads of constituent members of a Union exhibiting some characteristics resembling those of a sovereign state. Most informed commentators have subscribed to this view, and probably still do, but the prospect of a European Constitution has been the occasion of a pause for thought. Unless and until the project – in cold storage following rejection by French and Dutch voters in May/June 2005 – is revived it would not be profitable to engage in speculation on what characteristics such a state-emulating document could be expected to have. For what it is worth, the text of the, presumably defunct, draft acknowledges diversity of domestic constitutional practices of members. Article I-5 ("*Relations*

between the Union and the Member States"),[11] reflecting the Union's basic philosophy, proclaims:

> The Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

It is, however, not self-evident that monarchy is consistent with Article I-44: 'In all its activities the Union shall observe the principle of the equality of its citizens who shall receive equal attention from the Union's institutions, bodies, offices and agencies,' or Article I-45: 'The working of the Union shall be founded on representative democracy' - an apparently innocent platitude which could have unexpected implications and consequences.

--- *William the Unwilling; reluctance-to-serve scenario*

The journalist Johann Hari based his squib '*God Save the Queen*' on the conjecture that the combination of stifling protocol and goldfish bowl existence will eventually render the condition of monarchy intolerable for those destined to serve. Fernandez-Armesto detects a similar disinclination:

> Soon, however, the royals themselves will lose the will to go on. Even the Prince of Wales, who yearns to be king, no longer likes the country he is called to represent…The next generation, the duo of Wills and Harry, has no appetite for the job. Both take after their mother. The shallow, meretricious egocentrism of Diana's life and times is the only future the princes can hope to enjoy. Deracination, anomie, and future-shock separate them from the tradition to which they are supposedly heirs.[12]

Hari's premise is that the next-but-one in line did not wish to be King and, come the fateful day, would refuse absolutely to accept the crown. Supporting evidence, though imaginatively marshalled, inevitably rests on second-hand sources and, however accurately the Prince's views in his late teens might be represented, whether his resolve would survive the overwhelming pressure that would be exerted on him 'to do his duty' (particularly after exposure to the military code at

Sandhurst) at the hour of accession is quite a different matter. As Hari observes, the rules provide for rapid switch to the next in line:

> Constitutionally, the throne could easily pass to William's younger brother, Harry. But all the evidence suggests that Harry is even more wilful, individualistic and ill-inclined to sublimate all his energies into a pleasureless life of 'duty' than Wills.[13] [a]

The same difficulty for the younger Prince in declining the throne applies; however little he relishes the prospect, things might not be so simple *in extremis*. Hari is undoubtedly correct in assuming that abdication/refusal could be lethal for the monarchy – particularly if the process is repeated; dispassionate legal devices for identifying replacements and establishing procedures would undoubtedly materialise, but the PR damage would be immense. And that is the very reason that courtiers, who have no illusions as to the dangers, would strain every sinew to circumvent it. Doubtless, the potentially destabilising effect of abdication, reinforced by bitter memories of 1936, underlies Queen Elizabeth's apparent aversion to even contemplating the notion of retirement. The chief (and more worrying) motivation, however, might be that she literally believes those parts of the Coronation ceremony that proclaim that she was chosen by God and anointed by the Holy Spirit with the wisdom and blessings needed for the office.[14]

--- *gradualist scenario*

Quite apart from implausibilities inherent in the foregoing contingent scenarios, the practicalities enumerated at the beginning of this Chapter need to be considered. While Professor Hennessy's prediction that there will not be a British republic in his lifetime[15] looks safe, it is suggested that the difficulties he envisages might appear less formidable in the context of a 'gradualist' process. The term alludes to fundamental transformation of the monarchy through small accrued changes over a long period. The remainder of this Chapter elaborates the notion and explores some implications.

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[a] The January 2005 'Afrika Korps' incident supports Hari's depiction of the Prince's waywardness.

A scaled-down monarchy is an inevitable transition-state or end-state in the gradualist scenario. Attitudes to it do not correlate neatly with sides chosen in the monarchy *v.* republic debate. From the monarchist side, Prochaska refers dismissively to 'a piecemeal approach, to 'modernise' the monarchy into oblivion'.[16] It might be countered that one of his specific targets, a *Demos* pamphlet, justifies its reformist agenda as a device to give the monarchy: 'the opportunity to rethink its role and prevent a slide into obscurity'.[17] However, Prochaska has a point. The dispensations prescribed by the various bodies – *Demos, Fabians, IPPR, Charter 88* - differ in detail but in all of them an institution called the monarchy headed by the heir of the House of Windsor is preserved, though in heavily down-sized circumstances having shed residual political functions, accoutrements and much grandeur. It is not only the usual suspects on the centre-left that have gone down this road. The neo-liberal/free-market Institute of Economic Affairs went some of the way recommending in a (what was to become, retrospectively, draft[a]) discussion paper, that: 'powers would be transferred to an officer appointed by parliament and the monarchy would continue only as an emblem of historical continuity of British life.'[18] The dissident member of the Fabian Commission, Sir Michael Wheeler-Booth, who considered that 'radical reform of the monarchy would be inappropriate',[19] nonetheless, favoured review of the Oaths of Allegiance, ending of male preference in the rules of succession, replacement of the 1772 Royal Marriages Act, repeal of the anti-Catholic provision of the 1701 Act of Settlement, review of extra-parliamentary royal prerogative by ministers, simplification and transparence of royal finances, creation of a unified court bureaucracy, redefinition and restriction of membership of the royal family and changes in ceremonial: an agenda which some might consider as verging on radical. In his elaboration on the Fabian blueprint, Harvey calls for 'complete depoliticisation of the office'[20]

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[a] 'Such was the fury that descended on the hapless Frank Vibert, author of the paper, that within 24 hours it was withdrawn.' [Harris, *Sunday Times*, 7 October 1990] Another S. Times columnist proposed another explanation: ...'does someone at the institute think it will kill his chance of a knighthood?' [Barker, *Sunday Times*, 7 October 1990]

(including the necessity for Royal Assent), ending of male precedence and abolition of anti-Catholic discrimination. A pro-monarchy reformist, the Labour MP Graham Allen, considers that taking 'public pot-shots at the Royal Family' is an 'easy option'[21] but elsewhere argues that the monarch's symbolic role would be strengthened and his/her life made easier by removal of the residual political functions.[22]

Differences over where it might be safe or desirable to draw the line are illustrated in views of monarchists on disestablishment of the Church of England. Charles Douglas-Home saw it very much as a slippery slope:

> [t]he radical secularisation of Britain which would follow disestablishment would endanger rather than preserve religious liberty … It would force the monarchy to operate in a secular manner … It would only be a matter of time before the Sovereign was replaced as head of state by an elected president (probably a failed[a] politician) as part of a grandiose scheme for constitutional reform.[23]

But Professor Bogdanor, who shares many of the same assumptions, and recognises that disestablishment would entail radical reassessment of the position of the crown, concludes that: 'a secularised monarchy might nevertheless prove to be a monarchy more in tune with the spirit of the age.'[24]

Prima facie, Prochaska might be justified in categorising (some of) the authors of the *Fabian* and *Demos* pamphlets as closet republicans. Hames and Leonard ostensibly base their case more on the absence of political support for presidentialism than on any obvious affection for the institution of monarchy, but if 'oblivion' is their objective it is not stated openly. And, as McGuigan points out,[25] they were essentially carrying out tactical operation on behalf of 'New' Labour at about the first anniversary of the death of Diana, Princess of Wales. Approaching from the other direction Stephen Haseler describes a radically reformed monarchy but does not positively advocate it as a policy objective on the

[a] If the maxim attributed to Enoch Powell 'all political careers end in failure' is true there is no other kind.

pragmatic ground that he doubts whether it would be a palatable or an acceptable option to his opponents. The monarchy:

> is *either* the present lavish, intrusive political animal with its world-wide public relations appeal and soap opera status - *or* it is nothing … such a transformation …would signify nothing less than the final defeat of the House of Windsor …The arguments of republicans would have been humiliatingly conceded, leading inevitably to demands that the country might as well go the whole way.[26]

Christopher Warwick (biographer of Princess Margaret) was pursuing a similar train of thought in responding to the IEA's proposals: 'I can't help feeling that all monarchies are an anachronism. If you strip away the constitutional powers there is no point keeping the royal family as a historical curiosity.'[27] In Hodson's view: '[t]he peculiar value of an hereditary monarchy is lost if it is required to produce a blameless quasi-president with a crown on his (or her) head.'[28]

Few in either camp would find true psychological satisfaction in a compromise, even in a settlement which met all rational objections. An 'economical' crown stripped of grandeur and relieved of constitutional functions etc., would be an insipid thing for monarchist taste, but a true republican might be equally disgruntled: unhappy with retention of the hereditary principle, frustrated by the disappearance of useful polemical ammunition and irritated by the probable defection of some comrades who had reconciled themselves to the reformed structures. Thus, uncompromising republicans and unreconstructed monarchists share an attitude to radical reform.

Projects for reform, whether advanced by monarchists or abolitionists, tend to be posited on the assumption – not unlike that made by critics of Darwinian evolution - that a comprehensive reform programme would be undertaken as a single operation. Such an undertaking would indeed invite substantial, probably insurmountable, opposition but there are other ways of proceeding. If the process were spread over a period of years - perhaps three or four decades or more - it begins to look less daunting. Now, scaling down of the monarchy which has already manifested itself in decommissioning the royal yacht, concessions on

income tax and contraction of the scope of the Civil List, would grind on, perhaps rather slowly. The Queen's Flight would be grounded,[a] the Royal Train scrapped, the Civil List restricted to the nuclear family, the monarch and his/her immediate family brought into the inheritance tax net, the tax status of the Duchies placed on the same basis as other estate businesses and their personal link with the royals unambiguously severed, administration of the crown lands reformed to remove any lingering impression that they remain personal assets, the Church of England disestablished, the Commonwealth relationship reformulated and, perhaps Sandringham and/or Balmoral sold off to meet debts or unexpected costs which a hard pressed government declines to underwrite.

There are other possibilities. In 2002 the thirty-year rule revealed:

> [t]he Government was given a secret warning that the Queen might quit Buckingham Palace and live at one of her private residences if a proposal to turn the Royal Household into a department of state became a reality. Her vehement opposition to the plan,[b] and the machinations that helped to sabotage it, are disclosed for the first time in previously secret Treasury files from 1971, released at the Public Record Office … She might well wish to live elsewhere in her personal capacity and appear at the Palace only for official functions.[29]

The 'warning' bears a remarkably strong resemblance to the apparently satisfactory arrangements governing the Spanish royal family's use of the *Palacio Real* in Madrid.[c] To deploy the prospect as some kind of bluff seems inconsistent with the Court's blunt refusal a few years earlier to countenance a proposal involving: 'the Royal Family paying for its own private living quarters and Buckingham Palace becoming a historic monument funded by the tax payer.'[30] Reluctance by

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[a] - or at least renamed to reflect its true function "Royal flying accounts for less than 20% of the combined tasking of both [aircraft] which are more commonly used by senior military officers and Government ministers." [Official Website of the British Monarchy]

[b] the 'Houghton Plan' - after its progenitor, Douglas (later, Lord) Houghton, then on the opposition front bench and earlier Labour's Chancellor of the Duchy of Lancaster. [see Hall, 1992, p. 108-111]

[c] King Juan Carlos lives in the Zarzuela Palace in suburban Madrid. The stream of tourists is turned off at the *Palacio Real* when it is required for a state function, e.g. reception of a foreign dignitary. In Sweden the *Stockholms slott* in the centre of the capital houses the Court offices is used for State entertaining, but is primarily a museum. Since 1981 the Royal Family has lived in Drottingholm Palace on an island on the outskirts of the capital. ['Swedish Royal Court' website]

politicians to be seen squabbling with the royals was, presumably, why the ploy was effective. What helped sabotage this 1971 proposition was its being part of a bigger package which included, *inter alia*, effective nationalisation of the Duchy revenues, and what would have amounted to a fairly rapid transition to a Scandinavian-style monarchy.[a] The, perhaps counter-intuitive, conclusion is that piecemeal reforms can, with consensus, be pushed through; a joined-up, thought-through programme stands a chance only if the government is prepared to tackle the Court and its allies head-on.

Debate about reform of the core constitutional functions could arise at any point. Controversial handling of a hung election might provide an opportunity to consider further surrender of prerogative functions (e.g. selection of Prime Minister transferred to the Speaker of the House of Commons, subject to rubber-stamp ratification by the monarch). But even without such a precursor a government would be much less inhibited from taking on the issue if the monarchy had already been substantially demystified, and the prospects of success would increase if it was tackled as a stand-alone project. Thereafter, removal of the royal assent (and by implication, the veto) could follow.

As an integrated package, the programme outlined above is problematic, but when viewed as an ad hoc, cumulative process it begins to look more feasible; indeed most of the components are better than fifty-fifty bets. Withdrawal of privileged transport looked imminent for a few months after the PAC has so recommended[31] though a reprieve, possibly temporary,[b] was reported in 2003.[32] The real estate disposal is perhaps somewhat less probable. At some point along this road the institution would begin to look remarkably like a Benelux or Scandinavian monarchy. While it is certainly true that, if such an end state were to be the

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[a] Even the ultra-loyalist Daily Telegraph was, in August 1992, speculating on the possibility of the Queen retreating to Sandringham [Holden, 1993, p. 32]

[b] the defensive case for retention was based partly on the advanced ages of the Queen and her husband – 80 and 85 in 2006 - the issue was therefore only postponed. The high cost of the train continues to draw press attention on publication of each year's accounts. In response to the 2004 statement showing that it had been used nineteen times in the year and a single journey had been costed at £45,000 Labour MP Ian Davidson renewed the call for scrapping [*BBC News* Website; published 22 June 2005]

declared object of a specific set of measures, 'any attempt to reform it along Scandinavian lines will be doomed',[33] something akin to contemporary Swedish arrangements might come about as a result of such *piecemeal* changes. Monarchists would need to consider whether this watered down institution remained, from their point of view, worth keeping and whether they had the spirit to resist republican legislation. As we have seen, some advocates of the status quo, (e.g. Professor Prochaska) would have difficulty in coming to terms with fundamental reform, equating it with oblivion; and to Peregrine Worsthorne, the monarchy is a 'conservative institution or it is nothing.'[34] But not all monarchists think this way. Bogdanor,[35] for example, an admirer of monarchy's capacity to adapt itself constantly to contemporary circumstances, foresees a 'magical monarchy' evolving into a 'practical monarchy'; and Charles Douglas-Home envisaged some adjustment: 'The important point about the Monarchy, therefore, is that it is not yet constitutionally able to slip back fully into a world of sumptuous, if uncomplicated, ceremonial.'[36]

--- Legislative hurdles

At some point in the process the relative merits of simple 'absence of monarchy' and a 'strong' (see Chapter 7, *'Weak' v. 'Strong' Republic*) republic reinforced with legal institutions would become a live issue. Undoubtedly, the former is easier to achieve. In theory, it could be accomplished with a short act of Parliament (or possibly two) doing three things: (i) stipulating that functions exercised by, or in the name of, the crown would, thenceforth, be exercised by, or under the authority of, a Presidency, (ii) providing for a selection procedure, laying down a term of office, deputisation and dismissal arrangements etc., and (iii) making administrative and fiscal provision for a Presidency. Consequential measures would be required to determine the ownership of 'grey' property - certainly important, but not vital to the wider success of the project.

Legislation attempting to achieve the full gamut of 'constitutional' republican aspirations would, as anticipated by Hennessy, be the subject of sustained legal

and procedural challenge. The approach suggested by Tony Benn's (1992) *Commonwealth of Britain Bill*[37] illustrates the vulnerability of an ambitious agenda. Features he includes - a 'Charter of Rights', an elected upper house, devolved parliaments for England as well as for Scotland and Wales, and a declaration of supremacy of UK legislation over that emanating from the EU (?of debatable relevance to the exercise[a]) – can be argued on their own merits, but all are likely to stimulate opposition from factions of supporters of the central republican message. A Bill with more modest ambitions, however, concerning itself with just one aspect of 'downsizing' should be less problematical. For example, while 'republicans' would favour regularisation of the prerogative (as would many monarchists), they might be prepared to swallow a sub-optimal outcome if that rendered the greater project less vulnerable. Replacement by 'state' or 'presidential' prerogative could be an interim solution. Opportunities for obstruction would decline in proportion to the extent that the temptation to tack on checks and balances was resisted. The fate of any 'republican' (i.e., monarchy-abolition) legislation in its post-Commons stages is not easy to predict. While the predominantly hereditary chamber which existed until 2002 might have felt diffidence in overturning a measure sent to it by the elected house, members of a 'reformed' body, even if only partially elected might, faced with a fundamental constitutional issue, contemplate occupation of the last ditch like some of their forebears in 1911, confident in its legitimacy to ask the Commons to think again.

Is it plausible to contend that the monarch's obligation, famously prescribed by Bagehot, 'to sign her own death-warrant if the two Houses unanimously send it up to her', does not stretch to erasure of the institution as opposed to the individual? Anthony Bradley, both a barrister and former professor of constitutional law, questions the conventional wisdom:

> A question of some delicacy would arise if the Queen took the not unreasonable view that her duty to maintain in being the

[a] and in apparent conflict with the draft European Constitution: Article I-6; The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.

> United Kingdom outweighed her normal duty by convention to accept the advice of her ministers - in other words, she might refuse to abolish the right of herself or her successor to be sovereign. It is impossible to predict what the consequences of such a crisis would be.[38]

'Delicacy' is for connoisseurs of meiosis; it could equally be characterised as an attempted royal coup d'état. The outcome of such a crisis *would* be unpredictable. The probability of royal resistance would, presumably, be in direct proportion to the perceived popularity of the measure, and of the government that sponsored it, in the country at large. What is certain is that <u>if</u> resistance were successful the conduct of public business could not proceed thereafter as if nothing had happened. The Prime Minister's political life would be finished, the monarchy would be emboldened and its political position significantly magnified. The 'if' is a big one entailing a very real risk of extra-legal action by one side or the other.

Perhaps a more realistic, and less dramatic, prospect is suggested by another precedent from the 1909-1911 crisis, that is, there might not be an attempted veto but the monarch could insist on (or strongly urge) an additional general election to confirm the mandate, a prospect the administration would not relish if the bandwagon on which it had come to power had in the meantime slowed down - or gone into reverse. Without the guidance of a written constitution or relevant precedent in these uncharted waters, it is difficult to determine with any confidence whether a modern prime minister would be in a position to resist such a demand. The answer *might* be in the positive, but there is no certainty. It is for this, practical, reason that a referendum, which could be offered as a bargaining counter by the prime minister, would be an essential part of the package quite apart from the meeting of any normative considerations (discussed further in Chapter 7). Bradley foresees exotic bear-traps such as the courts questioning their own right or obligation to observe republican legislation after the disappearance of that curious entity "the Queen in Parliament" from which they take sustenance. The thought seems simultaneously to place a high estimate on judicial imagination in one respect and a low one on its ingenuity, but it at least illustrates that no path is likely to be entirely without peril.

A preliminary conclusion at this stage of this thesis is that none of the conventional scenarios by which Britain might achieve republican status is particularly plausible. However, the possibility of a fundamental change of constitutional arrangements coming about in a gradualist manner cannot be so easily dismissed. The argument is resumed in Chapter 7 following an intervening discussion of issues that would arise in the transition process. The discussion includes analyses of how they are addressed in a selection of other countries.

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[1] Hennessy, 1995, p. 71
[2] Dawkins, 1986, p. 77
[3] cited at Holden, 1993, p. 327
[4] Riddell, *Observer*, 6 January 2002
[5] Torre, *La Repubblica*, 11 November 2002
[6] *op. cit.*,p. 186
[7] *ibid.*, p. 195
[8] *New Statesman*, 24 April 2006
[9] Brendon, 1993, p. 215
[10] Bogdanor, 1995, p. 304
[11] Praesidium of the Secretariat, *passim*
[12] Fernandez-Armesto, 2005, pp. 50-51
[13] Hari, 2002, p. 15
[14] Bunting, *Guardian*, 21 April 2006
[15] *ibid.*, p. 72
[16] Prochaska, 2000, p. 219
[17] Hames & Leonard, 1998, p. 35
[18] Hughes & Chittenden, *Sunday Times*, 30 September 1990
[19] Fabian Commission Report, 2003, p. 150
[20] Harvey, 2004, p. 37
[21] Allen, 2001, p. 71
[22] Allen, *Times*, 10 May 2002
[23] *op. cit.*, p. 221
[24] Bogdanor, 1995, p. 239
[25] McGuigan, 2000, pp. 8-10
[26] Haseler, 1993, p. 7
[27] Hughes & Chittenden, *Sunday Times*, 30 September 1990
[28] Hodson, 1995, p. 90
[29] Tweedie, *Daily Telegraph*, 31 May 2002
[30] Duckworth, *Independent*, 22 July 2002
[31] Woolf, *Independent*, 4 September 2002
[32] Parris, *Daily Telegraph*, 27 June 2003
[33] Haseler, *ibid.*
[34] Holden, 1993, p. 304, passages in quotes from Worsthorne, *Daily Telegraph*, 7 July 1991.
[35] Bogdanor, 1995, pp. 306-7
[36] Douglas-Home, 2000, p. 209
[37] Benn & Hood, 1993, *passim*
[38] *Guardian* supplement, "New Republic", 1995, p. 20

Chapter 4: Problems of Transition; (1) Models - General Principles, and Analyses of Real World Constitutions; Ceremonial Heads of State.

This thesis has thus far concerned itself with ways in which the British state could move away from its existing constitutional arrangements. Attention is now turned to the next stage, identification of the destination; it therefore discusses institutional options. The label 'republic' is applied to a wide functional range of political systems;[a] a particular 'flavour' does not necessarily suit the taste of all consumers. A typography of models that exist in the real world is offered expressed in terms of head of state functions and of methods of election. Models are illustrated by reference to existing practice, the methodology resting on analysis of the relevant constitutional texts. Analyses in this Chapter relate to countries where the head of state does *not* exercise significant policy functions, a category including constitutional monarchies as well as ceremonial presidencies. The following Chapter looks to the constitutions of a selection of states where the head of state's job description includes at least some autonomous executive functions. Country discussions are concluded with observations on the relevance of the provisions to a future British polity. The concluding 'transition' section of this thesis (Chapter 6) is a case study of the 1999 Australian Republic Referendum in which precursor and related events are recounted and analysed to draw attention to questions that might arise in a transition process.

Types of Presidency

Constitutionalists and jurists customarily recognise a minimum of two basic models, namely the executive presidency and the ceremonial (or formal) presidency; Finer *et al.*, for example, observe this convention. Commonly accepted templates of these two models are the United States of America and Germany. But there is a more subtle typology, used by, for example, Derbyshire &

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[a] this is quite apart from the philosophical/semantic considerations discussed in Chapter 2.

Derbyshire (*'Political Systems of the World'*) which identifies an intermediate category - the dual executive[a] - of which Fifth Republic France is the chief exemplar. It is emphasised that the categories are useful, but rather fluid. Poland, (with other former CMEA/Warsaw Pact states) is a case in point, occupying shifting ground between the executive and 'dual executive' models; and South Africa, while nominally an executive presidency, effectively confers the functions and dignity of head of state on a political actor who would elsewhere be the prime minister. Further observations on the nature of the dual executive are offered in Chapter 5.

-:- *Method of Election*

For the purposes of this study the relevant aspect of the method of election is whether it should be 'direct' (that is, by popular vote) or 'indirect' (by legislators or other office holders[b]). Direct election of a president is often seen as lending legitimacy to the office and thus seen as a feature of 'strong' institutions: hence, the change to popular election in France in 1962 designed by General de Gaulle to enhance his authority, and Estonia's move in the other direction in order to diminish the 'second generation' presidency. Looking at the question in terms of effect rather than cause, Professor Kim Rubenstein[c] asserted (in evidence presented to the Australian Senate's 2003-04 Inquiry) (see Chapter 6 - *post mortem*):

> The broader those powers, the more reason not to have a popularly elected Head of State. The narrower those powers, the less controversial or problematic the direct election of a Head of State.[1]

In other words, the combination of direct election *and* a significant armoury of powers is liable to lead to something like executive presidency, the underlying

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[a] other commentators use the term *Semi-Presidential System*
[b] The process in the USA is hybrid: often described as 'indirect' because of the mediation of an electoral college, but since (a) the college is selected by popular vote and, (b) the system tends to confirm the popular choice except when the outcome is very close, as in 2000, it qualifies as 'direct' for our purposes. It introduces a numerical distortion into the equation, but there are no automatically privileged actors (as, say, in Germany).
[c] Member of the Law School, Melbourne University; the main thrust of her evidence was to present a feminist case, arguing for a mechanism to ensure alternate female Presidents.

assumption being that such an outcome is undesirable. If it were not there would be a positive case for buttressing presidential authority with a popular mandate.

Correlation between the method of election and presidential authority is, however, inconsistent. Textbook 'formal' presidencies with limited powers such as the German, Indian and Israeli are elected indirectly, but despite popular election, those of Austria, Ireland and Iceland have few formal powers. Dual and quasi-dual, executives such as France, Portugal, Finland and Poland elect their presidents directly, but in Turkey, where the institution is of some significance, indirect election applies. A case notably resistant to easy classification is that of South Africa where a strong executive president is chosen by parliament.[a]

Although the questions of type of presidency and the method of election are easily separable, commentators are not beyond muddying the waters. Thus, in making the otherwise perfectly valid point that (British) political parties would put all their energies into a campaign to secure victory for their candidate if the president were directly elected 'as in France',[2] Bogdanor disregards the value of the French Presidency as a political prize. Undoubtedly, the parties *would* campaign on behalf of their favourite sons, or daughters, even if the institution were not furnished with significant powers, but it is not *inevitable* that they would see it as a matter of life or death; and recent Irish experience illustrates that it possible for candidates who are not party war-horses to be electable. Ken Livingstone's (first) election to the London mayoralty illustrates that even in Britain office can be won against hostility of all the major parties. It would, of course, be possible to exclude candidature of persons who have held certain public offices within a given timeframe. Exclusion of active politicians raises the prospect of encouraging celebrity candidates; emergence of a sporting personality was a concern expressed by some Australians in the 1999 campaign.

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[a] The greatest concentration of executive presidencies is in Latin America where the United States model is followed.

--- Monarchy: absolute and limited

There is more than one flavour of monarchy. Even executive monarchy is still available if the tiny alpine state of Liechtenstein can be taken as an example. In March 2003 the seventeen-thousand-strong electorate approved by a referendum (64 per cent to 36 per cent on an 88 per cent turnout)[3] the restoration of what look like executive powers to the ruling prince. Hans Adam II von und zu Liechtenstein, Duke of Trappau and Jägerndorf and Count of Rietburg (*sic*) was empowered thenceforth to dismiss governments and control the appointment of judges, in addition to pre-existing powers to veto laws and call early elections.[4] Assuming this is a one-off eccentricity, the options available in the real world are probably limited to something like the current British model (comparatively elaborate, distant, formal, ostensibly dignified in style but consequently rather vulnerable to ridicule when the behaviour of an individual falls short), or the modern continental model: comparatively informal, 'normal' in life-style, bourgeois, and no longer perched on the apex of a legally recognised national aristocracy.

In practice, the continental monarchies have adopted their life-styles for contingent reasons. The point is well made in an obituary of Queen Juliana[a] of the Netherlands (who really did ride a bicycle around The Hague) in which Mark Steyn[5] drew attention to the factors which conspired to favour a 'homespun' style. These were, firstly, leadership of the House of Orange by a woman since 1890 (a circumstance unchanged under Queen Beatrix) was consonant with a domestic style;[b] secondly, Juliana's lack of pretension to personal glamour; thirdly, disinclination of a population that had suffered the horrors of occupation to fawn before a monarch who had sat out World War II in the safety of Canada – a factor reinforced by the Queen having a German husband – and a general lowering of national expectation following the loss of the greater part of the colonial empire. Whatever the motivation for adopting a particular life-style, it could have had a

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[a] 1909-2004;(r.1948-1980)

[b] This does not explain the absence of a parallel effect in Britain which has had queens-regnant for 117 of the 168 years from 1837 - 2005.

positive impact on public opinion in the countries concerned and thus contributed to the survival of the institution.

--- *'Scaled-down' monarchy*

If the notion of the 'crowned republic' coincides with reality anywhere it is, pre-eminently, in Scandinavia. Sweden, like Britain, is a monarchy but the regimes resemble each only superficially. The Instrument of Government Act (1989) (the latest version of a constitution dating from 1809) opens with the bold declaration: 'All public power in Sweden proceeds from the people' (*Chapter 1, Article 1*): no question here of everyone (or anyone) being a 'subject' of the monarch. The constitution allows the king only an exiguous role in government. He has the right to be kept informed of government business (*Chapter 5, Article 1*) in the Council of State or directly by the Prime Minister,[6] but the privilege is hollow given that he has been stripped of even core constitutional functions. He chairs the Council of State (comprising King and cabinet) and the Committee on Foreign Affairs and 'recognises' new Cabinets (in the Council of State). Dissolution of the (unicameral) Riksdag and selecting a party-leader to form a government are duties falling to the Speaker (*Chapter 6, passim*); it is the Speaker's signature, not royal assent, which confers the final approval on legislative acts, and there has not been a Coronation since 1873.[a] Article 6 of the Parliament Act (Riksdag Act) provides that: 'The Head of State shall declare the session (of Parliament) open at the request of the Speaker.' Note here the use of the formula 'Head of State' which, if the occasion arose, could remain unaltered if a president were appointed. Is Sweden then a 'republic' - in the broad, Kantian sense? *Prima facie*, it might be wondered whether the strength of the parliamentary strand of state power is not conducive to a 'parliamentary dictatorship' of the British type (single chamber and no reserve powers held by the head of state), but fundamental rights are deeply entrenched (*Article 12 (3)*) and the judiciary plays a key role in ensuring that constitutional safeguards are enforced. Furthermore, vigorous local government,

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[a] Gustaf V, acceded 1907, chose not to be crowned. He and subsequent monarchs have been sworn in.

guaranteed under the constitution (*Article 1(2)*) and responsible for some 40 per cent of public administrative activity,[7] ensures somewhat more pluralism than might be expected in an essentially centralised state. Thus, Sweden's 'republican' credentials are strong, certainly more so than anything that can be delivered by Britain's improvised institutions, and look somewhat more realistic than Prochaska's thesis that Britain is already a republic in all but name.[8] As shall be seen when discussing the other Scandinavian monarchies, the formal status and residual power of the Danish and Norwegian (and Benelux) institutions are rather closer to their British counterparts; the contrast lies chiefly in the scale of the grandeur in which they conduct their ceremonial activities and even their daily lives.[a]

--- *Ceremonial Presidency*

Schedules of duties of ceremonial (or 'formal') presidencies vary in detail but, typically, an incumbent (a) acts as a guardian of the constitution, for example, by ensuring that the correct procedures are followed in respect of the appointment (or dismissal) of the executive head of government and (b) performs ceremonial duties in the capacity of embodiment of the state when national custom so demands. Insofar as any system can claim to be the modern international norm it is probably the ceremonial presidency, though numbering no more than some two dozen in the world.[9] They are all, or aspire to be, liberal democracies; dictators tend to be too attracted to the gaudy trappings of self-advertisement offered by ceremonial function to make do with mere humdrum executive office. Broadly speaking, the functions of a ceremonial president are similar to those of a constitutional monarch.[b]

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[a] an unostentatious life style does not necessarily equate to modest financial means. According to a review carried out by *Time* (2002) the King of Sweden's private wealth stood at $20m, the Norwegian Royal Family's at $130m and their Netherlands counterparts were thought to have circa $3 *billion*.
http://www.time.com/time/europe/magazine/2002/0603/monarchy/riches.html

[b] The resemblance between the two is no accident given that the first modern ceremonial presidency, Third Republic France, was accepted in the 1870s as an interim arrangement by monarchists who believed it was the system most readily convertible to their preferences once a suitable candidate for the throne could be agreed upon.

Critics of ceremonial presidencies are apt to dismiss them as irremediably mundane, lacking both the fairy tale exoticism of royalty and the eroticism of raw power. Defenders will point to examples in the real world. In the main, ceremonial presidents attract, quite properly, little attention. They get on with their jobs – signing laws, awarding honours, inaugurating public works projects - seldom attracting scandal. The names von Weizsäcker, Rau, Herzog, or Köhler mean little outside Germany and, even domestically, might be better known for their former functions.[a] The office attracts attention when something discreditable emerges either from his/her time in office,[b] from an incumbent's distant past (Waldheim in Austria), when s/he is in the spotlight by virtue of exercising constitutional functions (a fairly common occurrence in Italy), or when the personality of a president has made a positive impression on the media (the oft-cited example of Ireland's Mary Robinson).

The perceived, or alleged, low quality of incumbents of ceremonial presidencies is seized on by British monarchist polemicists, and by some republican advocates of other systems. Drawing, it would appear, heavily on the experience of (pre-Berlusconi) Italy, a country with an apparently limitless supply of not very well known (even domestically) former Prime Ministers, it is suggested that the choice in Britain would be between retired first rank politicians - who would remain divisive figures of questionable impartially (for a number of years the spectre of

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[a] Richard von Weizsäcker (Bundespräsident 1984-94), like Willy Brandt (Chancellor 1969-74) had been Governing Mayor of West Berlin (1981-84), earlier (1972-79) deputy chairman of the CDU's caucus in the federal parliament ; Roman Herzog (President 1994-99) had been a professor of law and formerly a Justice of the Federal Constitutional Court; Johannes Rau, President 1999-2004, had spent most of his political career in local and regional politics (Mayor of Wuppertal; Minister-Präsident of the Land of North-Rhine Westphalia). Horst Köhler, elected to the Presidency in May 2004 had, from 2000, been managing director of the IMF. Vigis Finnbogadottir, President of Iceland from 1980 to 1996, had in a previous life served as director of the Reykjavik Theatre Company and taught French drama at the University of Iceland.

[b] Questioning by police of President Katsav in connection with sexual harassment allegations is a case in point. *Israeli President's home raided ...*, *Independent*, Eric Silver, 23 Aug 2006

Margaret Thatcher was conjured up to frighten the children[a]) - or second rank figures whose alleged low profile would contribute a bathetic note to state occasions. Hence, mocking accounts are concocted of President Hattersley at the Trooping of the Colour or of President (Tony) Newton on the balcony of Buckingham Palace for VE Day;[10] the identity of the butt changes over time. In 2000 Bogdanor commented[11] that genuinely non-partisan members of the 'great and the good' have 'mysteriously disappeared' consequent to the Thatcherite insistence that public figures stand up and be counted. As that époque recedes further into history, cadres such as former Speakers of the House of Commons, the judiciary, academia and retired senior civil servants (including diplomats) might again be prepared to put their heads over the parapet. There is surprisingly little in print on non-political recruitment, though in a round-up of views of 'prominent republicans' in the *Guardian* Clair Rayner proposed Mary Warnock or Elizabeth Butler-Sloss, and David Pannick's candidate was Lord (Chief Justice[b]) Woolf.[12]

Another contributor to the same piece, Keith Ewing,[c] while declining to nominate a candidate, identified what he saw as another potential obstacle across the path:

> I'm certainly not in favour of the current arrangements, but I think an elected head of state or president would create serious constitutional problems, especially if they were elected on a party ticket different from the party in power. It's a recipe for constitutional gridlock.[13]

That risk certainly exists but the admonition, as stated, makes some broad assumptions on the degree of power accorded to the president similar to those made by Bogdanor. A (relatively) non-political schedule of duties could condition the attitude of the electorate.

Pragmatic British republicans have a proclivity for the ceremonial presidency over other variants for the simple reason that it most closely resembles existing functional arrangements (and, paradoxically, the closest to constitutional

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[a] 'For, believe me, the run-off for the Presidential Palace would probably be between Lady Thatcher and Lord Owen.' [Hennessy, 1995, p. 71]

[b] until 30 September 2005

[c] Professor Of Public Law at King's College, London

monarchy). Its introduction, all else being equal, would least disturb the central roles of Parliament and the office of the Prime Minister. Conversion from one system to the other could, therefore, with the political will, and in comparison to alternatives, be fairly simple and painless. But therein lies its flaw; unless other changes are enacted at the same time all that will have been achieved is 'absence of monarchy'.

--- Israeli variant

The system used in Israel between 1992 and 2001/3, at first sight a somewhat Heath Robinsonian construct, rewards attention. The functions of the presidency were, and remain, confined to constitutional and ceremonial duties, but the Prime Minister 'serve[d] by virtue of being elected in the national general election.' ['Basic Law; The Government' (adopted 14 April 1992); Section 2(b)]. The practice thus achieved some of the virtues of the American system, *viz*, a chief executive chosen by the people but not loaded with purely formal functions. Its main down-side, and what contributed to its abandonment, was the same as that applicable to dual executives, namely there is no certainty that the head of the executive being able to command a majority in the assembly (Knesset), though the potential conflict is between the assembly majority and Prime Minister, rather than between Prime Minister and President as in France. The version of the 'basic law' in force at the time attempted to mitigate this potential anomaly by providing for simultaneous election of Prime Minister and the Knesset. A compromise with the continuing parliamentary nature of the state was underlined by a requirement for the Prime Minister to present his/her government (and programme) to the Knesset within 45 days. [*Basic Law: The Government (1992); Section 14*] Failure to do so would have resulted in a 'special election' (a Prime Minister-elect was allowed two attempts before this was resorted to[a]), a process which, presumably, would have been repeated until agreement was reached [*Section 15*]. Despite the parallel

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[a] The version of the Basic Law adopted in 2001 [*Basic Law: the Government (2001), Article 13*] does not allow for a second attempt, but a prime minister-designate emerging from the parliamentary balance of power is likely to be a realistic prospect.

with the dual executive referred to above there is probably a closer analogy with executive presidency systems, one which becomes clearer when allowance is made for terminology. The holder of the office of 'Prime Minister' could easily have been labelled 'President' if, (i) the title had not been pre-empted by another state dignitary, and (ii) there were not a cultural preference for 'parliamentary' terminology.[a]

Likud was the beneficiary in May 1996 when its leader, Netanyahu, was elected Prime Minister even though Labour obtained the largest single block of seats. The experiment came to an end in March 2001 on the initiative of Likud which had just had its plurality restored by a further general election.[b] It was accepted throughout the mainstream political classes that the 1992 reform had failed to achieve its objective. Instead of improving the prospects of stable government[14] – a reasonable assumption if the Prime Minister draws his/her legitimacy not from shifting allegiances in a fissiparous assembly, but directly from the electorate - it had in fact fermented factionalism and confrontation between the executive and a legislature relieved of the responsibility of sustaining the administration in office. It allowed governments to survive, but damaged their prospects of achieving anything. *If* it had been accompanied by dilution of Israel's exceptionally purist PR system[c] *and* by more full-hearted commitment to separation of powers envisaged in the original draft of the reform which had done away with votes of confidence; and *had not* been accompanied by introduction of a primary candidate selection system within the parties - which encouraged parliamentarians to seek a high profile - it might have turned out differently.[15] The perils of introducing organic reform without thinking through the possible knock-on effects are a warning to imitators.

This arrangement has some overlap with Graham Allen MP's proposals (referred to in Chapters 1 and 5). These envisage an office of prime minister more distant

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[a] See Mahler, 1997

[b] Basic Law: The Government(2001), (Article 7a); adopted 7 March 2001, entered into force with effect from the Knesset election of 28 January 2003

[c] 1.5 per cent threshold and all members of the Knesset elected from nationwide party lists

from parliament than British tradition is accustomed, but do not entail an American-style absolute separation of the legislative branch from the executive. Mr Allen refers to the institution he advocates as a 'United Kingdom Presidency':

> The choice now for the United Kingdom is not between a presidency and a prime ministership, but between an unregulated Presidency and a regulated one. My argument is not that a British Presidency should exist but that it *already exists*.[16]

Absence of effective, formal constraints on the executive, heavy governmental centralisation and personalisation of politics, he contends, have led to evolution of an office having more in common with a personal presidency than with an assembly-dependent prime ministership.[a] He could have added that since most British voters cast their ballot not for the local candidate but, perhaps unconsciously, for a representative in an electoral college (known as the House of Commons) who will, in turn, appoint a known chief executive, there is some logic in acknowledging reality. Though Mr Allen calls the office the 'Presidency', and endows it with presidential-style accoutrements, his draft Bill refers to the office-holder as 'Prime Minister', presumably a consequence of his preference to retain the monarch as nominal/ceremonial head of state. He proposes alternative methods of choosing the 'Prime Minister', one of which would be direct election held at the same time as a general election. He also prescribes formal House of Commons endorsement of the choice: both procedures used in Israel in the nineteen-nineties. His alternative option, appointment to the 'Prime Ministership' of a candidate declared formally to be the candidate of the party obtaining a parliamentary majority, entails less external change from existing arrangements though measures he proposes elsewhere to delineate prime ministerial powers and to codify the prerogative would make the conduct of business rather different. Option 2 also resembles the procedure followed in South Africa (see Chapter 5, *Executive Presidencies – South Africa*)

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[a] So, one school of thought considers that Britain is already a republic – by virtue of the monarch's comparative powerlessness but, according to another, there is already a presidency – by virtue of the Prime Minister's ascendancy.

--- *Analyses of real world constitutions*

The selection of states examined in this, and the following, Chapter is by no means comprehensive but incorporates a reasonably representative cross-section of democratic constitutional practice.

--- *Monarchies*

In broad terms, constitutional monarchs act as symbols of their nation, append their signature to legislation (without the option to withhold it) and, most importantly, preside in some way over the choice of prime minister after a parliamentary election. As will be seen from the notes which follow on individual countries, Sweden conforms least to this template. Britain fits it quite well, but differs from other monarchies in two, or possibly three, important respects. Its behaviour is governed by custom and precedent rather than by law, and it operates on a somewhat grander scale; it is only in the British monarchy that it is possible to discern a glimmer of the magnificence of the pre-Great War imperial courts. Related to this, the British monarchy still occupies the pinnacle of a state-recognised system of hereditary aristocracy.[a]

-- *Sweden*

Powers accorded to presidents (or constitutional monarchs) in the real world do not fall neatly into predetermined categories but rather occupy places in a continuum. Closest to political impotence is the Swedish crown. The constitution makes various provisions in connection with the succession and eligibility but, apart from presiding over a special session of the Cabinet when the government changes hands (Chapter 6, Article 4 of the 1989 Constitution) and the right of consultation referred to above in this Chapter under '*Scaled-down monarchy*', is silent on specific functions, omitting even to identify the monarch as the representative or

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[a] Cf. Section 83 of the Danish Constitution: `All privileges attached to nobility, title and rank shall be abolished,` and Article 23 of Norwegian Constitution: `The king may bestow…no rank or title other than that attached to office…no personal…hereditary privileges may henceforth be granted to anyone.`

symbol of the state. Since Swedish practice is discussed elsewhere in this study its inclusion here is largely for completeness.

Something resembling the Swedish dispensation could be the end-state of a number of recipes for constitutional reform put forward with Britain in mind. Whether British monarchists (including monarchs themselves) could reconcile themselves to this purely decorative model is a central question posed by this study. It is suggested elsewhere that the response might be in the negative in which case the journey to a republic could be deemed to be completed or beginning its last stage.

-- Denmark

By contrast, in neighbouring Denmark (Part I, Section 3 of the Constitution Act): '[T]he legislative power is jointly vested in the King and the Parliament. The executive power is vested in the King'.[a] A substantial schedule of functions carried out in his (*sic*) name is included in the Act, *viz*, appointment and dismissal of the prime minister, allocation of ministerial portfolios (*Part III, Section 14*), presiding over the Council of State (where 'all Bills and important measures shall be discussed' (*Section 17(2)*), acting 'on behalf of the Realm in international affairs' (Section 19), giving Royal Assent to legislation (*Section 22*), exercising the prerogative of mercy and amnesty (*Section 24*) and causing 'money to be coined' (*Section 26*). The monarch is prevented from exercising personal rule by a stipulation (*Section 12*) that the: 'King … shall exercise such supreme authority through the Ministers', and the requirement (*Section 14*) that, for legislation or other governmental utterances to be valid, the 'King's' signature must be accompanied by that of a Minister. There is no explicit right of veto in the Constitution but, interestingly, Section 22 states: 'A Bill passed before the Parliament shall become law *if* it receives Royal Assent not later than thirty days after it was finally passed.' Provisions such as those in Section 19 (1) forbidding the 'King' to conclude or abrogate treaties, or (*Section 19(2)*) to use military force

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[a] as the monarch, Queen Margarethe since 1972, is referred to throughout, though Section 2 stipulates that "[t]he Royal Power is inherited by men and women …

against a foreign state without the agreement of the Folketing suggest that what is intended is to impose parliamentary authority over competences analogous to the British crown's prerogative (see Chapter 1- *Residual royal powers and functions*). Taken as a whole, the Danish constitution provides for a dutiful monarch in whose name executive authority is exercised, but who has no personal political authority. The suspicion lingers, however, that the framers of the constitution envisaged that, in extreme circumstances of national emergency, s/he might assume an active role as a last resort. If this is not so there is an ambiguity in Section 16: 'Ministers may be impeached by the King or the Parliament with maladministration of office', and in Part VI, Section 60: 'The High Court of the Realm shall try such actions as may be brought by the King or the Parliament against Ministers'. Nowhere is the monarch explicitly empowered to initiate proceedings autonomously but, if members of the government are the target, their involvement, as apparently envisaged by Section 12, could be impractical. The same can be said of the crown's orthodox role, similar to that of constitutional monarchs and ceremonial presidents elsewhere, of brokering post-election government formation.

Allusion to such exotic topics as the impeachment of ministers instigated by the monarch- what would amount to a royal coup - in a stable country like Denmark is, of course, to venture into highly hypothetical territory. The essential point is that the Danish crown occupies a position somewhat further along the constitutional spectrum from that of its counterpart in Sweden. It is possible that the apparent contrast in the attitude of these two Scandinavian peoples illustrates nothing more profound than the different dates of their last thoroughgoing constitutional revision: 1953 in the case of Denmark (latest revision of a constitution first granted in 1849), and 1989 for Sweden (though the last vestiges of the Swedish monarch's constitutional powers were removed in an earlier reform in 1975).

An important operational difference between the Danish and British monarchies which resemble each other in many respects is that the former operates within a clear legal framework. If Britain were to adopt a minimalist written constitution

purporting to do no more than to describe and codify existing practice something rather similar to the Danish example might emerge.

-- Norway

The Norwegian constitution was drafted and adopted by a constituent assembly gathered at Eidsvoll in 1814 during a brief period of apparent independence – in the event a short interlude between subordination to the Danish and Swedish crowns. Nonetheless, national autonomy was retained within the new union, and the Storting was able to depose the King of Sweden from his Norwegian realm by a resolution passed in 1905. The 1814 constitution, subject to periodic amendment (the scope of royal prerogative was significantly reduced in 1884) up until 1995, remained in force through both Swedish union and full independence. Article 1 states: 'The Kingdom of Norway is a free, independent, indivisible and inalienable Realm. Its form of government is a limited and hereditary monarchy.'

Hence, as Prof. Thomas Wyller comments, the monarchy is firmly rooted in the constitution and can only be removed by an amendment to the constitution.[17] The Eidsvoll constitution regulates the position of the king, retaining the right to take away what it had conferred. Perhaps betraying its comparatively antique origins,[a] the document, read in isolation, gives the impression of describing a distinctly 'royal' polity. 'Executive Power is vested in the King' (*Article 3*); he may 'issue and repeal ordinances relating to commerce, customs tariffs, all economic sectors and the police' (*Article 17*), pardon criminals (*Article 20*), and 'choose and appoint, after consultation with the Council of State, all senior civil, ecclesiastical and military officials' (*Article 21*). He is the Commander-in-Chief of the armed forces (*Article 25*) and may (*Article 23*) 'bestow orders upon whomsoever he pleases', but honorific titles are prohibited. By virtue of Article 22:

> [t]he Prime Minister and the other members of the Council of State, together with the State Secretaries, may be dismissed by the King without any prior court judgment, after he has heard the opinion of the Council of State on the subject. The same

[a] The average age of the written constitutions of North and Western Europe (in 1995) was, according to the Derbyshires, 93 years. Norway's - circa 200 years - is therefore one of the older ones. [Derbyshire & Derbyshire, *op cit.*, p. 12]

> applies to senior officials employed in government offices or in the diplomatic or consular services....

The matter of forming a government is approached obliquely in Article 12 which requires him to choose a Council of State. It stipulates that this body shall consist of a Prime Minister and at least seven other Members (of whom half shall profess the official religion of the State and, curiously, 'husband and wife, parent and child or two siblings may never serve at the same time.' But it is not specified when and in what circumstances the Council should be convened, and the King may co-opt 'other Norwegian citizens, although no members of the Storting' to serve in the Council. Under Article 30: '[e]veryone who has a seat in the Council of State has the duty frankly to express his opinion, to which the King is bound to listen'.

Appearance is not, of course, reality.

> [A]nd when it is stated that the king chooses his Council, more than 100 years of constitutional common law have demonstrated that it is the Storting, through parliamentary procedures, that makes this choice.[18]

The limited nature of the monarch's prerogative is defined in what can be recognised as a standard proviso (in Article 31) requiring that: 'all decisions drawn up by the King shall, in order to become valid, be countersigned' (normally by the Prime Minister). It is not clear whether this blanket measure applies to the King's theoretically quite extensive power of veto over legislation. Article 78 enables him to return a Bill to the Odelsting (lower house) 'with a statement that he does not for the time being find it expedient to sanction it'(!) The hoops to jump through (*Article 79*) to override the royal veto are more challenging than in most presidential republics, in that the measure must be approved again by parliament after a general election in sessions separated by two intervening sessions. Whether the king could, in practice, use this power is another issue.[a] The British monarch, in theory, possesses an absolute legislative veto but has refrained from wielding it for three-and-a-half centuries. But that is a prerogative which, having withered on the vine, can be regarded as moribund; in the absence of a written constitution

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[a] The last royal veto in 1905, by Oskar II, King of Sweden and Norway, played an important role in the severing of the Union.

nothing is certain. The use of the Norwegian counterpart provision might, in normal circumstances, be equally inconceivable but, being based on constitutional authority couched in unambiguous language, it would be problematic to challenge its legality. Article 13 enshrines the right to be informed by requiring the Prime Minister to report business to the King. Though not provided for in the constitution, the King regularly attends meetings of the cabinet.

The head of state provisions in the Norwegian constitution are not very exportable to the extent that they describe what really happens only in indirect and coded language; as in Denmark, there is a Bagehotian dichotomy between 'dignified' monarchical forms and 'efficient' practices mediated through politicians. Britain, already amply equipped with constitutional ambiguity and imprecision, would benefit little from importation of an alien variety.

Pan-Scandinavian royal practice illustrates that a modest scale of operations does not compromise dignity of the institution.

-- *Spain*

The Spanish crown, restored on Franco's death in 1975 (following a *de jure* Republic from 1931 to 1936 and a period in effective cold storage thereafter) played a vital role in the late nineteen-seventies and early eighties in underpinning the foundations of the new democracy. As an institution it provided a degree of psychological reassurance to still highly influential conservative and traditionalist sectors of Spanish society. King Juan Carlos is credited with striking the right note in physically confronting the Tejero / del Bosch attempted coup in 1981, though whether his actions explained the coup's failure or the causality was more complex is less important than the widespread perception that they saved the fledgling democracy.[a]

Influenced by this phase of history, the monarchy is often portrayed as in some way different from analogues elsewhere in Europe. Does this accord with reality?

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[a] see, for example, Blain & O'Donnell, 2003, p. 93

The 1978 Constitution is clear about the King's formal powers and functions. Article 56 (1) declares him to be 'the Head of State, the symbol of its unity and permanence ... (who) arbitrates and moderates the regular functioning of the institutions.' Article 62 provides him, *inter alia*, with authority to approve legislation, to summon and dissolve the Cortes, to ask an individual to form a government and to appoint and dismiss him/her and other ministers, to award honours, to grant pardons, and to exercise supreme command of the armed forces. Under Section 63 he accredits and receives diplomats and declares war and peace. Other parts of the Constitution accord him further miscellaneous functions - such as (*Article 122 (3)*) the appointment of the members of the General Council of the Judicial Power. Some are specifically circumscribed as acts to be taken jointly with relevant ministers. Article 62 (e), for example, states: [i]t is incumbent upon the King: ... to approve decrees approved by the Council of Ministers' and, lest it be thought that Articles appearing to confer unqualified power imply royal autonomy, Article 64 (1) applies a blanket restriction: 'The actions of the King shall be countersigned by the President of the Government' (= Prime Minister) 'and, when appropriate, by the competent ministers.'

Even the core constitutional function of choosing someone to form a government after an election is subject to co-competence rules; the same Article continues: 'The nomination and appointment of the President of the Government and the dissolution provided for in Article 99 shall be countersigned by the President of Congress.' While Juan Carlos's behaviour certainly earned the Spanish monarchy a good measure of prestige, its powers, formally and legally, are towards the lower end of the range. In conspicuous contrast to the situation that pertains in Britain, the Spanish media, conscious of the role of the monarchy is perceived to have played in underpinning the fragile foundations of national institutions, have drawn back from the sensationalist treatment of the royal family. There is perhaps, an *ad hominem* flavour to Spanish attitudes:

> Spaniards are not monarchists but Juan Carlists. The king has a very limited constitutional role (far smaller than that of the British monarch), and the constitution is, to all intents and purposes, republican. And yet Juan Carlos remains, for many

> Spaniards, almost a symbol of Spanish democracy. It is debatable to what extent his personal popularity extends to the rest of his family, or to the monarchy as an institution, and whether it can survive him.[19]

The extent to which the Spanish monarchy is unique is a consequence of Spain's singular history.

-- *Netherlands*

Historically, the Netherlands provides a prime example of the terminological ambiguity alluded to elsewhere in this study. The state emerging from the sixteenth-century revolt against Spanish dynastic rule was called the Dutch 'Republic', though presided over by an hereditary '*Stadtholder*' supplied by the House of Orange.[a] Whatever the republican credentials of this structure, they did not inhibit an office-holder from accepting the English crown in 1688, or a later descendant becoming King of the United Netherlands in 1814.[b]

At first reading the constitution (overhaul effective 1983) reveals only a minimal function for 'the King' (there has not been a male on the throne since 1890). Article 42, paragraph (1), 'The Government shall comprise the King and the Ministers', places the institution at the summit of the state, but paragraph (2): 'The Ministers, and not the King, shall be responsible for acts of government' emphasises the formal role of the monarchy. The monarch is positively required by the constitution to do remarkably little. There is, for example, no symbolic role in relation to the military, quite the contrary: 'The Government shall have supreme authority over the armed forces.' (*Article 98 (2)*). Nor, unusually for a monarchy, is the crown the legal fount of state honour: 'Honours shall be established by Act of Parliament.' (*Article 111*).

But the office is not without substance. The fundamental head of state function, common to constitutional monarchies and ceremonial presidencies, as encapsulated in Article 48:

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[a] this is a simplification of complex arrangements. Not all of the (seven) Provinces accepted a particular incumbent, and there were periods without a Stadtholder.
[b] the title used until the southern provinces seceded to form the kingdom of Belgium in 1830.

> The Royal Decree appointing the Prime Minister shall be countersigned by the latter. Royal Decrees appointing Ministers and State Secretaries shall be countersigned by the Prime Minister

is, prima facie, an onerous responsibility that entails significant influence on politics. In the Netherlands (and neighbouring Belgium) a fragmented party system lends an element of personal choice in the selection of the Prime Minister and even modification of policy positions to accommodate royal preferences.[20] The monarch is spared direct involvement in the minutiae of government formation, often entailing long, complex and contentious negotiations between potential coalition partners, by appointment of an *informateur,* a senior politician who, in turn, selects a *formateur* who either forms a government, or brokers its formation. Indirect influence derives from Article 74 which confers nominal presidency of the Council of State[a] on the monarch. Responsibility is delegated to a vice-President but members of the royal family customarily serve on it - the daughter and wife of the Crown Prince were appointed in 2003 and 2004.

By and large, royal powers and functions are written down (the institution of informateur/formateur is an exception, being based on national political traditions not referred to in the Constitution), but there is little difference in the political/administrative area to distinguish Dutch practice from the British, though again the *formateur* is an exception. In the event of Britain adopting proportional representation, diminishing the probability of a clear-cut majority for a single party, the question of establishing something similar would arise. Bogdanor is dismissive: 'there seems no reason to adopt the more cumbrous machinery employed in Belgium and the Netherlands and little to gain by doing so'[21] taking the view that interaction between the monarch's private secretary and counterparts in Downing Street and the Cabinet Office would continue to be satisfactory. Possibly so, but what suits the straightforward transitions that generally occur under simple plurality might be seen as lacking transparency in a more complex system. Recruitment of the Speaker of the House of Commons is a solution likely

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[a] An advisory body which reviews proposed legislation before submission to parliament; also an appeal tribunal for administrative acts and secondary legislation.

to find favour with large parts of the political classes but is not without its pitfalls (counter-arguments presented in Chapter 7).

-- Australia

The British monarch is also Australia's head of state, though attendant administrative functions are carried out by the Governor-General, an officer nominated by the Government of Australia and formally appointed by Buckingham Palace. Crucially, the Government – in practice the Prime Minister – also has the power to 'advise' the Queen to recall her representative, advice which by convention cannot be rejected.

The Australian constitution is a businesslike document concerning itself with such minutiae as the competences of the legislative chambers and the distribution of functions between the States and the central, or 'Commonwealth' (= federal), tier of government. After discarding extensive redundant material regarding transitional arrangements on establishment of the federation, it can fairly be described as minimalist. It eschews, for example a comprehensive statement of human rights[a] and avoids using the title 'prime minister' anywhere in its one hundred and twenty eight sections. Nor does it explicitly charge the Governor-General with asking a party leader to form a government, though authority is implicit in Section 64:

> The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.
>
> Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

This lingering trace of the British 'invisible ink' tradition was to complicate the 1999 referendum to the extent that it was seen as an obstacle to a simple transfer of Governor-General functions to a president. It was argued that, however acceptable vaguely formulated prerogative powers might be for a Governor-General who could be relied not to use them autonomously, an elected president might be

[a] Section 116 guarantees freedom of religion

tempted to flex his muscles. To prevent this, further constitutional changes would be required.

The early vintage of the Constitution is betrayed by the original Section 127 (not repealed until 1967) which stipulated that 'aboriginal natives' were not to be counted in Commonwealth or State censuses. It derives from an Act of the United Kingdom parliament, namely the Commonwealth of Australia Constitution Act of 1900 which came into force on 1 January 1901, since when it has been amended on rather few occasions, possibly a consequence of a rigorous alteration[a] procedure (see Chapter 6, - *post mortem* of this thesis). Section 128 (in Chapter VII) requires an absolute majority in both houses of the Commonwealth parliament followed by ratification by referendum:

> if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

The appointment of an officer to perform the functions of head of state is provided for in Section 2 (of Chapter I):

> A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him,

that is – as decreed by the Government of Australia or authorised by ordinary Australian law subject to the Constitution remaining inviolate. The method of appointment is not specified. By convention, the British monarch automatically accepts the advice of the Prime Minister of Australia. Since this procedure applies equally to dismissal of the Governor-General there is potential for farce when a Governor-General simultaneously feels obliged to dismiss a Prime Minister – an improbable combination of events in a stable realm, but one which came close in Australia in 1975. 'It could be a question of whether you get to the Queen first for

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[a] The term 'alteration' being preferred to 'amendment' in the Australian Constitution, it is often used by Australian commentators

your recall or you get in first with my dismissal',[22] Gough Whitlam said to Sir John Kerr three weeks before Kerr used his reserve powers to dismiss Whitlam.[a]

The Constitution does not include a composite schedule of Governor-General powers and functions, but scrutiny of the whole document reveals an office resembling both formal presidency and constitutional monarchy. Section 2 assigns a broad role, including residual functions in practice carried out on the advice of the Prime Minister, akin to royal prerogative as it has developed in Britain. This imprecision was to prove an embarrassment in the 1999 referendum campaign, an episode expanded upon in Chapter 6 of this thesis. Section 2,[b] amongst others, of the Constitution is also significant in that it makes clear to the satisfaction of most observers that the Governor-General is *not* himself the head of state, but one who has a vicarious relationship thereto, an argument upheld[23] by Bede Harris,[c] and by Prof. John Warhurst:[d] 'The Governor-General is not Australia's Head of State. This is not a matter of semantics, Republicans are not being pedantic in making a fuss about this point, we hold to it absolutely.'[24] These pronouncements did not satisfy Sir David Smith (*Australians for Constitutional Monarchy* activist) who, giving evidence to the 2004 Senate Inquiry (Canberra Session), cited various legal authorities to support the construction that the Governor-General 'is in no sense a delegate of the Queen but the holder of an independent office'.[25] The argument did not impress the aforesaid Dr Harris who[26] found Section 61 (see below) quite unambiguous. Dr Mark McKenna based a similar interpretation on the Governor-General's customary self-effacement when the Queen sets foot in Australia. It was nevertheless a subsidiary argument used by monarchists in the 1999 referendum in

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[a] Richard McGarvie (himself a former Governor of Victoria and designer of a little-favoured republican model involving the creation of a conclave of elder statesmen) disagreed, arguing that the Queen would have been obliged to 'make inquiries' if the PM had requested the recall of the G-G; of whom, he does not reveal. [McGarvie, 25 August 1999]

[b] 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'

[c] lecturer in constitutional law at Canberra University

[d] then Chair of the Australian Republican Movement

order to counter appeal to nationalist sentiment inherent in the notion of a President being an indigenous head of state.

Section 61 (Executive Power) is broad-brush:

> The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Section 5 is somewhat more specific:

> The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

Other provisions designate the Governor-General as nominally responsible for routine functions embodying the state – receiving the resignation of the President of the Senate, causing writs for a general election to be issued, receiving messages regarding appropriations. Section 28 confers on the Governor-General potentially significant powers: 'Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.' Premature dissolution enforced from on high is exceptional, though it came into play in the 1975 crisis. '1975' shone a bright light on the anomaly by which the two houses of the parliament enjoy, except where otherwise specifically provided for, equal status. Hence, refusal of the Senate to approve the budget is the occasion of a constitutional crisis. The USA where continuance of government is not dependent on legislative support can cope, after a fashion, with deadlock; a political crisis ensues, but not a constitutional one. Quite different forces come into play in a parliamentary system where the 'lower' house generally takes precedence in financial affairs. In Britain it took a full-blown constitutional crisis culminating in the 1911 Parliament Act to resolve similar ambiguity.

Australia, a realm of the British monarch, might appear, prima facie, inappropriate for inclusion in this survey, but there is an important divergence from British

practice in that Australia has a written constitution which provides *some* guidance on what the head of state (or his/her local representative) can do. And in 1999 Australia, a country whose population shares many attitudes and assumptions familiar in Britain, underwent a unique experience when an attempt to discard the British monarchy by fully legalistic methods, failed - despite apparent majority support for the change.

Ceremonial Presidencies

Typically, a 'ceremonial' president discharges constitutional and representational responsibilities. The former, in which the president acts as a constitutional long-stop, entails presiding over government formation - usually in the immediate aftermath of parliamentary elections - and related duties such as adjudicating requests for premature dissolution of the assembly; sometimes the incumbent is empowered, in a crisis, to initiate a dissolution. S/he will also usually append his/her signature to legislation as the final act before promulgation. The authority to impose a delay, usually until the legislature has reconsidered the measure, is common but not universal. The extent to which such powers are held might be seen as a test as to whether a given head of state's role is edging away from the 'formal' category. Ceremonial/representational duties vary according to national custom, but are usually not unlike those enumerated in Chapter 1 -*Residual royal powers and functions*.

-- *Germany*

The German Constitution ('Basic Law'; *Grundgesetz*), drawn up by the western occupying powers, adopted in 1949 and last amended in 2003, provides for a presidency which closely fits this template. As with, say, the Danish monarchy, there is a long list of duties and *apparent* powers. These include conclusion of treaties, accrediting and receiving ambassadors, appointment of officials, military officers and judges and the right of pardon, though no mention of conferring state honours. In reality, wrote Finer *et al.*: 'The office of President, allegedly abused

by Hindenburg after 1930, is shorn of authority and preserved only as that of a largely ceremonial[a] Head of State.'[27]

The German President is not the commander-in-chief, even nominally, of the armed forces (Germany's history again a factor here?) - a position explicitly reserved to the Minister of Defence (*Article 65a*). In Germany, as elsewhere, the incumbent's powers are circumscribed by a standard catchall provision: 'Orders and directions of the President require, for their validity, the countersignature of the Chancellor or the appropriate Minister.' (*Chapter V, Article 58*) But, to allay ambiguity regarding the President's autonomy, when s/he exercises core functions, the same Article continues: 'this does not apply to the appointment and dismissal of the Chancellor, the dissolution of the Bundestag...and a request made under Article 69 (3).'[b] There is no explicit power in the Constitution for the President to veto or delay legislation. The President is indirectly elected, that is by an electoral college ('Federal Convention') consisting of all the members of the Bundestag (the lower house of the legislature) and an equal number of delegates sent by the *Land* parliaments.

Although the post-World War II German presidency has been viewed with respect, perhaps as a result of a series of circumspect and dignified incumbents, it has, in accordance with the intentions of the authors of the constitution, operated unobtrusively.[c] Its schedule of powers, limited but not entirely exiguous (the post-election umpiring role is important), would suit Britain's needs, though a project to

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[a] true, provided that 'ceremonial' is understood to encompass core constitutional functions such as holding the ring in the aftermath of a general election; arguably 'formal' functions (in normal times), but certainly not merely decorative ones. President Köhler was presented with delicate decisions in 2005, first in deciding whether to grant the early dissolution requested by Chancellor Schröder, and secondly in presiding over the negotiations leading to the appointment of Angela Merkel at the head of a right-left coalition.

[b] Art 69 relates to a Chancellor staying on as a caretaker in the event of a premature dissolution.

[c] There is a Marxist analysis which interprets the selection in 2004 of Horst Köhler (IMF Managing Director who 'is used to speaking in a commanding tone and will not limit himself to passive representation') as heralding 'political upgrading of the presidency'. [Reissner, 19 March 2004]

install a similar institution would be derided for alleged dullness by numerous mass media.

-- Austria

Despite Austria's absorption into the German Reich between 1938 and 1945, the currently effective version of the Austrian constitution dates, subject to minor amendments, to 1929 – the last pre-WW2 revision of the first post-Hapsburg constitution of 1920. It confirms the continuing validity of half-a-dozen laws enacted in the Hapsburg and immediate post-Great War transitional eras giving them constitutional status, the oldest being 1862 enactments on protection of liberties. Pertinent to the purpose of this study, the 1919 Law 'respecting the banishment and expropriation of property of the House of Hapsburg-Lorraine' is deemed to be a part of the constitution (*Article 149 (1)*) thus erecting a barrier, should one be required, to any project to restore the imperial crown.

The Presidency is an orthodox formal institution. Miscellaneous powers are enumerated but any prospect of Presidential autonomy is blocked by Article 67(2):

> Save as otherwise provided by the Constitution, all official acts of the Federal President require for their validity the countersignature of the Federal Chancellor or the competent Federal Minister.

An apparent exception to the co-competence rule is appointment and dismissal (*Article 70(1)*) of a Chancellor. It is not clear whether Article 67(2) trumps Article 29 which gives the President authority to dissolve the lower house for any reason (but 'only once for the same reason'). Unlike the German counterpart, the Austrian President *is* named as formal Commander-in-Chief of the Army (*Article 80(1)*) (not such a sensitive issue in 1920 as in Germany in 1949?). As might be expected, the relevant Ministers exercise actual authority (*Articles 80 (2) & (3)*) but Article 80 (2) also envisages circumstances in which '…the Defence Law reserves disposal over the Federal Army to the Federal President'.

Popular election is the element of Austrian practice which most rewards study in the context of devising a template for Britain: 'The Federal President is elected by the nation on the basis of the equal, direct, secret, and personal suffrage'.

(Constitution: Article 60(1)). While the institution thereby acquires a measure of legitimacy over and above that normally enjoyed by a largely ceremonial presidency, no post-World War II incumbent has attempted to convert the mandate into tangible political influence. Austria is unique amongst contemporary democracies in combining a popularly-elected ceremonial presidency with a decentralised, federal constitution.[a] This feature might have made it a more suitable model than (unitary) Ireland in the 1999 Australian debate (though one less familiar to participants). Should some kind of federalism evolve in Britain, Austrian practice could be worth study.

-- *Italy*

The Italian presidency departs from the German in that the schedule of duties and responsibilities (Article 87 of the 1948 Constitution) includes 'command' of the armed forces (*87(9)*) and chairmanship of the Supreme Council of the Judiciary[b] (*87(10)*).The biggest difference lies in Article 74 ('*Request for new Deliberation*') which empowers the Italian President to ask the legislature to reconsider any law submitted to him/her for signature. The competence is largely symbolic in that the delaying power can by overridden by simple resubmission of the measure (*Article 74(2)*), but its use carries moral weight and is the occasion of embarrassment to the government of the day, a factor of which all parties were conscious in December 2003 when President Ciampi sent back a media bill sponsored by the then Prime Minister, Silvio Berlusconi, whose companies held a dominant position in Italian broadcasting.[28] Amongst other repercussions, in February 2004 the coalition's junior partners failed to agree on minor amendments to the Bill forcing its temporary withdrawal.[29] The President finally gave assent, as obliged by the Constitution, in May – a development prompting resignation of the Chair of the state-owned broadcasting network.[30]

There is an exclusion clause common to ceremonial presidencies (*Article 89*) which runs:

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[a] Austria is an unusual federal state in being comparatively small ('slightly smaller than Maine' as the CIA factbook puts it), and ethnically and linguistically homogenous.
[b] a body responsible for judicial appointments and discipline

(1) No act of the President shall be valid unless it is countersigned by the Ministers who have submitted it and who assume responsibility for it.

(2) Acts having the value of law and such other acts as are laid down by law shall be further countersigned by the President of the Council of Ministers.

No exemption is specified for acts taken in connection with government formation. It could be held that Article 87(10), taken with Article 104 (1): '[t]he judiciary is an independent branch of government and shall not be submitted to any other', gives the incumbent an autonomous role in relation to the judiciary. The President is elected indirectly, through an electoral college resembling the German version, that is, members of both house of parliament sitting jointly with representatives appointed by the Regional Councils.

In practice, Italian Presidents have been seen as more significant figures than counterparts filling apparently similar roles. The prospect of the occupant of the Quirinale seizing the reins of government in order to fill a vacuum left by a political crisis and the collapse of authority requires a feat of imagination, but hardly such a prodigious one as would be required in respect of, say, Germany or Ireland. But that is almost certainly because history suggests that a political crisis of such a magnitude is itself more likely to occur in Rome than in Bonn/Berlin or Dublin.

Although Mr Berlusconi lost office following the April 2006 parliamentary election a referendum he sponsored went ahead which, if successful, would have occasioned the first major change to the 1948 Constitution.[a] In March 2005 the Senate had approved for the second time[b] (as required by the Constitution) a package under which further functions would be delegated to the Regions (paying off a political debt to the *Northern League* coalition partner) and the powers of the head of government (to be renamed *Premio Ministro*- formerly *Presidente del*

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[a] In 2001 in the first ever constitutional referendum approval was given to grant enhanced powers to local government.

[b] The session was bad tempered. The final vote – 162-14 – appeared overwhelming but many opposition Senators had walked out.

Consiglio- President of the Council of Ministers) enhanced at the expense of the President.[a] He would have the authority to appoint and dismiss ministers without the need to seek approval from either the President of the Republic or parliament (Article 92 of 1948 Constitution), the President's limited legislative veto (*Article 74*) would have gone and s/he would have no longer chosen a head of government, but simply 'designated' the leader of the victorious group after an election. Under the project, the *Premio Ministro* would 'determine' rather than merely 'guide' (*Article 95*) the conduct of government business. While the then governing coalition had no difficulty in securing the necessary confirmation (absolute majorities required) from each Chamber, the two-thirds majority needed to circumvent a referendum (*Article 138*) was not available.[31] In the event, the proposal was defeated at the referendum (62-38 per cent on a 52 per cent turnout). Berlusconi's frustration with the limitation of his office, compared with, say, British or German equivalents, was understandable though pique at the fate of the media bill affair cannot be discounted as a motive.

The President's power under Article 74 to request reconsideration of legislation is, for the purposes of this study, the most potentially relevant part of the Italian Constitution. Whether a similar competence would be appropriate to a reformed British head of state is a factor that would need to be looked at in a wider context. It might, for example, be considered one check or balance too many if a democratised second chamber were also equipped with an effective veto weapon. Even then, it could be of value when both chambers are subject to the same influences, for partisan or other reasons.

-- Ireland

The Irish constitution, enacted 1 July 1937 and amended at various times up until 1999, also provides for an orthodox formal presidency. Local variations worthy of

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[a] A proposal in an earlier draft asking approval of direct election of the *Premio Ministro* Israel-style [*Independent*, 16 October 2004] was dropped before the referendum reached the voters. Serious consideration of electing the prime minister directly has been given in Japan [*Prime Minister of Japan and His Cabinet* website; Yoel Sano, *Asia Times On Line*, 27 April 2004]

note are in the area of delay in granting of presidential assent to legislation. There is a power to refer to a Committee of Privileges (both houses of the legislature equally represented and a Supreme Court Judge presiding) disputes about whether a particular measure qualifies as a Money Bill (*Article 22 - 4*). The initiative for this action comes from the Senate (*Article 44 - 2*), but the President appears to have the right to accede or refuse as s/he thinks fit. The President enjoys similar discretion in respect of other (non-Money) legislation which s/he may refer to the Supreme Court to adjudge its constitutionality (*Article 26 -1*)[a] or, for a non-constitutional measure and at the request of a majority of the Senate and one third of the Dail (lower house), to pronounce on whether it is a 'proposal of such national importance' (*Article 27 -1*) that it should be endorsed by national referendum.[b] In all these cases the President is required to 'consult' the Council of State, a body bringing together the serving Prime Minister and his/her deputy, the Chief Justice, the President of the High Court, the Chairmen of the Dail and Senate, the Attorney-General and, if able and willing, former Presidents, Prime Ministers, Chief Justices and Presidents of the Executive Council (*Art 31(2)*). The President may at his/her absolute discretion appoint up to seven further members (*Art 31(7)*). Article 13 (9-11) purports to tie down the non-executive nature of the Presidency:

> The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution that he shall act in his absolute discretion or after consultation with or in relation to the Council of State, or on the advice or nomination of, or on receipt of any other communication from, any other person or body.
> Subject to this Constitution, additional powers and functions may be conferred on the President by law.
> No power or function conferred on the President by law shall be exercisable or performable by him save only on the advice of the Government.

After consultation with the Council of State and with the agreement of the Government, the President may (*Articles 7.2 & 7.3*) 'address a message to the

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[a] The procedure has some teeth. Six out Ireland's eight Presidents have invoked it from time to time; in her first term Mrs McAlleese referred 4 Bills to the Council of State, of which 3 went on to the Constitutional Court – one was struck down.
[b] never invoked.

Nation at any time on any such matter.'[a] Ireland is amongst the minority of formal presidencies 'elected by the direct vote of the people' (*Article 12-1*).

The prestige brought to the office by Mary Robinson, President 1990-97, and Mary McAleese, 1997-2004 (and re-elected unopposed for a second seven-year term in September 2004) has featured in republican polemic in Britain and other Commonwealth monarchies, often cited as a riposte to monarchists' contention that it would not be possible to identify a plausible candidate. It is in this area – making the institution palatable to national taste rather than in its detailed provisions – that the Irish case has relevance to Britain. Irish experience provided ammunition in the Australian referendum campaign for the faction supporting direct, popular election by showing that the method does not necessarily produce an ambitious partisan political actor intent on constructing an autonomous power base out of the presidency. Counter arguments challenging the appropriateness of the Irish analogy are summarised in Chapter 6 –*the 1998 Constitutional Convention.*

-- *Iceland*

The Icelandic constitution (dating from independence from Denmark in 1944 and last amended in 1999) provides for a parliamentary executive accompanied by a presidency of the orthodox ceremonial type in most, but not all, respects. The incumbent is directly elected (*Articles 3 & 5*) for four years without term limitation. 'The President appoints ministers and discharges them' and 'determines their number and assignments' (*Article 15*). 'Meetings' (of ministers) 'shall be presided over by the Minister called upon by the President of the Republic to do so, who is designated Prime Minister' (*Article 17*). Article 24 states that 'The President may dissolve the Althing' (parliament) but does not specify the circumstances, and Article 25 permits the President to 'have bills and draft resolutions submitted to the Althing'. 'In case of urgency the President may' (*Article 28*) 'issue provisional laws when the Althing is not in session'. Such laws lapse if not confirmed by the Althing within six weeks. S/he concludes

[a] Invoked only twice; by President Childers in 1974 and President McAleese in 2001

international treaties (*Article 21*), and 'makes appointments to public offices as provided by law' (*Article 29*). Article 26 provides for a bill of which the President does not approve to be submitted to referendum.[a] His/her overall powers are, however, circumscribed by Articles 13 ('The President entrusts his authority to Ministers') and 14 ('Ministers are responsible for executive acts'.) Article 11 which seems to say the same thing in reverse ('The President of the Republic is not responsible for executive acts') in fact provides legal immunity to the incumbent for acts performed in his/her name. Actual experience over the half century since independence supports the description of Iceland as a parliamentary executive with a formal presidency, but given the will and the appropriate political circumstances the constitution appears to provide legal cover for transforming the country into a dual executive.

The Icelandic presidency represents a set of variations on a familiar theme, closely resembling the Irish example, though its competence to submit disputed legislation to referendum gives it more (theoretical) scope to obstruct the government of the day or, to take a different viewpoint, to defend the people against an overbearing administration. It is the kind of provision that British constitution-makers would undoubtedly wish to consider.

-- *India*

The Indian constitution dates from 1950[b] with numerous amendments through to

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[a] Never invoked, but came close in 2004 when President Olafur Grimmson rejected a controversial bill to curb what the government viewed as an incipient media ownership monopoly; the government redrafted the legislation thus averting the crisis. [*Initiative & Referendum Institute, Europe* website]

[b] India was proclaimed a Republic on 1 January 1950; from independence in August 1947 it had been presided over by Governors-General representing the British crown; at first by the last Viceroy, Mountbatten, who stayed on in the new role, and from June 1948 by an Indian Government nominee, Chakrarathi Rajagopalachari.

1995. A voluminous document,[a] it expounds at length on minutiae of government and enumerates probably undeliverable fundamental rights and aspirations,[b] but it provides comparatively little guidance on the functions of the head of state. It prescribes the manner of choosing him/her at length (Article 54: by an electoral college consisting of all members of the two houses of the Union Parliament and of State assemblies), and provides detailed instructions on how to impeach the incumbent in the event of misconduct (*Article 61*). The essence of the presidency is captured in Article 53 (1):

> The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

By virtue of Article 77 (1): '[a]ll executive action of the Government of India shall be expressed to be taken in the name of the President', and Article 74 (1) lays down that:

> [t]here shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice

- provisions which seem to parallel, in a codified form and republican language, the role of the British monarch.

India's constitution does not provide the President with detailed instructions on how to conduct a change of government (as in, for example, Greece) but simply describes core functions in broad terms (*Article 75 (1)*): 'The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.' There is a glimmer of potential Presidential autonomy in Article 75 (2): 'The Minister shall hold office during the pleasure of the President' – with no guidance as to whether office can be

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[a] The Wikipedia article claims that at 117,369 words (in English language version) it is the world's longest. http://en.wikipedia.org/wiki/Constitution_of_India. 93 amendments were made between 1951 and 2005.

[b] for example: Article 24: "No child below the age of fourteen years shall be employed to work in any factory …', or (*Article 51a*), "(It shall be the duty of every citizen of India) … to promote harmony and the spirit of common brotherhood amongst all the people of India transcending … diversities …"

terminated without the advice of the Prime Minister, though Article 74(1) can presumably be held to apply. The President has a right to be kept informed of government business (*Article 78 & Article 78 (c)*) and to require the Council of Ministers to consider 'any matter on which a decision has been taken by a Minister but which has not been considered by the Council'. The President is the nominal commander-in-chief of the armed forces (*Article 53 (2)*) and the prerogative of pardon is exercised in his/her name (*Article 72*). The President's legislative veto (*Article 111*) is residual/symbolic in that it can be overridden by a simple majority on reconsideration by parliament. Its use would not constitute a major practical hurdle for the government but would, as in Italy, serve as a significant political embarrassment.

The Indian constitution, having its origins in the efforts of British-trained lawyers and politicians to crystallise liberal-democratic norms and to reconcile sectional and regional interests, is a product of a particular time and place. The head of state provisions, towards the bottom end of the weak-strong spectrum, have no characteristics worthy of particular note though their overall impact would put them within the bracket of acceptability.

-- Greece

Between 1975, when the 'post-Colonels' constitution was adopted and 1986, when it was fundamentally revised, Greece was in many ways a 'potential' dual executive, at least in terms of what a president could theoretically do, if not in what he actually did. Katougalos observes that the President:

> had the power 'in case of a serious disturbance or of manifest threat to public order and to the security of the state from internal dangers' to suspend the protection of human rights, put into effect the law on state of siege and establish extraordinary tribunals. Given his competence to dismiss the government after consulting a purely consultative organ, the Council of the Republic, he had also the possibility to appoint a puppet Prime Minister of his choice and govern hence, during the state of siege as a constitutional dictator. Even without declaring this exceptional state of siege, the President could, in extraordinary circumstances, convene on his own initiative and preside over the cabinet. He could also dissolve Parliament, if he considered that it was not 'in harmony with popular feeling', and proclaim referenda even against the will of the Government …. The Presidential prerogatives have never been used.[32]

These arrangements are in some respects parallel to those which survive residually in Portugal (*q.v.*). The common historical factor is emergence from a period (lengthy in the case of Portugal and fairly brief in Greece) of authoritarian, right-wing rule. A presidency with wide-ranging reserve powers served as the largely psychological comfort, a fall-back to insure against the onset of chaos that it was feared could result from entrusting power to an executive dependent on a fractious assembly, though assurance was being provided to different sectors of society in the two countries. In Greece it was conservative opinion that felt vulnerable after the collapse of military rule. In Portugal more complex forces made themselves felt. The left was able to view the military, which had been instrumental in the overthrow of the Salazar/Caetano regime, as a guarantor of democracy; but at the same time the right and centre were alarmed by the quasi-Marxist language included in the 1975 Constitution and by prominent politicians of that era. In both Greece and Portugal, self-confidence subsequently grew to the extent that transitional arrangements could be largely dispensed with. In Greece, the 1986 revision 'abolished the semi-presidentialist elements of the regime and restored its pure parliamentary character'.[33] The left's opposition to presidentialism was motivated by the history of interventions, often extra-constitutional, in national affairs by Greek monarchs. The bottom line on the revised arrangement was therefore indirect election of the President (*Article 30*) preventing the incumbent from claiming independent popular legitimacy to bolster his/her authority. The President is nevertheless somewhat more than a cypher. S/he is Head of State of a parliamentary republic founded on popular sovereignty (*Article 1 (1 (2)*). Article 26 (1) names the President and Parliament as having legislative power and Article 26 (2) confers executive power on the President and the government. The President *appears* to enjoy wide powers in the field of external relations; s/he declares war, concludes alliances and treaties (*Article 36*), *but* only in conjunction with the responsible members of the government. Article 45 confers the title of Commander-in-Chief but qualifies with the provision that the armed forces 'shall be administered by the Government as the law provides.' Under Article 46 (1) the President appoints and dismisses civil servants 'according to law' (*Article 46 (2)*).

S/he confers state honours and grants pardons (*Article 47*). Specific functions allotted to the President include an orthodox role for a head of state in government formation.

The Greek Constitution provides the President with notably little discretion when appointing a Prime Minister (*Article 37*), handling the resignation or enforcing the dismissal of a Cabinet (*Article 38*) or dissolving Parliament (*Article 41*). His/her role is largely to see that the rules are followed but s/he retains a degree of interpretative discretion which would apply in unforeseen circumstances. S/he has an unqualified power to send back legislation to parliament for reconsideration (*Article 42 (1)*) but the veto can be overridden by an absolute majority of deputies (*Article 42 (2)*). The Constitution expounds on the procedures to be followed in the event of a declaration of a State of Siege, requiring the President 'to publish the resolution of the Parliament' (*Article 48 (1)*) and to issue Legislative Acts 'after proposition of the Cabinet' (*Article 48 (5)*), all of which is consistent with the role of a formal head of state. Presidential powers are subject to the kind of overriding qualification met elsewhere: 'No act of the President of the Republic shall be valid or executed unless countersigned by the competent Minister…' (*Article 35 (1)*). The same paragraph provides grounds for potential confusion in the event of a crisis: 'If the Cabinet has been relieved of it duties - - -and the Prime Minister fails to countersign the relevant decree, this shall be signed by the President of the Republic alone.' Presidential acts specifically exempted from governmental countersignature are: the appointment of a Prime Minister (*Article 35 (2) (a)*), exercise of the exploratory mandate (i.e., identifying a parliamentarian with enough support to form a government) (*Article 35 (2) (b)*), dissolution of Parliament in certain circumstances of deadlock (*(2) (c)*), exercising the limited veto allowed under Article 42, and appointments to his/her own staff (*Article 35 (2) (e)*).

The armoury of presidential powers has evolved in response to events in recent national history and to provide a coping mechanism should they recur. It is unlikely that another polity not having been through similar experiences would

wish to import the emergency provisions, though those relating to normal times are unexceptional.

-- Israel

The Israeli presidency, as distinct from the president-like role once filled by the Prime Minister which is discussed elsewhere in this study (Chapter 4 –*Ceremonial Presidency,* and –*Israeli variant*), conforms to a familiar pattern. Section 11 of the 1964 *Basic Law: President of the State* invests the incumbent with a routine schedule of functions including umpiring government formation, accrediting / receiving diplomats, signing Bills and treaties, the award of pardons or commutation of sentence; and the government is obliged to furnish him/her with accounts of its meetings. Section 12 unambiguously limits these powers by requiring the countersignature of a minister to validate any presidential act, 'other than a document connected with the formation of a government.' The President is elected by the Knesset for a five-year term, with a maximum of two successive terms.

While the head of state provisions in Israel's 'constitution' (present and past versions) are unexceptional it is the attempt to reconcile competing normative objectives incorporated in the singular head of *government* arrangement of 1992-2001 that merits further study.

-- Hungary

The Hungarian parliament (unicameral and quadrennial – Article 20 (1)) elects the President of the republic for a five year term (*Article 29A*). The President is Head of State; s/he 'monitors the democratic operation of the State' (*Article 29 (1)*) and plays an orthodox role in brokering government formation (*Article 28*). S/he represents the State (*Article 30A (a)*), announces dates of national and local elections (*30A (d)*), and is notional Commander-in-Chief of the armed forces (*Article 29 (2)*). The President has theoretically substantial powers which include the right to participate in parliamentary proceedings (*30A (e)*), 'to petition Parliament to take action' (*f*), and, untrammelled by parliament or government, to initiate referendums (*Article 25*). S/he (*Article 26*) may delay legislation, but only

to the extent of asking Parliament to reconsider the measure. If his/her objection is on constitutional grounds, s/he may (*Article 26 (4)*) refer the measure to the Constitutional Court for a ruling. The Parliament is designated (*Article 19(1)*) as 'the supreme body of State power'; it is entrusted to conclude treaties (*Article 19 (3) (f)*), to declare war (*g*), or a state of emergency (*i*). The President and the National Defence Council, of which the President is the chairman, however, assumes these functions provisionally 'should the Parliament be obstructed' (*Articles 19A & B*) until normal parliamentary functioning can be resumed.

The first President of the post-communist era, Árpad Göncz,[a] was, like equivalents elsewhere in east/central Europe, able to exert considerable moral authority to keep the ship of state on an even keel in the vulnerable early years, though attracting less international attention than his better known neighbours, Walesa and Havel. He did not play as active role in national politics as the constitution could be construed to offer. His successor, Ferenc Madl,[b] followed a similar path though his refusal in 2002 to permit a parliamentary committee to release potentially damaging information about the governor of the National Bank showed him to be more than a cypher.[34] With the growing maturity of national institutions it is now improbable that a president could intervene more actively and frequently in controversial affairs of state without a constitutional crisis ensuing.

Consolidated comments on the three former CMEA countries included in this set of analyses are supplied at the end of the entry on Bulgaria.

-- *Czech Republic*

The Czech Republic's presidency is another whose prestige derives from the heroic period in which the CMEA/Warsaw Pact regimes fell apart; Vaclav Havel's history of championing civil rights is widely remembered abroad as well as in his

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[a] Technically not quite the first; from August 1989 until Göncz's election in August 1990 Matyas Szuros had served as acting President. Göncz, a former dissident playwright, had been imprisoned between 1958 and 1963 for opposing the communist regime.

[b] President, Aug 2000 – Aug 2005: succeeded by Lazlo Solyom, an environmentalist lawyer with former involvement in the Hungarian Democratic Forum but elected on an independent ticket with cross-party support.

home country. The Debyshires's,[35] characterisation of the institution as 'a largely ceremonial figure' fits Havel's presidency (of Czechoslovakia 1989 to 1993 and of the Czech Republic 1993 to 2003) well enough but it looks understated against the activism of his successor. Under the post-"velvet divorce" constitution effective from 1 January 1993, presidential powers are, potentially, quite extensive carrying the seeds of development into dual executive should the political chemistry ever favour such an evolution. The second President, Vaclav Klaus,[a] as an unashamedly partisan former Prime Minister of robust free-market conviction, had presided over an 'anything goes' privatisation process in the reconstruction period. Incapable of suppressing Euro-scepticism not out of place in the post-Thatcher Conservative Party, he declined to disassociate from the 'no' campaign in the June 2003 EU accession referendum, a cause that was defeated by a 3:1 majority. In the three years up to March 2006 he rejected twenty bills, though Parliament over-ruled the veto on eighteen occasions.[36]

The President is elected by joint session of the two chambers of Parliament (*Article 54 (2)*) for five years (*Article 55*) with a maximum of two terms *(Article 57 (2)*). Article 63 provides a conventional catalogue of presidential functions and powers: external representation of the state (*63(1) (a)*), negotiation of treaties (*b*), command of the armed forces (*c*), receiving and accrediting diplomats (*d* , *e*), calling elections (*f*), senior military and judicial appointments (*g* , *i*), conferring of honours (*h*), and granting amnesty (*j*). All of the foregoing is nominal to the extent that they require the countersignature of the appropriate minister. Elsewhere *unqualified* functions are listed. These include core constitutional functions of appointing and accepting the resignation of governments (*Article 62 (a) & (d)*), convening and dissolving the legislature (*62 (b) & c*)), and important, but less fundamental ones, *viz*, appointing judges to the Constitutional and Supreme Courts ((*e*) & *f*), and members of the Supreme Inspection Office (*j*) and the National Bank (*k*). Core functions are expanded in Article 35 which specifies the circumstances in which the President can dissolve parliament. Article 73 enumerates the

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[a] elected in a keenly fought contest with a bare majority

circumstances in which a Prime Minister is obliged to offer his resignation to the President and Article 75 enables the President to dismiss a government 'which did not offer its resignation although it was obliged to offer it' i.e., implying a measure of interpretative elbow room, together with an *in extremis* power of dismissal. The President exercises the prerogative of pardon and sentence mitigation (*g*). Article 62 (h) arms him with a limited power of legislative veto: the President of the Republic 'has the right to return to Parliament adopted laws with the exception of constitutional laws.' The right is spelled out again in Article 50 (1), but is circumscribed by 50 (2) which empowers the lower house to override the veto by reconfirming the measure, without amendment, by an absolute majority. President Klaus's frequent use of the procedure illustrates that, unlike in some other countries, it is more than nominal.

-- *Bulgaria*

An essentially formal presidency has a few powers not encountered in western counterparts. Under the 1991 Constitution (promulgated by the National Sobranie in the dying days of the communist era) executive acts of the President normally require the countersignature of a minister (*Article 102(2)*); but specifically exempted from this requirement are: appointment of a Prime Minister or caretaker government (*102(3) (1)* and *(2)*), dissolution of the National Assembly (*102(3) (3)*), returning of a Bill for reconsideration by the Assembly (*102 (3) (4)*), and the scheduling of a referendum (*102 (3) (6)*). Article 99 lays down guidelines to be followed by the President in establishing a government but allows him/her a degree of interpretative latitude. The reconsideration power is limited and derives from Article 101 which enables the President to return legislation, but the veto is overridden (*Article 101 (2)*) on the vote of an absolute majority of National Assembly members – not just those who attend for the vote.[a] In addition the President is the Commander-in-Chief of the armed forces (*Article 100 (1)*) with the power to appoint and dismiss 'the higher command' (*100 (2)*), has

[a] which might not appear a particularly difficult hurdle, but it might be noted that if a similar provision had been in force in Britain in 1979 the Callaghan administration would have survived (by a margin of four) the vote of confidence that brought it down.

responsibility for proclaiming mobilisation and a state of war (*100 (4)* and *(5)*) and presiding over the Consultative National Security Council (*100 (3)*). The President is directly elected for a period of five years (against a parliamentary term of four years) (*Articles 93 (1)* and *64*) without term limitation.

No mention of Bulgaria in the current context would be complete without reference to the prime ministership of ex-king Simeon from 2001 until 2005. It seems plausible that some degree of nostalgia for monarchy motivated an electorate to entrust office to a politically inexperienced émigré without direct experience of his homeland for over fifty years, but the episode did not look like a symptom of resurgent monarchism. In the words of the *Guardian*'s leader-writer: 'Having campaigned in last month's elections for a "new ethics in politics", Simeon could hardly turn round now and start rooting for a resurrection of the divine right of kings.'[37] In the event, he left office in August 2005 when, following a general election, The National Movement of Simeon II was relegated to junior partner status in a Socialist-led coalition. The ex-king/ex-Prime Minister declined to take office himself leading to speculation that he would seek election to the presidency.[38] The spectacle of him doing so would be of interest to some British republicans who have made the debating point that they envisage no barrier to a member of the Windsor family standing for election as president.

In the central and east European countries covered in this Chapter powers of the head of state have migrated to, or become consolidated into, the ceremonial category, though retained powers are more extensive than in the general run of non-executive presidency states. Though the typical resulting mix of presidential powers, in absolute terms and in relation to the prime minister, is not out of the question, it is reiterated that each national solution has been arrived at for contingent reasons arising from recent history. This does not mean that a British republic might not find itself subject to similar pressures, but only at the end of an unpredictable train of events.

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[1] Australian Senate Hansard; Legal and Constitutional References Committee, 14 April 2004
[2] *Guardian*, 6 December 2000
[3] Osborn, *Guardian*, 17 March 2003
[4] Langley, *Observer*, 9 March 2003; Osborn, *Guardian* 17 March 2003, p. 18; Flick, *Daily Telegraph*, 17 March 2003, p. 13; 'Smallweed', *Guardian*, 22 March 2003, p. 19
[5] Steyn, 2004, p. 48
[6] '*Welcome to the Swedish Royal Court*' website
[7] Derbyshire & Derbyshire, 1996, p. 515
[8] *op. cit.*, 2000, *passim*
[9] *ibid.*, p. 42-3
[10] Bogdanor, 2000; Bates, 2002
[11] Bogdanor, *Guardian*, 6 December 2000
[12] Norton, N. & Fleming A., 1 June 2002
[13] *ibid.*
[14] see, for example, Mahler, 1997
[15] Ottolenghi, 2004, *passim*
[16] Allen, 2001, p. 55
[17] *op. cit.* 1998
[18] *ibid.*
[19] Riordan, 2002, p. 141
[20] Hague, Harrop & Breslin, 1992, p. 322
[21] Bogdanor, 1995, p. 172
[22] cited in Bogdanor, 1995, p. 285
[23] Harris, *Canberra Times*, 26 May 2003
[24] Warhurst, 30 May 2003
[25] Australian Senate, Legal and Constitutional References Committee (Canberra Session); 29 July 2004, p. 9
[26] *ibid.*, p. 36
[27] Finer, Bogdanor & Rudden, 1995, p. 24
[28] Hooper, *Guardian*, 16 December 2003
[29] Barber, *Financial Times*, 5 February 2004
[30] Popham, *Independent*, 5 May 2004
[31] Popham, *Independent*, 16 October 2004, p. 36; Heuzé, *Le Figaro*, 16 October 2004; Wetherall, *World Markets Analysis*, 18 October 2004. Rizzo, *AP Worldstream*, 23 March 2005
[32] Katrougalos, *op. cit.*
[33] *ibid.*
[34] Wright, *Financial Times*, 19 August 2002
[35] Derbyshire & Derbyshire, 1996, p. 276
[36] White, *Prague Post*, 8 March 2006
[37] *Guardian*, 13 July 2001
[38] International Strategic Studies Association website, 17 August 2005.

Chapter 5: Problems of Transition; (2) Analyses of real world Constitutions (continued): dual executives, executive Presidencies and intermediate cases

--- *Executive Presidency*

That the American presidency combines the office of head of government and head of state in one person is perhaps not unconnected with the Republic having been founded when prime ministers (or 'chancellors') were just emerging from the ranks of senior courtiers; hence, contemporaries did not readily envisage separation of effective power from formal trappings. While seventy to eighty polities can be classified as limited presidential executives (i.e., where an elected president is also the head of government)[1] those that dispense altogether with the services of a prime minister are largely restricted to Africa and to (the great majority of) Latin American states that mirror US practice.

--- *Dual executive*

While a dozen or so republics exhibit some degree of working relationship between a president and a prime minister, (the post-communist regimes in East/Central Europe present a rich field of study here) the genuine dual executive (or semi-presidentialist) system, characterised by formalised division of executive responsibilities is fairly rare, being exemplified in Europe to a limited degree by Finland and Portugal, and the more familiar case of post-1958 France. Given France's varied post-revolutionary constitutional history - thirteen regimes and sixteen constitutions in two hundred years - it is all the more remarkable that the Fifth Republic's provisions, designed to meet General de Gaulle personal needs, have survived with only marginal tinkering for nearly half a century, even exhibiting the robustness to survive three prolonged periods of *co-habitation* not envisaged by the founding father.

--- *The United States Executive Presidency*

The US constitution is widely admired for the classical dignity of language of a single, quite short, document, its capacity to evolve while remaining relevant despite its origins more than two hundred years ago, its robust defence of personal liberty and, through its codification of the principle of separation of powers, its success in minimising of the risk of arbitrary or despotic government: in the words of Anthony Scrivener: 'The most sublime and simple statement of the rights of ordinary people'.[2] There is nothing new about this favourable view. Victorian scholars such as Henry Maine (1885) and W E H Lecky (1896) both considered that, if popular government were inevitable, it would best be constrained by American-style checks and balances.[3] Jonathan Freedland is numbered among modern admirers. In '*Bring Home the Revolution*'[4] he heaps praise on American governance, noting that the people are the authors of their own destiny; it is they who install governments to act on their behalf. Freedland identifies virtue in popular sovereignty, responsiveness of US politicians to public opinion / preferences, attachment of citizens to their constitutional rights and the sacred texts, openness of government, sanctity of freedom of speech, decentralisation of government, community spirit.[a] But even he detects vice in supposed virtues - its vulnerability to sclerotic government.

> 'Critics of divided government - including many Americans - bemoan the 'gridlock' it can cause: voters elect a President on a set of promises, only to see him stymied by a hostile Congress. It is as if the American law-making beast suffers from a dire and chronic constipation.[5]

He is, however, prepared to tolerate, for example, systemic delay and populist outcomes (e.g. ineffective gun control, continuation of capital punishment) if the system also prevents ill-thought out measures like Britain's 1991 Dangerous Dogs Act, the poll tax or abolition of the capital city's strategic layer of local government against the opposition of the overwhelming majority of Londoners. A critic from the opposing school, Bruce Ackerman, has attacked 'classical',

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[a] Had he been writing a couple of years *after* 11 September 2001, rather than two or three *before*, the author would have been obliged to defend the Patriot Act and other security measures.

Montesquieuian, tripartite separation of powers on various grounds, one being its awful export record. Here, he draws on the work of Juan Linz who had noted that in separated-powers regimes numerous presidents, frustrated by congressional log-jam, have disbanded legislatures and taken plenary powers as *caudillos* with military support. This train of events has occurred in about thirty, mostly Latin American, countries, in some of them repeatedly.[6]

Strict separation of powers might have prevented 'top-down' party discipline from developing to the extent that it has in Britain (and elsewhere): not necessarily an occasion of congratulation if the result is excessive localism ('pork-barrel' politics) and no certainty of enactment of public business - what Ackerman labels 'the pathology of impasse'.[7] Inevitably, some observers are attracted to pluralistic dispersal of power whereas others, by temperament, prefer the greater predictability and increased certainty of implementing government policy that flows from a unified system. The key role played by the Supreme Court is widely admired, but what can be construed as excessive power granted to unelected judges raises hackles in other quarters. A negative view is expressed by Anthony Barnett:

> America's settlement is 200 years old and now stands as a caution, not a model. It was built upon such a distrust of executive power that its checks and balances have led to legislative gridlock. This has had disastrous consequences for its democracy, as lobbyists have moved in on the backstage deals that are essential if Congress is to pass anything. From my point of view, we need a written constitution *to limit, if not prevent*, the Americanisation of Britain.[8]

The hegemony of a single individual that executive presidency can entail excites some suspicion:

> Where electoral, legislative or constitutional constraints are weaker than in the United States, as in much of the third world, executive rule by Presidents often approaches the authoritarian model.[9]

What tends to attract fairly uniform unease is a peripheral issue, namely the requirement for a party politician to act as an embodiment of, and a symbol for, the nation. Matthew Parris, for example, (writing less than a year before the invasion of Iraq) observes that:

> … in some circumstances the President is to be seen as a political, party-based force; in others as representing the whole nation. In my experience many, even quite humble, Americans do sense the theory behind this duality, rarefied though it is. People are capable of understanding that an individual may wear two hats. But it is a fumbling business, and when a President stoops (like Bill Clinton) or falls (like Richard Nixon), or when a President like Lyndon Johnson prosecutes a war which millions of his countrymen think futile or cruel, I think it can be difficult for some Americans to know what emotions they are supposed to feel when they see in official places the regulation framed photograph of their President [,][10]

An American critic of the Vietnam war, the Mogadishu expedition or the invasion of Grenada or the 'war against terror'- particularly its Iraq element - is left in no doubt that s/he is criticising his/her head of state and commander-in-chief, not just a 'mere' politician. George W Bush's success in the 2002 mid-term legislative election and the 2004 Presidential in focusing attention on terrorism and military action against Iraq contributed to the Republican Party's successes; the effect was partially offset by lengthening casualty lists but these also stimulated the customary 'stick with the President when things are getting tough' reaction. A tendency to foreign policy bipartisanship, and for the party in office to take advantage of it, is not unique to the USA, but the American system makes it exceptionally potent. The phenomenon also influences domestic affairs: Bogdanor (in 1995): 'When…Nixon came to be tainted by the Watergate scandal, the taint extended not just to the head of government, but also to the head of state.'[11] The obligation on the US president, a busy government leader, simultaneously to carry out at least some of the ceremonial functions of a head of state brings in its train a degree of 'overload'. While some delegation is possible, the President will, from time to time, be obliged to devote some time to accredited representative of certain foreign states.[a] Foreigners tend to have difficulty in coming to terms with

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[a] A new Ambassador formally first presents his/her credentials to the State Department – s/he is normally received by the Secretary of State. 'This protocol requirement under the United States system precedes his formal presentation of credentials to US President…at a formal ceremony to be held at the White House, at a date to be determined by the White House. With the presentation of copies of credentials the Ambassador becomes the functional head of mission.' [website of Sri Lanka Embassy, Washington]. The White House ceremonies often process a collection of minor states' representatives

the notion of an active practitioner of partisan politics also providing the sole focus for national unity. In practice, presidents have achieved the necessary standards of time management - in the case of Ronald Reagan by attending assiduously to ceremonial duties while delegating policy functions. Americans got accustomed to the idea that the President can be simultaneously mascot of the nation, Commander-in-Chief *and* party leader in an age before the modern conception of partisan politics took root. The British of the twenty-first century, without a couple of centuries for the political culture to acclimatise to the notion, would undoubtedly struggle with 'the rarefied duality'. If a separately-elected legislature takes some of the partisan strain and a constitutional court adjudicates the rules it is possible to embody the 'efficient' and 'dignified' aspects of the state in one individual, though whether there is any advantage in doing so remains unproven. Thus, while some features of the American constitution might he promoted within many utopian projects, the dual-role presidency is probably not one of them. It is hazardous to attempt to select and transplant isolated features from a complex organic system to another.

The prospect of an executive presidency gives rise to other questions such as the extent to which any regime with one person at its head could remain, at core, 'parliamentary', and the oft-asserted contention that an unacknowledged presidency is already in place in Britain. Accusations of presidential ambitions have with ever-increasing frequency been directed at Prime Ministers - certainly since Harold Macmillan, and probably longer. Such interpretations abound during a spell when the incumbent is strong in parliamentary and party terms, but are heard less when the vultures are circling. The notion is developed in Maurice Foley's '*Rise of the British Presidency*' [1992] and, from a somewhat more prescriptive angle, in Graham Allen MP's tract, '*The Last Prime Minister*' [2001]. Both writers use the term 'president' or 'presidency' to describe a head of the governmental executive, no longer recognisable as *primus inter pares*, who exerts strong personal authority, but neither pretends that his/her authority derives from

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on the same day. In Washington, the short formal speeches which are customary on these occasions, are exchanged in writing. [Berridge & James, 2001, p. 192]

any source other than that sustained by a majority in the House of Commons. Their implied understanding of a 'president' is therefore relative – a head of government who wields strong personal powers without much formal constraint from representative bodies and who is *primus*, but not *pare* with his/her colleagues. By contrast, the assertion (e.g. by Prochaska)[12] that there is already a "crowned republic" is founded on relocation of power with the political leadership and the comparative powerless of the monarchy.

A US-style executive presidency would satisfy many normative schemes. Detailed and carefully thought-out constitutional arrangements discourage the emergence of an over-mighty ruler (or institution) while fostering pluralism and competing centres of power giving rise to 'republican' civics; but whether these institutions remain sufficiently robust to check the perceived privileging of property rights over economic equality[13] that comes with the (classical) liberal economic vision is a moot point. Much popular suspicion of republicanism appears to be founded on the misapprehension that the double (head of state-cum-head of government) role of the American presidency is a necessary concomitant of a republican constitution. It might be contended that the founding fathers thought of everything, but their failure to separate the dignified from the efficient functions renders their blueprint unpalatable in Britain. It is notable that the US model has not featured, or appear to have been given cursory consideration, in the various essays in constitutional carpentry which have appeared in Britain in recent years; nor was it a contender in Australia in 1998-9. Overload can be addressed through the agency of managerial remedy, e.g. selective delegation of duties to other office holders; the more strongly felt objection relates to the exercise of a state-symbolic role by an active party politician, an issue which acquires particular sensitivity at the time of a foreign armed conflict.

--- *dual executives*

The clearly visible downside-risk inherent in the French Fifth Republic's institutional arrangements is of the President and the Prime Minister, who are

obliged to work together if not necessarily in harmony, coming from opposing parties. It was presumably De Gaulle's unquenchable self-confidence that persuaded him[a] that such a situation would not arise while he was on the scene and, by the time he was no longer around to guide them, his compatriots would have acquired sufficient maturity to cope with the situation, or it would be the occasion for France to embark upon yet another of its constitutional fresh starts (*Après moi, le déluge*?). Experience of the intervening half century has been mixed. To conclude that France has been ungovernable during its (three) spells of *co-habitation* is certainly more that the evidence can bear. On balance, the episodes have passed smoothly enough, though not without some awkwardnesses and there is at least a *prima facie* case that the untidy outcome of the 2002 Presidential election was attributable to the perception, if not the reality, of unfocused government in the preceding five years.

The charges levelled at full executive presidencies discussed above are applicable to dual executives, their strength being in direct proportion to the political powers reserved by the president. Just what these powers might be - where the dividing line between president and prime minister is located - is infinitely variable. On paper, the scope of the French presidency does not go much beyond those of some ceremonial analogues. In practice, the incumbent wields considerable influence over the broad direction of domestic policy and has a more direct voice in foreign affairs. In Finland too, the President enjoys foreign policy pre-eminence. While in most respects the formal position of the Portuguese presidency resembles that of ceremonial equivalents elsewhere, tenure by active politicians has given rise to a presidency closer in 'feel' to that of Fifth Republic France.

A political scientist arriving from Mars would undoubtedly be puzzled by a constitutional scheme which requires a president and a prime minister to share power, without taking the precaution to ensure that they are political allies. Matthew Parris's article cited above defending the British limited monarchy ("*I am*

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[a] or possibly Michel Debré (Prime Minister 1959-62) who oversaw the drafting of the new Constitution.

a republican in favour of the practical monarchy") is prompted by scepticism about the workability of arrangements adopted in France, though without acknowledging that the example is far from typical.[14] Nonetheless, the French Fifth Republic, the most familiar exemplar of the dual executive, has been operating on this basis more or less successfully since 1958. And here it might be expedient to challenge some of the fanciful ideas stimulated by the crudescence of the *Front National.* Donald Macintyre's: 'This is not a good year for republicans... because the emergence of Le Pen as a serious candidate to be the French head of state isn't exactly a good advertisement for republics'[15] is unfortunately typical of the genre in attributing contingent political misfortunes to a supposed systemic defect. More generally, the political culture - as in the United States - has made it possible for the French to cope, when the occasion has arisen, with *cohabitation.* British politics has become too much of a spectator sport; the prospect of, for example, a Conservative President and Labour Prime Minister establishing a *modus vivendi* in the manner of Mitterand /Chirac or Chirac/Jospin is not easy to contemplate. Even if the individuals concerned possessed a fund of good will to try to make it work it is sadly predictable that large sections of the media would do all in their power to sabotage the experiment through magnifying every minor difference and accommodation to look like a constitutional crisis. France might not be a notably cohesive society, but the bitter divisions of the nineteenth and early twentieth centuries have largely faded and sufficient respect is felt for the institution of the Republic *per se* to impart inherent stability.

It is worth giving some thought to the extent to which *cohabitation* is an unavoidable consequence of the dual executive. If a president is chosen by direct election and the prime minister is dependent upon parliamentary arithmetic some degree of risk is inevitable, but it can be minimised and it is an eventuality the political classes can learn to live with. Synchronisation of the terms of office (in France between 1958 and 2002 septennial presidential terms coexisted with quinquennial parliaments) does not necessarily ensure identity of political complexion, but mismatch is probable only when party strength is finely balanced, or a significant section of the electorate is determined to split-vote, e.g. to

demonstrate support (or distaste) for a prominent political figure without punishing (or rewarding) the party more generally. It is tempting to think that the example of the USA, where half the congressional elections coincide with Presidential elections and half are held mid-term, could be a guide to how France might behave under the new dispensation, but a very different political culture and circumstantial factors render the read-across, at best, partial.[a]

A more generalised difficulty with the dual executive, of which *cohabitation* is just one systemic risk, is that the dividing line between the two branches must necessarily be arbitrary and, probably, unstable. In the real world (for example, France and Finland), presidents have tended to adopt foreign affairs and / or defence as their sphere of influence, but there is no obvious reason why the *chasse reservée* might not be, say, state security (there has been an element of this in Poland), or, perhaps, macro-economics. Dual executive systems appear to arise from particular sets of circumstances reflecting the preferences and personalities of those who fathered them (e.g., De Gaulle) or presided over them during critical periods of history (e.g., Kekkonen conducting Finland's neutralist East/West tightrope act during the Cold War). Opportunities for jurisdictional warfare, and consequential governmental paralysis, are limitless. The dual executive can be made to work, but dangers abound and, the more one studies it, the more unsuitable it looks for general application.

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[a] Of thirty congressional contests held between World War II and 2003, twelve produced 3-way partisan congruence (the majority in each House and the President coming from the same party). In the remaining eighteen cases, fourteen produced two Houses with a nominal opposition (to the President) majority and, in the remaining four, one House (the Senate) did not return a presidential majority (included here is the 107th Congress (2001-03) which originally comprised 50 Republicans and 50 Democrats; subsequent defections brought about temporary spells of control for both sides). A bare majority, ten, of the eighteen failing to produce executive/legislative correspondence were held in the middle of presidential terms: not much of a correlation. A stronger factor is suggested by fourteen of the eighteen opposition majorities occurring during Republican presidencies, a fact reflecting the greater nominal strength of the Democratic Party in congressional politics (but not in terms of presidential preferences) for as long as conservative southerners retained their traditional allegiance to the Democrats. The effect has worn off; only two (out of 25) Houses of Representatives had Republican majorities between 1945 and 1995; but all five up to 2003 were Republican-controlled.

Derbyshire & Derbyshire do not provide a prescriptive definition of the term 'dual executive', but identify ten countries[a] where 'the executive consists of a working partnership between the president and a Prime Minister', and two more where the head of state is a monarch.[16] While France and Finland are the most commonly cited (European) exemplars of the dual executive, membership of the category is not set in concrete. Portugal satisfies many of the requirements and Poland, for example, while classified as a presidential executive by the Derbyshires, has, for at least some of its post-communist history, exhibited some of the characteristics of a dual executive. The Czech Republic also hovers between models; the Derbyshires include it in their conservative count of dual executives but come to the hesitant conclusion that that the pattern might be *ad hominem* – owing more to the personal authority and prestige enjoyed by Vaclav Havel than to deep-seated structural factors.[17] This carries the implication that the system is likely to evolve into an orthodox ceremonial presidency.[b] Given these intermediate examples it might be expedient to categorise as a dual executive any polity in which the head of state (usually an elected president) exercises more than formal powers and in which there is also a 'prime minister' who will be formally appointed by the president, but who requires the support of a majority in an elected assembly to be sustained in office. A look at the constitutions of a selection of states in this group illustrates how they work.

Existence of the category is not universally acknowledged. Finer *et al.*, for example, designate France as a presidential executive (and if France is not a dual-executive, nowhere is), commenting:

> [t]he French constitution with its seemingly bicephalous executive, at first appears to stand midway between these two types of constitution. But, in general, it is the President who...[18]

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[a] Sri Lanka, Haiti, Czech Republic, Estonia, Lithuania, Slovenia, Lebanon, Finland, France, Portugal: and two monarchies – Cambodia and Morocco. [*op cit.*, p. 17]

[b] Frequent use of the Presidential veto by his successor, Klaus, suggests that the day has not yet arrived. (see Ch. 4, - *Czech Republic*)

(note the qualifications – 'seemingly' and 'in general'. The anomaly inherent in this neat pigeonholing is, however, apparent in the next clause of the same sentence):

> ...normally enjoys effective power except in periods of *cohabitation*, such as the years 1986 to 1988 and 1993 to 1995, when the majority in the National Assembly is opposed to that of the President. Under such circumstances, it is the Prime Minister rather than the President who becomes the effective executive. Thus, the Fifth Republic constitution can sustain two quite different systems of government depending upon political and electoral vicissitudes.[19]

To view France as oscillating between two models is rational but the interpretation might understate the authority and influence exerted by the President of the Republic (surely more than would be expected of a ceremonial German-style president), particularly in foreign affairs, even during *cohabitation*. Perhaps after the completion of yet another period of *cohabitation* (1997-2002) it is easier to view power-sharing and practical give-and-take as a standard feature of the system rather than as an aberration.

-- Turkey

The Turkish constitution (latest version, effective 1982 following a short period of military rule; last amended 2002), prescribes a variant of the dual executive system which like others in the category – as broadly defined – is imprecise about the division of power between President and Prime Minister. The President's role is formally identified in (Chapter 2, Part I) Article 104 as representing the Republic 'and the unity of the Turkish Nation.' Numerous functions and duties catalogued at Subsection (a) include summoning the Grand National Assembly and the right (but not the obligation) to address it at its annual opening. S/he has the prerogative to return bills to the Assembly for reconsideration. Article 89 (in Chapter 2, part II) empowers the Grand National Assembly to reconsider Bills (excluding budget measures and constitutional amendments) referred back by the President; debate is restricted to that part of the measure that has earned Presidential displeasure. The Constitution is silent on what happens if the deadlock is not broken at this stage. The operation of the veto competence was illustrated when Recep Tayyip Erdogan,

leader of the (Islamist) Justice and Development Party (AKP), was temporarily unable to become a member of parliament, and hence disbarred from the prime ministership, as a consequence of a previous criminal conviction.[a] An amendment to the relevant passage of the constitution[b] rapidly enacted by the AKP-dominated parliament was vetoed for being *ad hominem* by President Sezer in November 2002 but, after some apparent hesitation, he took no action when the legislature bounced the measure back to him allowing Mr Erdogan to enter parliament and assume office in a by-election in March 2003.

The President may refer relevant measures to the Constitutional Court for consideration and (restated in Article 175) may refer constitutional amendments to referendum. S/he has authority, without apparent restraint, to call new Assembly elections and to appoint a Prime Minister (under Article 109 the appointee must be a member of the Assembly) and preside over the Council of Ministers 'when he or she deems it necessary.' The President as head of state receives and accredits Ambassadors and ratifies international treaties. The President is nominally Commander-in-Chief (*Article 117*), but is obliged to appoint a Chief of the General Staff 'following the proposal of the Council of Ministers' who is 'responsible to the Prime Minister in the exercise of his duties and powers.' (*Article 117*). S/he has considerable latitude in proclaiming and administering martial law, and states of emergency and mobilisation (*Articles 104, 119, 120, 121 & 122*); and of making key state appointments – members of security bodies, of the State Supervisory Council (an audit body), members of the Higher Education Council, university rectors and many senior judicial offices. Article 105 appears to impose an internationally standard restraint on the President by requiring ministerial countersignature for '[a]ll Presidential decrees except for those which the President of the Republic is empowered to enact by himself', and goes on to state: 'No appeal shall be made to any legal authority, including the Constitutional

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[a] he received a four-month jail term in 1999 for a speech deemed to be incendiary in which he had quoted a poem that compared mosques to barracks and minarets to bayonets.

[b] Article 76. The ideological nature of the offence triggered the ban; disbarment does not arise from other categories of criminal activity unless the sentence is twelve months imprisonment or more.

Court, against the decisions and orders signed by the President of the Republic on his own initiative.'

In formal terms, there is every opportunity for a President to assume effective political primacy but Turkey is probably one of the best examples of the scope of the office being constrained by the method of election. The President (*Article 101*) is an electee of the National Assembly and must be selected from its membership; the Prime Minister is notionally chosen by the President, but would not be able to hold office without the support of the Assembly. Hence, although the machinery of selection is different and the term of office varies, President and Prime Minister are responsible to exactly the same 'electoral college' (*Articles 93 (1)* and *64*). There is, therefore, no obvious scope for the President to appeal to an independent power base.

Distribution of powers between the actors in the Turkish government structure reflects the accumulation of compromises and accommodations arrived at in the course of a political roller-coaster ride lasting two-three decades featuring military coups, periods of martial law, authoritarian government and, lately, the advent of an Islamist government which has surprised observers for its apparent adherence to international liberal-democratic norms. The prescriptions that have emerged in Turkey are not likely to constitute a template. Aspects of the Constitution exhibit a flexibility to which others might aspire but could equally provide fertile ground for future dispute.

-- Portugal [a]

Portugal illustrates the mixture of presidential and prime ministerial power-sharing to qualify for membership of the exclusive dual executive club. Under the *Constitutional Law* (1/97 of 20 September 1997) the (popularly-elected) President is granted clear and extensive orthodox government formation / dismissal and assembly dissolution powers (*Article 133 (b) - (g)*), - excepting dismissal of individual ministers which is reserved to the Prime Minister (*Article 133 (h)*).

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[a] See also country entry for Greece in Chapter 4.

S/he has a power of veto (*Article 136*) which can be overridden by an absolute majority of the Assembly (*136(2)*), though, additionally, a two-thirds majority (of attendees) is required (*Article 136(3)*) for reserved topics: external affairs, public ownership, electoral law. Most presidential functions, as elsewhere, are performed in tandem with ministers but the office retains some significant discretionary powers. The most notable is in the military area, a circumstance having its origins in the instrumentality of the armed forces in restoring democracy in 1974. The President may 'preside over the Superior Council for National Defence' (*Article 133 (o)*), and 'perform the functions of Supreme Commander of the Armed Forces'. His/her absolute authority in this area is qualified by the requirement for the President and the government jointly to appoint or dismiss the Chief of the General Staff; the 'opinion' (though not the explicit endorsement) of the service chiefs is also required (*Article 133 (p)*). Other powers exercised at the President's discretion are veto of referendum proposals (Article 115 (1) & (10) taken with Article 134 (c)); reference of measures in advance of enactment to the Constitutional Court (*279(3)*) are being resubmitted after earlier veto; reference of 'legal provisions' to the Constitutional Court to test their constitutionality (*Article 134 (g) & (h)*) and award of honours and decorations (*Article 134 (i)*).

A Constitutional Council defined as 'The Political organ that advises the President'(*Article 141*) provides a further brake on political aspiration; Article 145 enumerates the following powers:

> a. To state its opinion on the dissolution of the Assembly of the Republic and of the organs of self-government of the autonomous regions;
> b. To state its opinion on the dismissal of the Government in the circumstances specified in Article 195(2);
> c. To state its opinion on the appointment and removal from office of the Ministers for the Republic for the autonomous regions;
> d. To state its opinion on the declaration of war and the making of peace;
> e. To state its opinion on the actions of the interim President of the Republic specified in Article 139;
> f. To state its opinion on all other matters as are provided for in this Constitution, and, in general, to advise the President of the Republic on the performance of his or her functions at the request of the President.

Membership of the Council comprises the President of the Assembly, the Prime Minister, the President of the Constitutional Court, the Ombudsman, presidents of the regional administrations, former Presidents of the Republic, five appointees of the serving President, and five more elected by Parliament; the President of the Republic is the chairman. What the Constitution does not spell out is the extent to which the President, or any other state official, is required to abide by the Council's opinions. The topic is considered further in Chapter 7 in the context of a broader discussion of similar supervisory bodies.

Apparently innocuous provisions such as the power: 'to address messages to the Assembly of the Republic and to the Regional Legislative Assemblies' (*Article 133 (d)*) and; 'to preside over the Council of Ministers at the request of the Prime Minister' (*Article 133(i)*) have, in practice, given pro-active incumbents - a description applying to most of them – sufficient leverage to set the national agenda on social issues, as well as defence and external affairs, particularly regarding relations with the EU.

Some of the analyses in this study suggest there is a tendency for states emerging from authoritarianism to hold on to the familiar institution of personal rule for a period before gradually adopting a more parliamentary system. Portugal has been less ready than, say, Greece to redistribute power. Whether there is a potential parallel for Britain is a factor discussed in Chapter 7.

-- Finland

The Finnish Constitution (substantially revised 1999, effective 1 March 2000, ultimately inherited from the 17 July 1919 document adopted on independence from Russia) allocates responsibilities in broad terms. Under 'Parliamentarianism and the Separation of Powers', Section 3 states:

> (1) Legislative powers are exercised by the Eduskunta (Parliament), which shall decide on State finances;
> (2) Governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of the Parliament. Judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances.

But that does not throw light on where the division between the President and the government / Prime Minister might be found. Section 58 ('Decisions of the President') purports to elucidate. Subsection (1) expounds the general principle that Presidential decisions are based on proposals made by the government, but goes on to enumerate exceptions. Chief amongst these are: appointment / dismissal of ministers (*Section 58 (1)*), calling elections (*58 (2)*), granting pardons to individuals (*58 (3)*), military appointments (*58 (5)*) and certain functions in respect of the (semi-autonomous) Åland Islands. Section 61(1) declares that the Parliament shall elect the Prime Minister 'who is therefore appointed to the office by the President of the Republic'; Section 64 (2) empowers the President to dismiss the government or a minister who has lost the confidence of parliament; and under Section 128 (1) the President is commander-in-chief of the defence forces, but 'may relinquish this task to another Finnish citizen' (*sic*; no explicit requirement for that person to be either a civilian minister or a member of the military.) The former power of the President to initiate legislation (formerly enshrined in Section 18(1) of the 1919 Constitution) has been removed; and that to veto legislation is reduced to authority to refer it to the Supreme Court or the Supreme Administrative Court (*Section 77(1)*). Simple readoption by the Eduskunta overrides the presidential veto (*Section 77(2)*).

Section 93 (1): 'The foreign policy of Finland is directed by the President of the Republic in co-operation with the Government' is disdained by one authority[a] as speaking 'in riddles about foreign policy.'[20] Why, it is asked, should a clear chain of command described in the 1919 Constitution ('The relations of Finland with foreign powers shall be determined by the President' Section 33) be replaced with ambiguity? One element of the explanation relates to the ending of the Cold War, a phenomenon of crucial significance to Finland, a nation on the verge of falling into the Soviet orbit in the 1940s.[b] During their terms of office from the mid-

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[a] Tuomas Ojanen - Professor of Public European Law at Helsinki University
[b] it was the only significantly contiguous European state (Norway's common border with Russia is short and remote) not to have a communist government thrust upon it.

fifties to the mid-nineties Presidents Kekkonen and Koivisto could make East-West relations their particular speciality, a prerogative which few presumed to challenge, causing the Foreign Ministry to be known as 'the President's ministry.' With the collapse of the Soviet Union (December 1991), one part of the rationale for the President's special position was removed. The process was hastened by Finland's entry into the EU (1995). It follows from the Constitution then in force that: '[i]f European affairs were to be considered a matter of foreign policy, they would fall within the competence of the President'.[21] Hence, given the impact of EU policies (and activities of institutions) on member states' domestic affairs, the President would have become, de facto, responsible for a growing slice of governmental business, a development quite contrary to the zeitgeist which, in reaction to the Kekkonen pre-eminence, clearly favoured a move away from presidentialism towards parliamentarianism. Section 3 (2) of the 1999 Constitution therefore deliberately tilted the balance of power: 'The Government is responsible for the national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures.'

The other prop of the strong Presidency, its capacity to counterbalance the inherent instability of parliament-sustained governments, was also becoming less important. Finland's combination of multi-parties and purist proportional representation generated twenty-eight governments between 1946 and 1989 (average life, a little over eighteen months) in a period that saw only five Presidents. Lately, however, the carousel has slowed down somewhat with six administrations between 1989 and 2005, bringing the average to over three years.[a] The co-competence compromise, though messy, has worked, on balance, satisfactorily. President Ahtisaari (1994-2000) could not accept the Prime Minister's automatic pre-eminence at European Council meetings, particularly those relating to the second Pillar (Common Foreign and Security Policy), but a workable modus operandi was arrived at to be put into force in time for the term

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[a] and would be longer if not for the resignation of Mrs Jäätenmäkki in 2003 after only two months as a result of a convoluted political scandal.

of office of President (Mrs) Halonen[a] under which the President informs the Prime Minister if she wishes to participate; she usually does.

The 1999/2000 Constitution restricts the President to two consecutive six-year terms (*Section 54*), preventing repetition of Urho Kekkonen's 25-year uninterrupted incumbency. Election is direct and a second ballot of the two leading candidates is held if the first round does not produce an overall majority of the votes cast (the previous Constitution handed the choice over to an electoral college if the first round was indecisive).

The presidential element of the Finnish Constitution is another example of a contingent, and probably transient, accommodation. If a future British presidential state were to exhibit similar characteristics it could be only as a consequence of yet unknowable international pressures guiding a parallel evolution.

-- *France*

Insofar as there is a prototypical dual executive, it is Fifth Republic France. The 1958 Constitution was designed to reconcile two contradictory aims, namely to establish a measure of stability that was so conspicuously lacking in the Fourth (and Third) Republic while guarding against recurrence of the 'Bonapartism', i.e., personal rule, of the First and Second Empires. The chosen solution was to strengthen the existing institution of the presidency so that the fate of the republic would not be at the mercy of partisan factionalism. Subsequently (in 1962, and endorsed by referendum), the presidential element of state power was reinforced by direct popular election of the President. Formal presidential powers include that of exercising 'arbitration'[b] between the agencies of government (*Article 5*), appointment of the Prime Minister - who is, however, responsible to the National Assembly - (*Article 8*), appointment of military officers (*Article 13*), the right to preside over the Council of Ministers (*Article 9*) and Defence Council (*Article 15*),

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[a] Re-elected January 2006

[b] In the French language text: 'il assure, par son arbitrage, le fonctionnement régulier des pouvoirs publics ainsi que la continuité de l'Etat.'

to initiate declaration (*Article 16*) of a state of emergency (subject to consultation with the Prime Minister, the Presidents of the Assemblies and the Constitutional Council (*Article 16 (1)*), to dissolve the Assembly (*Article 12*), to negotiate treaties with foreign countries (*Article 52*), to declare war (*Article 35*), and to appoint Ambassadors (*Article 13(3*)). Article 34 ('Legislative Powers') lists areas in which Parliament may make laws ('legislative domain'),[a] a provision when reinforced by Article 41 ('Declaration of Inadmissibility') which effectively places a limit on what parliament can do, i.e., what is not reserved *to* parliament is beyond its competence. Further subordination of the legislature flows from Article 47 which places an overall limit of seventy days for consideration of finance bills; thereafter the measure may be imposed by ordinance. The foregoing provisions regulate boundaries between governmental and parliamentary functions, not between governmental and presidential, a distinction which takes on real significance only during *cohabitation*.

In political reality, the 'reach' of the office is not readily discernible from a reading of its formal description. The intention was undoubtedly, in the Derbyshires' words, for the President:

> to remain aloof from day-to-day government and act as a mediator and conciliator, who ensured that the different factions, in whatever coalition was formed on the basis of Assembly support, worked successfully together.'[22]

The area in which presidential influence has been most visible, foreign affairs, partially illustrates how this division has worked. It was for example de Gaulle, and not the then Prime Minister (Pompidou) who famously initiated a boycott of EEC meetings ('the empty chair' policy) and who led France out of NATO's military command structure; and more recently it has been Giscard d'Estaing, Mitterand and Chirac who have successively represented France in major league international *fora* (e.g., EU and G7/8 summits). The authority for the President to act as 'foreign minister-in-chief' is not self-evident from a few scattered words in

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[a] civil rights, nationality, property rights, criminal law, taxation determination, electoral mechanisms, nationalisation / privatisation, principles of defence policy, local authority powers, education, labour law, social security, the budget.

the Constitution; it derives more from personal chemistry and party affiliation than from readily identifiable legal provision. The opportunity for the President to play a full part in developing foreign policy is greater when the Foreign Minister is of a similar persuasion than when the two are engaged in turf battles and the Prime Minister and foreign affairs minister inclined to insist on their rights.

A half century of stable and, on the whole efficient, government suggests that the distribution of powers enshrined in the Fifth Republic's Constitution passes the pragmatic test, but that is not to say that it is readily exportable. The sometimes puzzling capacity of British writers who should know better (such as Matthew Parris and Donald Macintyre as cited earlier in this Chapter under --- *dual executives*) to misunderstand and misrepresent it further illustrates its unsuitability as a template.

-- *Poland*

The current Polish constitution, adopted by the National Assembly in April 1997 and confirmed by referendum in October 1997, confers a substantial schedule of powers on the President who is 'elected directly by the Nation.' (*Article 127 (1)*). In a familiar looking provision, Article 144 (2) states that:

> [o]fficial Acts of the President shall require, for their validity, the signature of the Prime Minister who by such signature, accepts responsibility therefore to the Sejm (lower house).

Presidential powers exempted from the co-signatory requirement resemble those in other constitutions, except that they run to thirty items. These include predictable functions such as appointing a Prime Minister (*Article 144(3) (11)*), proclaiming legislative elections (*Article 144 (3) (1*), and (*Article 144 (3) (30)*) resigning his own office. Powers to shorten in life of a Sejm are limited: on a two-thirds majority vote (*Article 89(3)*), loss of a vote of confidence (*Article 155(2)*), defeat of the Budget (*Article 225*). The President enjoys powers commonly held by ceremonial incumbents such as conferring honours and decorations (*Article 144 (3) (16)*) and others often exercised by presidents only in tandem with a minister, such as granting pardons (*Article 144 (3) (18)*), or citizenship (*19*) and making judicial

and administrative appointments (*(20) - (25)*). In addition, s/he has wide powers to refer legislation to the Constitutional Tribunal and to require the Sejm to reconsider legislation (*Article 122*) - after which it requires a three-fifths majority to override the veto. Elements of executive power are introduced by Article 135: '[t]he advisory organ to the President regarding internal and external security shall be the National Security Council,' appointments to which body s/he can make independently of the government (*Article 144 (3) (26)*). More ambiguously, s/he has similar powers in respect of the National Council for Radio Broadcasting and Television. Appointment of its members is listed as a competence for which the President does not require ministerial countersignature (in Article 144 (3) (27)) though Article 214 (1) states that: '[t]he members of the Council … shall be appointed by the Sejm, the Senate and the President of the Republic.' Hence, there would seem to be a distinction drawn between the legislature and the government – though the latter depends for its sustenance on the former. Jurisdictional imprecision (*cf.* Finland) arises from the provisions on external affairs: 'The President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy' (*Article 133 (3)*), but it is not specified how far this co-operation should go and how disagreements between the two arms might be resolved.

The document is bestrewn with ambivalence as to where the boundary is drawn, from one of the introductory declarations of fundamental principle: '…executive power shall be vested in the President of the Republic and the Council of Ministers …' (*Article 10*), to the opening provisions on the role of the government: 'the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland' (*Article 146 (1)*). When (in December 2003) the issue of voting rights for candidate EU members became a bone of contention between Poland and Germany, President Kwasniewski undertook some of the negotiations of the Polish side, only deferring to Prime Minister Miller (who had been injured in a helicopter accident a few days earlier) when the latter presented himself in a wheel-chair.[23] The circumstances were undoubtedly exceptional but in a purely ceremonial presidency the occurrence would have been out of the question,

however incapacitated the prime minister. Similar ambiguity arises in the context of the 'Weimar Triangle', a periodic meeting at which the Polish President confers with French President and the German Chancellor.[a]

Article 146 (2) purports to place a limit on this responsibility: '[t]he Council of Ministers shall conduct the affairs of State not reserved to other State organs or local self-government', an objective not furthered by the imprecision of, say, 133 (3). In their commentary, the Derbyshires observe that: 'ministers are appointed by the president, but it has been uncertain whether they can be dismissed by the president without restraint.'[24] While the relevant Article, (159 (2)): 'The President of the Republic shall recall a minister in whom a vote of no confidence has been passed by the Sejm' does not give the President much apparent discretion, political reality seemed to point in the other direction when (Prime Minister) Marcinkweicz was manoeuvred out of office by President (Lech) Kaczynski.[25]

Poland is perhaps the prime example of a central/east European country where extensive authority was granted to the post-communist era presidency in acknowledgement of the central contribution of the first incumbent – Lech Walesa – to successful transition. With growing national self-confidence faith in other state organs has developed apace generating a mismatch between the letter and the spirit of presidential authority and, inevitably, a certain amount of ambiguity. Time will tell whether the appointment (July 2006) of Jaroslaw Kaczynski (the President's identical twin brother) as Marcinkiewicz's successor will have a lasting effect on the political chemistry. Should a presidential system emerge in Britain a section of opinion would, it can be safely prognosticated, favour a highly flexible framework in order to leave room for organic evolution of institutions but any resemblances to the Polish mode would be coincidental.

-- *Estonia*

Estonia represents a variation on the themes found in post-communist East/Central Europe. The first President of the new era, Lennart Meri, came to office by

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[a] Attention was drawn to this practice when President Kaczynski declined to attend having taken offence at an article in a German newspaper. [*The Times*, 8 July 2006]

popular election but the 1992 Constitution provides for subsequent indirect election by Parliament (*Article 79 (1)*) (in the event of deadlock, by an electoral college consisting of members of parliament and representatives of local authorities – *Article 79 (5)*). As elsewhere, the institution is what the incumbent, under the influence of the prevailing political climate, makes of it. The President represents the Republic in international relations and appoints and receives diplomatic representatives, but the relevant Articles, 78 (1), does not specify where his authority ends or where that of the foreign minister begins, though the competence to accredit and receive diplomats (*78(2)*) is 'on proposal by the Government.' S/he is required to nominate candidates for certain public offices (including Chairman of the National Court, National Bank Chairman, Auditor-General, Legal Chancellor, Commander-in-Chief of the Armed Forces) for parliamentary ratification, but the relevant Articles -78 (11) and specific provisions elsewhere- are unclear as to the extent that this is more than a nominal competence. The Presidency is fully charged with core constitutional functions: presiding over inter-party negotiations and appointing the Prime Minister (*Article 89, passim*), calling elections (*Articles 78 (3), 97, 119*). S/he is 'supreme commander of national defence' (*Article 127 (1)*); and the National Defence Council reports to the President (*Article 127 (2)*). The forces are headed by a professional Commander-in-Chief whose nomination by the President is ratified by parliament. The President is required to initiate a proposal for a state of war (*Article 128*) or state of emergency (*Article 129*). Article 107 confers a limited power of legislative veto. If Parliament chooses to resubmit the measure (unamended) the presidential veto is overridden unless the President refers it to the National Court to determine its constitutionality. By virtue of Articles 78 (8) the President is empowered to initiate proposals to amend the constitution; and Article 103 restricts that power to the President alone.

While Estonian presidential powers fall well short of those that mark executive presidency, they create a significantly political office which is unlikely to conform to British preferences.

--- Dual Executives, concluding observations

Examination of the constitutional provisions and existing practice in dual executives, whether defined strictly or broadly, leads to some tentative conclusions on common features of the category. Firstly, the arrangement tends to be favoured by states where for historical reasons confidence in institutions remains fragile or strained. Thus, former communist states installed charismatic figures from the dissident movements to whom it might be possible to entrust a degree of personal power if factious parliamentary rule threatened chaos. In Portugal the "dark age" to be avoided was the Salazar/Caetano dictatorship and in Greece the colonels' regime. Finland is *sui generis* in that the threat resided more in the geopolitical position, though a fragmented party system made a contribution. There is something counter-intuitive at work here in that it might be expected that a newly democratised (or redemocratised) state would be on its guard against personal rule – *cf.* France in 1870, restated in 1945. But what appears to be equally potent is reluctance to put all the eggs in a single constitutional basket; that is, a hesitancy about (rather than full-blown distrust of) institutions until they have proved themselves – choosing to 'keep ahold of nurse, for fear of finding something worse'. A second characteristic, significant but not universal, is a tendency to move, uncertainly and stochastically, in the general direction of parliamentary government (towards an end-state of unambiguous primacy of the prime minister combined with a formal presidency) as confidence is rebuilt. France is an apparent exception; excessive parliamentarianism of the Third and Fourth Republics, having brought the country close to the brink, pushed sentiment back in the other direction.

--- Executive Presidencies

While the American constitution is undoubtedly a serviceable model for the category, the following notes illustrate that it is broad enough to encompass a wide

spectrum of practice. The United States 'clones' which abound in Latin America[a] (and less obviously in Africa and some parts of Asia) are excluded, partly because their arrangements reveal little that is not readily discernible from their common model and partly because, with a few exceptions, their commitment to the spirit as opposed to the external forms of democratic government is not entirely unambiguous.[b]

-- South Africa

South Africa is certainly a presidential executive, but a look at the provisions of the 1996 Constitution reveals some unusual features. The President is chosen (*Sections 42 (3) & 86 (1)*) by the National Assembly (the lower House of Parliament) - a procedure encountered more often in a ceremonial regime than in an executive presidency. The person so chosen must be a member of the Assembly (*86 (1)*) but automatically relinquishes his seat (*Section 87*). The term of office (subject to uncompleted terms – death, illness, impeachment), it might be inferred, runs concurrently with the parliamentary session since Section 86 (1) requires the Assembly to elect a President at its first sitting after an election. Once elected, the President is empowered to appoint the Deputy President and ministers (*91 (2)*) and to head the cabinet (*91((1)*). The Deputy President is required to 'assist the President in the execution of the functions of government' (*91(5)*), leaving the way open to run the government on a day-to-day basis. The Assembly can remove the President in the event of misconduct or incapacity on a two-thirds majority (*Section 89 (1)*), or force his resignation with a vote of no confidence by a simple majority (*Section 102 (2)*). Apart from acting as head of the executive specific functions of the President include: assenting to legislation, appointing Commissions of Enquiry, appointing and receiving diplomats, exercising the

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[a] direct popular election prevails throughout Latin America all of which are presidential executives. In all ten 'Iberian' states on the South American mainland there is a directly elected executive president. In two, Peru and Chile there is also a prime minister but s/he is an appointee of the president; two (Ecuador and Chile) have unicameral assemblies. The Constitution of the Philippines (a country with a long history of US direct control or informal hegemony) is another American clone. South Korea's is like it in some respects but includes some quasi-French characteristics.

[b] It has been argued (e g. by Ackerman) that the failing points to a systemic defect in presidentialism. (see Chapter 5, - *United States Presidential Executive)*

prerogative of pardon and conferring honours (*Section 84*). He may return a Bill to the National Assembly on grounds of questionable constitutionality, and then refer it to the Constitutional Court if his doubts or objections persist (*Sections 79 & 84 (2) (b)*). The requirement (*Section 101 (2)*) for Presidential decisions to be countersigned by the relevant minister would not, in the political climate that has prevailed since the fall of apartheid, seem to be a major constraint when ministers are presidential appointees, but it might be so were the tenure of an ANC-appointee less assured and some degree of power sharing prevailed (e.g. if a government majority depended on coalition partners).

The South African President exercises recognisable head of state functions but is appointed by the legislature and, in an emergency, is removable by it. Nothing prevents the President running the minutiae of government but he has the opportunity to stand back from day-to-day involvement while delegating business to a Deputy whose role is somewhere between a prime minister in a dual executive (like France) or a presidential chief-of-staff (as in the USA). Leaving aside the titles that have been adopted, it is tempting to view the South African variant as hybrid Presidential / Prime Ministerial. Some observations on the applicability of the South African structure to Britain are offered at the end of this Chapter.

-- USA

The powers and responsibilities of the President of the United States of America are, ultimately, founded upon just a few words here and there, some of them of ambiguous meaning, in that celebrated document, the Constitution of 1791. It is far from clear that the founding fathers foresaw the evolution of the Presidency into what it is today - some certainly opposed the prospect- though there are some clues. Domestically, the 'most powerful man on earth' lacks many competences considered as unexceptional in parliamentary regimes, not least that of Britain.

Article II, Section 1 (1) states that '[t]he executive Power shall be vested in the President of the United States' - which in itself means everything or nothing. Section 2 is a little more helpful. Clause 1 designates the incumbent Commander-in-Chief of the armed forces (understood to mean just what it says - the President

may deploy the armed forces as s/he thinks fit in time of war - but the details are not spelled out). S/he is empowered to 'require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices' (again, this could mean a lot, or nothing much); and has the power of reprieve and pardon. Clause 2 endows the President with the power to make treaties and to nominate persons to several public office, amongst them ambassadors and Supreme Court Judges but only, in the case of treaties, with the concurrence of two-thirds of the Senate and, in the case of appointments, with the 'Advice and Consent' of the Senate. Section 3 requires the President 'to give to the Congress Information of the State of the Union'. The consequential annual address has become an important political ritual, but it is not difficult to imagine a parallel universe in which it had not evolved into anything of significance, or had entirely withered away. The mixed bag of Section 3 requires the President to 'take care that the Laws be faithfully executed'. This possibly represents some real meat; imaginatively construed and conscientiously carried out it provides the legal basis for a fully rigged bureaucracy. The President is enabled (also in Section 3) 'on extraordinary occasions to convene either or both Houses', 'to receive Ambassadors and other public Ministers,' and to 'Commission all the Officers of the United States' (also a foundation for extensive bureaucratic activity). Another pillar of presidential authority is built on Article 1, Section 7 (2) which confers legislative veto on the President, but which can in turn be overridden by a two-thirds majority in both Houses. A clue to the pre-eminence of the office is in what it does <u>not</u> say, namely in not providing for a parallel figure relying on support from a majority in Congress. Thus, should a President wish to delegate, in his name, the oversight of day-to-day business the resulting appointment (for example, of a Chief-of-Staff) is personal to the President, and is not subject to partisan strength as would the appointment of a prime minister in a parliamentary regime.

---- *Executive Presidencies, concluding observations*

As observed elsewhere in this study, many of the normative values celebrated in the world of political philosophy are enshrined in the Constitution of the United States of America and attract widespread admiration in Britain. There is, however, some scepticism and little apparent desire to import the detailed mechanisms of the American system. Some opposition is based on anomalies (recounted under *The United States Executive Presidency* earlier in this Chapter) arising from amalgamation of office of head of state with that of chief executive, but probably more salient is that which come in the train of strict, institutional separation of powers, a topic explored in Chapter 7 (under *'Weak' v 'Strong' Republic*). What cannot be overlooked is the sheer practical difficulties in inserting a complex and legalistic system of checks and balances into an informal, pragmatic environment. The South African solution, by contrast, is one to which a state with a parliamentary system and tradition could readily adapt and would not necessarily entail fundamental changes in approach to the relationships between the arms of government; but exercise of state-symbolic functions by the head of government, as in the USA, would be unlikely to attract much support, particularly when it could be portrayed as a Prime Minister aspiring to a quasi-royal status. It appears unlikely that an executive presidency would attract much support in Britain though, whatever system is adopted, some aspects of the American constitution will certainly continue to be held up as worthy ideals.

A summary of constitutional features of the countries referred to is tabulated in Appendix 1.

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[1] Derbyshire & Derbyshire, 1996, pp. 41-43
[2] *Guardian*, 7 December 2000
[3] Bogdanor, 2003, p. 2
[4] Freedland, 1998
[5] *ibid.*, p195 and Freedland, 2000, p. 69
[6] Ackerman, 2000, p. 646
[7] *op. cit., passim*
[8] Barnett, 1997, p. 84
[9] Hague, Harrop & Breslin, 1992, p. 315

[10] Parris, *The Times*, 4 May 2002
[11] Bogdanor, 1995, p. 62
[12] *op. cit.*, 2000
[13] Hutton, 2002, pp. 47-8
[14] *The Times*, 4 May 2002
[15] Macintyre, *Independent*, 2 May 2002
[16] *op. cit.*, p. 44
[17] *ibid.*, p. 47
[18] *op. cit.*, p. 69
[19] *ibid.*, pp. 69-70
[20] Ojanen, 2004, p. 552
[21] *ibid.*, p. 548
[22] *op. cit.*, p. 46
[23] *The Times*, 12 December 2003
[24] *op. cit.*, p. 300
[25] McLoughlin, *Observer*, 9 July 2006

Chapter 6: Problems of Transition (3); The Australian Experience

There are numerous differences between British and Australian public and political life but they resemble each other in ethnic composition, though nothing like as closely as fifty years ago, a shared political culture centred on parliamentarianism and a similar history of demonstrative loyalty on the part of a large section of the population to the Hanover/Windsor dynasty. It is not unreasonable, therefore, to view Australia's October 1999 Republic Referendum as having *some* predictive value for any similar exercise which might be carried out in Britain. Despite optimism on the part of its supporters rationally founded on strong and consistent opinion poll ratings the referendum failed to secure endorsement of the necessary constitutional alteration. Should any republican sympathisers in Britain, where such favourable circumstances are barely conceivable, have underestimated the difficulties inherent in prosecuting the cause to which they are attached events in Australia should dispel them. This Chapter, which concludes the section of the thesis discussing the problems of transition, describes the background to the referendum and reviews some of the reasons put forward to explain its outcome.

--- *republicanism in Australia*

According to the conventions of 'history from above', Australia's post-settlement story is one of steady, legalistic, 'Whiggish', teleological progression from dumping ground for convicts to full nationhood. Significant events include grant of responsible government to the individual colonies in the 1850s; the Corowa Conference calls for a federal convention in 1893; Federation of the separate colonies and adoption of a constitution in 1901; recognition by the Imperial Conference of 1923 of the right of Dominions to make treaties;[a] the Balfour

[a] A fishing treaty between Canada and the USA in 1923 was the first example.

formula[a] of 1926; appointment of the first Australian Governor-General[b] in 1930; enactment of the Statute of Westminster[c] in 1931; (Australia's own) Statute of Westminster Adoption Act[d] of 1942; regular appointment of Australian Governors-General from the 1960s onwards, abolition of appeals to the Privy Council from decisions of the (federal) High Court (for most purposes in 1968 and completely in 1975); abandonment of *God Save the Queen* for a new national anthem[e] in 1984, the Australia Act[f] of 1986; discontinuance of the acceptance of imperial honours in 1989, and of swearing of the oath of allegiance to the crown in 1992.

The foregoing is a litany of formal, legal events. There is a parallel narrative, based on the bottom-up story of evolving national consciousness. This is rooted in the anti-authoritarian strand in Australian political culture, one that celebrates the strong Irish (in some eyes, synonymous with republican) element in Australian immigrant stock (about a quarter of the convict intake, supplemented by great waves of Irish immigration later in the nineteenth century) and given a boost by cosmopolitan immigration from the nineteen-seventies.

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[a] Canada, Australia, South Africa, New Zealand, Newfoundland and the Irish Free State were declared: autonomous communities within the British Empire, equal in status, in no way subordinate to another in respect of their domestic or internal affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations. [cited in Bogdanor, 1995, p. 246]

[b] Sir Isaac Isaacs.

[c] the purpose of which was to give legal force to the Balfour formula. Section 6 states: No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof.

[d] "An Act to remove doubts as to the validity of certain Commonwealth legislation, to obviate delays occurring in its passage, and to effect certain related purposes, by adopting certain sections of the Statute of Westminster, 1931, as from the commencement of the War between His Majesty the King and Germany."

[e] '*Advance Australia Fair*', written by a Scottish immigrant (Peter Dodds McCormick) and first performed in 1878. '*God Save the Queen*' was retained as a 'Royal Anthem', to be played in the presence of royalty.

[f] The 1942 Act had, it appeared, not removed 'all doubt', thus requiring a further measure to deal with residual technicalities, including appeals to the Privy Council from State Courts' rulings on State legislation.

Key events in this story are the 'Battle' of Vinegar Hill (also known as the Castle Hill rising) of 1804[1] when some three hundred Irish convicts, many of them survivors of Wolf Tone's rebellion,[a] rose up in Parramatta, New South Wales, in protest against brutal treatment – most to be shot during the action or hanged thereafter. A republican newssheet, the *People's Advocate*, was founded in 1848, that *annus mirabilis* of revolution in Europe; '*The Bulletin*' (founded 1880) took up the cause before succumbing to xenophobic rightist populism, and other publications had brief lives later in the nineteenth century, notably '*The Liberator*' (from 1886). The Eureka Stockade incident of 1854, whilst having 'Irish' undertones, was a more cosmopolitan affair involving 'Californians' (prospectors of various nationalities who had participated in the 1849 gold rush and then moved on to the next bonanza), Canadian transportees,[b] English Chartists, and sundry European adventurers, as well as Irish. The proximate *casus belli* was the imposition of licence fees, perceived iniquitous, on free-lance miners in the gold fields at Ballarat, Victoria; but a political strand emerged with some leading rebels urging wider objectives going all the way to separation from the British crown. Choice of the emotive phrase 'Vinegar Hill' as a password illustrated the linkage to the highly sensitive issue of Irish separatism. The allusion served to bind some elements to a wider cause but also alienated others, unwilling to identify with one side in an imported British - Irish quarrel. The uprising having been put down with the usual bloodshed - the lives of thirty miners and five soldiers were lost - public opinion swung behind the rebels; all thirteen taken prisoner were acquitted by local juries. Despite its immediate outcome, 'Eureka' was a medium-to-long term success in that within two years Victoria, together with the other Australian colonies, had achieved manhood suffrage, the secret ballot, fair electoral distribution and self-government.[2]

Some republican-inspired protests flared up in response to perceived extravagance of the 1887 Golden Jubilee celebrations and a handful of short-lived publications

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[a] The name 'Vinegar Hill' is derived from the site of an insurrectionary battle in Co. Wexford in 1798.
[b] In 1837 and 1838 unsuccessful risings against the Tory ascendancy in Quebec and Ontario resulted in 153 Canadians being transported to the Australian penal settlements.

came into existence but, following a logic familiar in Britain, the nascent Australian Labor Party[a] took the view that the working class would be just as oppressed in a republic as in a constitutional monarchy.[3] Defeat of two plebiscites to introduce conscription during World War I maintained the Australian public's reputation for disrespect of authority,[4] but British observers would have no difficulty in recognising Australia's uncritical attachment to monarchy which characterised most of the subsequent century – perhaps at its apogee in the early years of the reign of Elizabeth II. In 1954: 'Scenes of near hysteria greeted Queen Elizabeth II when she last visited Ballarat, in rural Victoria,' - the very location of nineteenth century anti-authoritarian mayhem -

> More than 150,000 besotted Australian subjects lined the streets and cheered their fresh-faced young Queen until they were hoarse. "We shared in an elevating experience from which we should all emerge better citizens and better Britishers", the next day's Ballarat Courier declared.
> The sentiments were echoed in every town and city graced by the newly crowned Queen during her first triumphal tour of Australia. An estimated 70 per cent of the population, then 10 million, saw her in person; in Sydney, 2,000 people fainted in the crush outside the town hall; in Lismore, in northern New South Wales, women and children were trampled underfoot.[5]

A report on the 2000 royal tour, four months *after* the referendum that had rejected the establishment of a republic, commented:

> Now, as her reign passes into its evening, the Queen returns today to find the hysteria of 1954 faded, her cherished Commonwealth ideal forgotten. Few want to fly the flag for a monarch who they retain only by default.[6]

In the intervening half century Australia had ceased to seen as an outpost of Britain, the 'White Australia' policy had been abandoned (on the initiative of Whitlam's 1972 administration) and immigration from Asia and Eastern Europe encouraged; hence:

> Guiseppe Interligi, Andreas Kouremenos, Ivanka Kontelj, Mai Ho - the names reflect the ethnic diversity of modern Australia, once populated almost exclusively by Anglo-Celts, now home to immigrants from every corner of the planet, particularly, in recent years, South-east Asia.[7]

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[a] Labor (or Labour) Parties had been founded in the individual colonies in the 1890s: they were federated into a national party in 1901.

---the modern revival

Thus, by the late twentieth century Australia had inherited a miscellany of conflicting traditions. These include a history of orderly constitutional development, one of anti-British resentment bequeathed by another set of problems, another of what can be seen as either sentimental attachment to essentially British 'motherland' institutions or legitimate shared patriotism, and, lastly, the inchoate attitudes of a cosmopolitan 'new' population largely unaffected by the history of its new home. However it is interpreted, Australia is left with the monarchy, as represented by the Governor-General, as the sole British, or imperial, institution. An Australian republican, John Hirst[a] wrote:

> Only one step in this evolution remains. Republicanism played only a small part in all the previous steps. To make this last step we must become republicans but our task is the culmination of the nation-building which our ancestors began. There is one last public office which we must take out of British hands and put into Australian.[8]

The establishment of an Australian republic could equally neatly tie together the history-from-above and history-from-below narratives.

Study of the Australian case quickly reveals arguments familiar in the context of the British debate:

> the political scientist, Brian Galligan, has long argued that the head of state issue is a relatively minor matter. His central argument is "that Australia's constitutional system is essentially that of a federal republic rather than a parliamentary monarchy" … The system is republican, according to Galligan … "because the constitutions, for both the Commonwealth and the States, are the instruments of the Australian people who have supreme authority".[9]

There is a mismatch between what happens in law and in reality. Bede Harris[b] writes:

> In contrast to this bottom-up transfer of authority in a republic, authority in a monarchy vests the monarch and, while some of it may flow down to other institutions, it is ultimately traceable back to the monarch. Of course, in a constitutional

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[a] historian and prominent activist in the Australian Republican Movement (A.R.M.).
[b] of Canberra University

> monarchy such as ours, conventions … dictate that the monarch and her representative exercise their powers only at the behest of the government of the day, but in strict law the monarch is the source of all executive authority, and her consent (through the governor-general) is required for legislation.[10]

To establish itself as a significant political force, republicanism needed proximate stimuli. One interpretation is that a sector of opinion, boosted by the nationalist sentiment flowing from the 1988 bicentennial celebrations, became convinced that the time had come to put the strength of republican conviction to the test – to ascertain whether that last step should be taken. According to a (post-Referendum) Chair of the ARM: 'Popular sentiment grew until by the 1990s republicans became a majority and therefore constitutional change became a serious issue on the political agenda.'[11] Others put a different slant on events attributing the momentum to the propagandising of an elite group orbiting the Australian Labor Party and motivated by the constitutional crisis of 1975. That celebrated affair has achieved an iconic status and, for the left, a legacy of bitterness. Leaving aside the merits of the case, the essential fact is that the Governor-General dismissed a (Labor) Prime Minister, his ground for so doing being loss of confidence by the Upper House. A negative slant was supplied by columnist Michael Duffy in a pre-referendum article possibly overdoes the scepticism: '…what we now see is not republicanism but Labor's revenge…on both the monarchy and the Australian people.'[12] Just after the Convention, Ted Mack[a] advanced a hybrid explanation: 'Paul Keating initiated the republic debate both for his big-picture sense of history and for electoral advantage in tapping the ever-present dark currents of nationalism and sectarianism.'[13]

It is possible to see in the 1975 affair *some* parallel with controversial uses of the reserve powers in Britain. None is an exact precursor, though George V's insistence on a second dissolution in 1910 probably comes closest. A big difference is in the effect. The British 1909-1911 budget crisis led to the subordinate status of the Upper House being made unambiguous. In Australia the

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[a] formerly an independent member of the House of Representatives

causative anomaly survived;[a] the chambers of parliament have roughly equal powers though only the lower house sustains the government in office. During the referendum campaign Malcolm Turnbull set out the dilemma as it affects the head of state issue:

> It is most improbable any Government will control the Senate[b] and so the potential for constitutional impasse is always there. Such an impasse can have an unpredictable course and the potential need for an umpire is obvious. Can a partisan discharge that duty to the satisfaction of the electorate? An answer to that, of course, is to codify the procedures to be followed. We could abolish the right of the Senate to refuse money bills. That would be politically unachievable, as everyone [i.e. at the Constitutional Convention] acknowledged. On the other hand, we could … provide that if the Senate refused to pass an appropriation bill there would be an automatic double dissolution within a nominated period. That would be opposed by the Labor Party … as entrenching or legitimising the Senate's power and thereby encouraging it to use it more often. Another alternative … was to provide that the President could not dismiss a Government for breach of the law (such as spending money which had not been lawfully appropriated) without the approval of the High Court. This too was regarded by the Labor Party as potentially legitimising the Senate's power.
>
> The upshot of all this was that those who did not favour the Senate having the right to turn out the Government believed that the current, rather messy and uncertain state of affairs served a purpose.[14]

--- the 1998 Constitutional Convention

Whatever the motivation, the wheels had been set in motion. The Keating government appointed a Republic Advisory Committee in 1993 with the objective of bringing about a republic in time for the centenary of federation. Though Labor lost office, John Howard's Liberal/National administration agreed to a Constitutional Convention – which met in February 1998.

One hundred and fifty three delegates took part: half elected by the population at large in a voluntary postal ballot[c] and half nominated by the government to

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[a] To deprive the Senate of its power would, just like removal of the monarchy, require endorsement by referendum so would be, at the very least, an uncertain enterprise.
[b] The STV system used for Senate elections is not well-designed to produce a majority; Senators are elected for 7-year terms. Members of the House of Representatives (lower house) serve 3-years terms and are elected by Instant Run-off (Alternative Vote).
[c] The turnout was 46.93 % - low for Australia where voting in parliamentary elections is compulsory.

represent a cross-section[a] of society. At the opening session the Prime Minister identified three main topics to be discussed:

> whether Australia should become a republic;
>
> which republic model should be put to the electorate to consider against the status quo; and
>
> in what time frame and under what circumstances might any change be considered.[15]

After ten days of deliberation the delegates answered the first question in the affirmative, opted for indirect election of a President (the 'Bipartisan Appointment of the President' model) and additionally proposed that a new declaratory preamble should be inserted into the constitution. Secondary, though important, decisions were that the President would continue to act on the advice of ministers in those areas where the Governor-General had acted on advice (with no attempt to codify Constitutional conventions regarding reserve powers) and – more controversially – the Prime Minister should have authority to dismiss the president, but would not have carte blanche in appointing a replacement.

The main subject of contention at that stage of the debate, which continued for another eighteen months while the skeleton was fleshed out and the precise terms of the referendum process were negotiated in parliament, was the choice of 'presidential model'. In the Australian debate there was a consensus behind some version of ceremonial presidency – so strong as to give the impression that there was little awareness of other options – such as US-style executive presidency etc.[b] The dispute about 'models' therefore largely related to the second order issue of methods of selection. Available options were: direct popular election, the 'McGarvie' model, and the bipartisan model. The first subdivides according to

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[a] Former Prime Ministers, Governors-General, judges, federal and state politicians and representatives of the media, arts and sport were included.

[b] though the idea got an airing when the republic issue was restored to the political agenda. Dr David Solomon, giving evidence to the Senate Inquiry: 'I believe we should have an elected executive President, generally along the lines of the US system of government … Those changes would deal with what I see to be a major problem with our current democratic system; namely that too much power has accrued to the person of the Prime Minister.' [Australian Senate Hansard; Legal and Constitutional Affairs References Committee (Brisbane Hearing), 29 June 2004 (p. 38)]

eligibility, voting procedures etc., but, leaving aside these detailed mechanics, is self-explanatory. The second relies for its appeal on ultra-minimalism to an even greater extent than the indirect bipartisan system. In its author's[a] own words:

> The organisational change needed to move to the republican equivalent of our present system, is to set up a Constitutional Council of three eminent Australians to take the place of the Queen in performing the one power she now performs – appointing or dismissing a Governor-General as advised by the Prime Minister. The other change has constitutional but no operational effect. It involves making the Governor-General actual head of state of Australia and transferring or patriating from the Queen the few remaining powers of head of state that are the Queen's not the Governor-General's.[16]

The model included provisions for the establishment of microcosms in the States[b] where Governors would function under parallel arrangements. Its appeal being based on minimalism, it became the republican option monarchists would have gone for, *faute de mieux*.[c]

Under the third model, the one endorsed by the Convention, the Prime Minister would, with the Opposition Leader's support, present a name to Parliament for ratification which would require a two-thirds majority.[d] Contention began as early

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[a] Richard McGarvie (died 2003) saw himself as an antipodean Alexander Hamilton or James Madison. A former Governor of Victoria, he published a collection of (forty-eight) 'papers' – commentaries on aspects of the Australian constitution (originally newspaper articles, speeches to graduands and learned bodies etc). see *Bibliography, Miscellaneous*

[b] mockingly dubbed 'Lesser McGarvies' by Malcolm Turnbull. [Turnbull, 6 August 1998]

[c] Prime Minister John Howard, a monarchist, even voted for 'McGarvie' at the Constitutional Convention

[d] A fuller summary runs as follows:

> The President would become Australia's head of state, replacing the Queen and the Governor-General.
> The President would have the same powers as the Governor-General and like the Governor-General would, in almost all cases, act on the advice of Ministers.
> The Federal Parliament would establish a broadly representative nominations committee to invite public nominations for the office of President and to prepare a report and shortlist for the Prime Minister. After taking into account the committee's report, the Prime Minister would present a single nomination for the office of President, seconded by the Leader of the Opposition, to the Federal Parliament. The nomination would require affirmation by a two-thirds majority of a joint sitting.
> If the Prime Minister nominated a person not shortlisted by the committee, he or she would need to inform Parliament of the reasons.
> The term of office of the President would be five years.

as the second day of deliberation. A breakaway faction began to suspect the forging of a cosy establishment consensus[a] when it became clear that the majority of delegates favoured indirect election, a position shared, if opinion polls are to be believed, by a distinct minority of the public at large. Thenceforth, the republican cause was irretrievably split. The essence of the dispute is simply stated. On one side stood 'direct-electionists' who contended that, if Australia was to have an elected head of state, it would be an outrage if the population of the country were to be denied the opportunity of taking part in that election. The other side countered with reasoned arguments, such as those put by Malcolm Turnbull in August 1998.[17] The case is twofold: i) a directly-elected president would inevitably be a partisan figure having achieved office by virtue of nomination by a political party and with the assistance of its machine; and, ii) direct election was not appropriate for the incumbent of a ceremonial presidency which was the clear preference of the delegates; in the event of a contentious situation, such as that of 1975, a directly-elected president might feel that s/he enjoyed the legitimacy conferred by a nation-wide popular constituency and, hence, confidence to take controversial decisions: not necessarily wrong decisions – but perhaps more far-reaching ones than an indirectly president would dare to contemplate. In the words of another republican academic:[b]

> First, a presidential election would require media and organization resources that only a political party could undertake it. Secondly, a directly elected president would enjoy a massive electoral mandate. This would mean that he or she would be rival for power with the elected Prime Minister, leading to disastrous constitutional instability.[18]

The riposte to the argument that the Irish Republic, where there is a directly-elected ceremonial president, had got by without such traumas, was that the Irish

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The Prime Minister could remove the President, but would then have to seek the approval of the House of Representatives for this action within 30 days, unless an election were called. [Australian Electoral Commission, ["1999 Referendum Report and Statistics" – AEC website]

[a] 'Anyone who seriously thinks that the Australian people are going to vote for a model that means that politicians do a behind-the-scenes deal to get a two-thirds majority to elect a President are smoking opium.' Queensland Labor leader, Peter Beattie, at Press Conference at end at Day 2 of Convention. {ABC TV transcript- ABC website; Bibliography, Miscellaneous)

[b] Professor Greg Craven, then Professor of Law, University of Notre Dame, Western Australia

upper house (Senate) is, unlike its Australian equivalent, advisory in function, with few significant powers. It is reasonable therefore that, *in extremis,* its presidency should play a limited role as a counterweight to the executive – there are few other constitutional constraints on governmental action. The Irish constitution also places presidential authority in a tight legal straitjacket, a condition which could only be replicated in Australia by amending the Constitution, achievable only through the uncertain process of a further referendum. Furthermore, Ireland is a small, unitary nation; Australia is a federal polity where power is dispersed widely to States which constitute rival power centres. The applicability of Ireland as a feminist model has also been challenged. According to Eve Mahlab, addressing the 1998 Women's Constitutional Convention:

> Feminist supporters of popular election often mention Mary Robinson as President of Ireland. To the best of my knowledge Mary Robinson was able to win only because Ireland is a small country and she was able to travel its length and breadth to personally demonstrate her principles and character through public appearances. This would not be possible in a large country like Australia where we are subject to media image making and breaking.[19]

The powers held by the Australian Governor-General (which, as a default position, the president would inherit) are set out only in broad terms. The circumstances in which he may dismiss a Prime Minister, for example, are not enumerated in the constitution but are governed by convention and precedent; a politically ambitious president could, therefore, within the letter of the law, though at variance with national political culture, assume very extensive powers. Malcolm Turnbull, with the rest of the Australian Republican Movement's leadership, gave consideration to direct election but concluded that it would be dangerous to go down that road *unless* the president's powers were formally circumscribed, a venture which could seriously jeopardise the project. In the words of Michael Lavarch, one time Federal Attorney General:

> The key point is that the Queen and a Governor General have no legitimacy to exercise power. Legitimacy rests with the Parliament and Government which draws their authority from the will of the people expressed through free elections. Contrast this with a Head of State given broad powers by the Constitution

> and who gained office via a direct expression of the will of the people. Surely such an office holder would have perfect legitimacy to exercise powers vested in the office by the Constitution.[20]

Turnbull further argued[21] that a bipartisan nominee enjoying the support of two-thirds of the House of Representatives would *not* be a partisan figure for the simple reason that the necessary cross-party consensus would not be forthcoming for anyone seen as such.

These and similar arguments were advanced repeatedly by the ARM's mainstream spokespersons - but to little avail. Much of the direct-electionist polemic was founded on emotional appeal, but there *was* a dispassionate case, perhaps put as well as any by Patrick O'Brien.[a] In summary, this rests on the concept of the Crown's omnipresence in the existing dispensation. All public business is conducted in its name yet some of the most important organs of state – the prime ministership, the Cabinet – are not even mentioned in the constitution, though they are the *de facto* channels through which the Crown's *de jure* powers are exercised. To dispose of the Crown, therefore, must entail wholesale changes to the Commonwealth and State constitutions. He concludes:

> …once the principle of the sovereignty of the people is constituted, it is constitutionally and morally imperative that all Australians have the exclusive right to nominate candidates for the offices as well as the exclusive right to vote for their nominees.[22]

But Professor O'Brien acknowledges that the direct-election model could not work unless accompanied by significant constitutional amendment – not achievable without a referendum. Appreciation of that insight was not always evident in much of the direct election rhetoric, not only in the popular press, but in contributions to the scholarly debate. Alan Ward's analysis[23] of the referendum outcome, for example, makes a sound case for amending the Constitution in order to accommodate a directly-elected Presidency but omits to mention the obstacle presented by Section 128.

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[a] associate Professor of political science at the University of Western Australia

Populist sloganeering against politicians as a class was well to the fore.

> The dissenters want the people to elect the president, full stop. Otherwise, they'll be landed with "another bloody politician". You can see the force of this argument, particularly in Australia, where politicians are regarded as the lowest form of life.[24]

Representatives of every shade of opinion, apart from mainstream ARM, queued up to denounce the bipartisan model as a device to secure a "politicians' president". Its proponents defended the scheme but were unable to overcome the inbuilt, almost atavistic, suspicion felt towards the political profession. The arguments were set to nought by the overwhelming unpopularity of indirect election with the Australian public '–the scheming politicos loathed and mistrusted by the blokes on the streets and in the farms.'[25] Opinion polls consistently put support for a republic – 'model' unspecified – well ahead of retention of the monarchy: 47 per cent to 28 per cent [*Newspoll*],[26] and still 51 per cent to 25 per cent in late 2002, three years after the referendum.[27] The preferred model however had just as consistently been direct election: 75 per cent (asked which model they would chose if Australia became a republic) at the time of the Convention and 79 per cent in November 2002. Another survey conducted just before the referendum in October 1999 put support for the bipartisan model at only 14 per cent, against 50 per cent for direct election.[28] Bipartisan model supporters were given misleading encouragement by a poll held at the close of the Convention showing a majority would vote for it,[29] but the plurality was fleeting and 'no' leads of 6 to 15 per cent[30] were standard in the run-up to and during referendum campaign in late 1999, that is when the choice has been whittled down to the bipartisan model *versus* the Queen-plus-Governor-General status quo. Unsurprisingly, it became the received wisdom that the model on offer was the explanation for the failure of the republic project at the referendum. Indeed, it might have been so, though there were other factors - which are evaluated below. A concession, allowing nominations to be submitted by the public through a parliamentary nomination committee to the Prime Minister, was helpful in securing agreement at the Convention but made little impression on the electorate.

A parallel debate which took place after the Convention concerned presidential removal mechanism. The agreement reached allowed the Prime Minister to dismiss the president, subject to parliamentary ratification, after which the full nomination/appointment process would have to be repeated. The ARM camp argued that since this left the Prime Minister with *less* power *vis-à-vis* the president than he had customarily enjoyed in relation to the Governor-General it represented greater accountability than the status quo.[31] This is correct to the extent that under the 1901 Constitution the Prime Minister may not only dismiss the Governor-General but also nominate the successor - all on the basis of unignorable 'advice' rendered to Buckingham Palace. Driven by preference for a predominantly parliamentary system in which a Prime Minister enjoying the support of the popularly elected house has political primacy - and doubtless haunted by memories of 1975 - proponents of the model played down the extent to which the powers envisaged for the Prime Minister were exceptional by international standards. In Germany, for example, removal of the President requires impeachment before the Federal Constitutional Court (after one quarter of the members of either house of the federal parliament has instituted proceedings), or by one of the houses by a two-thirds majority [German Constitution, Article 61]. In Italy a two-thirds majority at a joint sitting of the two chambers is required [Italian Constitution, Article 89]. In the directly-elected ceremonial presidencies the hurdle is higher; Ireland [*Article 12.3.7*] requires a national referendum, and Austria [*Article 60 (6)*] a two-thirds majority in the lower house, as well as a referendum.

George Winterton[a] defended the model on the grounds that it represented minimal departure from established procedures *vis-à-vis* the Governor General (but with the added safeguard of abolition of the Prime Minister's power to nominate the successor); and the more elaborate mechanisms would allow a miscreant president to remain in office while the procedures worked themselves out.[32] As might be expected, Richard McGarvie criticised[33] this aspect of the model through the

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[a] Professor of Law at the University of New South Wales

prism of his eponymous blueprint which, he argued, would , by introduction of a built-in delay factor, prevent an undignified dismissal race of the kind that *could* have occurred (but didn't) in 1975. The Constitutional Council (the committee of elders who would appoint the president) would have up to two weeks to act on a Prime Minister's advice to remove the Governor-General; the bipartisan model provided for instant removal. The Prime Minister's capacity to remove the president, Mr McGarvie contended, would effectively cripple the reserve authority of the head of state.

An occasional speechwriter for the then leader of the opposition made a similar point:

> The fact that partisanship is absolutely endemic and unavoidable in a party-based political system just hasn't been adequately taken into account. Almost invariably, the opposition would side with a sacked president,

and went on to speculate on the prospects of two claimants to the presidency taking rival claims to the High Court.[34] The scenario seems to pay little heed to the bipartisan-model advocates' case that a president selected through their favoured mechanism should *not* be a partisan figure. There is, of course, no guarantee that s/he would not be tarred with the brush of partisanship as a by-product of the current crisis, but the contribution highlights the hypothetical nature of some of the difficulties put forward by the various protagonists.

During the Convention, debate on the rhetorical issue of the preamble attracted somewhat less attention though, as will be seen, became more prominent thereafter. Professor Craven led opposition (in the event, only partially successful) to inclusion of endorsement of basic values such as democracy and commitment to equality[35] lest the text provided the grounds for legal actions, a prospect monarchists might exploit as polemical ammunition. Similar considerations applied to the question of affirmation in the constitution of the rights of Australia's aboriginal peoples and acknowledgement of the wrongs done to them (discussed below under *'– the Preamble'*).

The delegates voted 89 to 52 in favour of a republic 'in principle'. The 'bipartisan' model was carried less convincingly, 73 to 57 with 22 abstentions giving a pretext for the government to refuse a referendum, but in the event the preference of 117 delegates for a referendum, irrespective of the preferred result, made it inexpedient to deny a choice to the nation. On the preamble, delegates voted in favour of affirmation of the rule of law and: 'acknowledgement of the original occupancy and custodianship of Australia by Aboriginal and Torres Strait Islanders.'[36]

--- *the parliamentary and national debate*

A legislative package[a] was then prepared and, following internal government discussion, select committee scrutiny (including public hearings) and the usual parliamentary stages, was passed into law in August 1999.[37] In common with most referendums (or opinion polls) at least as much rode on the precise wording of the question to be put to the voters as on the underlying issue. An early version on the table proposed simply to ask voters to say whether they wanted a republic headed by a president. The final version, controversially insisted on by Prime Minister Howard and reluctantly agreed to by the (largely pro-republic) Labor opposition in order to avoid irreparable damage to the timetable, asked them whether they approved:

> A proposed law: *To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.*

The practical consequences of this language did not differ materially from those flowing from the earlier draft but implications previously unstated were now spelled out. A controversial election process was to be emphasised, and marginal monarchists were to be reminded of the absence of the Queen in the new dispensation.

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[a] Constitution Alteration (Establishment of Republic) Bill and Constitution Alteration (Preamble) Bill

--- the Preamble

This study devotes some space to the preamble question, not an essential feature of the republic issue, for two reasons, This first is: that it is likely that debate on it had some cross-over impact on opinion on the main question; the second is to illustrate how easily the main issue can become vulnerable to a distraction.

Once the 'model' (in the restricted Australian sense of the term) had been selected the rest was, apart from the wording of the referendum question, detail; the preamble, however, now demanded careful attention. Two subsidiary questions occupied the attentions of legislators and concerned citizens. One was, predictably, that of how to implement the Convention's commitment to the Aboriginal peoples. The other was a bizarre side issue, raised by the Prime Minister, concerning the proposed honouring in the constitution of the peculiarly Australian virtue of 'mateship'.

In February 1999 when Mr Howard spoke on the subject in parliament and gave a series of media interviews. He signified a minimalist position, and hinted an intention to bypass the Convention's recommendation, in telling a television interviewer: 'Once custodianship or the idea of ongoing rights was mentioned in the draft preamble, you lose me, you lose middle Australia.'[38]

Despite legal opinion that declaratory language in the preamble carries no legal force, Howard was aware that his supporters in the country did not necessarily take such a complacent view - concerns that could have been well founded.[a] His

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[a] 'Given the High Court's occasional recognition of matters that have no constitutional basis, there is understandable concern that some judges would seek inspiration from the preamble. Perhaps future appointees should be made to take an oath imposing a ban on taking extraneous matters into account when preparing adjudications'.[*Sunday Telegraph* (Sydney), 15 August 1999, p. 61] An example is Cole v. Whitfield (1990) when the High Court accepted speeches made in the Convention Debates as an aid to interpretation of the Constitution – thereby reversing precedent of some eighty years. [McGrath, 'Upholding the Australian Constitution: Ch. 1 – see Bibliography, Miscellaneous]

sub-text, therefore, was to do as little as possible to provide grounds for land claims, an ever present undercurrent in Australian politics, particularly following High Court landmark rulings in the cases brought by the Wik and Mabo peoples.[a] The inherent danger was certainly in the mind of the leader of the New South Wales National Party[b] when he attributed a strong showing on the part of '*One Nation*'[c] in a state election to fears about native land title.[39]

Preceded by inspired leaks from the government and despite a declaration from the Labor opposition leader, Kim Beazley, that any version omitting 'custodianship' would be unacceptable,[40] a government text – which the poet[d] Len

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[a] "In the Mabo case of 1992 brought by indigenous inhabitants of the Murray Islands off the coast of Queensland, the Court held that the litigants possessed 'native title' over the land by virtue of occupancy since time immemorial, despite the later arrival of Europeans. Seeking to codify the ruling into statute law, the Native Title Act of 1994 based rights on continuity of occupation and observance of custom. In order to establish whether this right stretched beyond vacant Crown Lands, the Wik people of the Cape York Peninsula in Northern Queensland sought, and obtained, a ruling that the pastoral leases which had been granted over their traditional lands did not necessarily extinguish native title. These judicial and legislative events had the effect of destroying the concept of *terra nullius* that had been paramount in Australian land law." [Woodford, 3 May 1997]

[b] The junior partner in the ruling coalition at Federal level.

[c] A far-right party led by Queensland populist Pauline Hanson which achieved considerable, but short-lived, success at this time on a platform of playing on resentment of perceived advantages being given to aborigines. The party achieved twenty per cent of the popular vote in W. Australia State elections in 2001 but declined rapidly when two of its leaders, including Mrs Hanson, were convicted of fraud in 2003. "[I]t is anti-Asian, anti-intellectual, anti-media, anti-green, anti-non Christian, anti-oil company, anti-big business, anti-union, and anti-judges who are soft of crime. It is 'pro' very little, except white English speaking people, and their right to own guns without undue bureaucratic restrictions." [Sandilands, *Dawn*, 16 February 2001]-

[d] 'Feeling, perhaps, that he was linguistically and spiritually out of his depth Mr Howard called in Australia's most substantial poet for consultations. The document that survived cabinet approval attempted a much wider statement about national beliefs than had, perhaps, been originally envisaged but, despite Les Murray's undoubted poetic skills and Howard's considerable political ones, it was seen as unsatisfactory from almost all points on the political spectrum.' [Page, *Canberra Times*, 9 May 1999]

Murray took part in drafting - saw the light of day on 23 March. The document[a] was notable in four respects: the anomaly of invoking the deity in the constitutional documents of a secular, pluralist state; omission of the custodianship commitment; a mildly paranoid tone in the gratuitous attack on political correctness ('influence of fashion, prejudice or ideology'); and inclusion of a paean to the curious concept of 'mateship'. Mr Howard's position on custodianship had a clear political motivation, and the theological and political correctness issues could have been put in as negotiable bargaining chips, but the rationale of mateship is difficult to discern except, perhaps, in terms of a personal hobby-horse or as an intentional distraction from the main issue. The word is meant to encapsulate comradeship of the kind forged in making a living in an unforgiving outback, or fighting in the trenches of Gallipoli or the jungles of Kokoda. Leaving aside the facts that urbanised modern Australian life has little connection with the outback and that these military operations were conducted by earlier generations, this updated, antipodean version of the French revolutionaries' *fraternité* might seem progressive, but it is now widely, if not universally, felt that *fraternité* itself does not necessarily embrace *sororité* - and the Australian term carries somewhat stronger implications of male exclusivity. Whether it is true is of little significance, it is *felt* by many Australians that:

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[a] Text "With hope in God, the Commonwealth of Australia is constituted by the equal sovereignty of all its citizens.
The Australian nation is woven together of people from many ancestries and arrivals.
Our vast island continent has helped to shape the destiny of our Commonwealth and the spirit of its people.
Since time immemorial our land has been inhabited by Aborigines and Torres Strait Islanders, who are honoured for their ancient and continuing cultures.
In every generation immigrants have brought great enrichment to our nation's life.
Australians are free to be proud of their country and heritage, free to realise themselves as individuals, and free to pursue their hopes and ideals. We value excellence as well as fairness, independence as dearly as mateship.
Australia's democratic and federal system of government exists under law to preserve and protect all Australians in an equal dignity which may never be infringed by prejudice or fashion or ideology nor invoked against achievement.
In this spirit we, the Australian people, commit ourselves to this Constitution." [*Illawarra Mercury*, 24 March 1999, p. 3]

> mateship is a term that excludes women and blacks. '...What has made 'mate' a four-letter word among young Australians is its hint of cronyism and nepotism'. . .The Women's Electoral Lobby has blasted the proposal as "shocking and appalling," arguing that mateship has "always been about Anglo bonding".[41]

The public response was mixed. A poll conducted just after publication showed only 23 per cent of voters in favour with 27 per cent against. But, paradoxically, the reaction to the draft's components, as opposed to its totality, was more positive with 48 per cent approving 'mateship' and 62 per cent endorsing the reference to Aborigines.[42] When confronted with unified support from the Democrats and Greens[a] behind a Labor alternative draft Howard threatened to drop the preamble altogether.[43] The stand-off was resolved when Howard negotiated a compromise draft with the Democrats. Mateship was sacrificed, and so was disapproval of fashionable causes. God (or at least, hope in God) stayed in. The language regarding Aboriginals was reworked, but:

> custodianship has been side-stepped again, the Democrats bowing to the Government's belief that a formal statement of ownership might have implications for land-title claims in the future.[44]

Mr Beazley, unhappy with the revised version, offered to agree to restitution of (symbolic) mateship in exchange for (potentially substantive) custodianship. But Howard stood his ground, secure in the knowledge that the deal was more or less fireproof having been negotiated with Aden Ridgeway, Democrat senator and the only Aboriginal in the federal Parliament. Hence, the text eventually put to the electorate reads:

> With hope in God, the Commonwealth of Australia is constituted as a democracy with a federal system of government to serve the common good.
>
> We the Australian people commit ourselves to this Constitution:
>
> - proud that our national unity has been forged by Australians from many ancestries;
> - never forgetting the sacrifices of all who defended our country and our liberty in time of war;
> - upholding freedom, tolerance, individual dignity and the rule of law;
> - honouring Aboriginals and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands and for

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[a] minority parties holding the balance of power in the Senate.

their ancient and continuing cultures which enrich the life of our country;
- recognising the nation-building contribution of generations of immigrants;
- mindful of our responsibility to protect our unique natural environment;
- supportive of achievement as well as equality of opportunity for all;
- and valuing independence as dearly as the national spirit which binds us together in both adversity and success.[45]

--- the campaign

The official campaign added little to the sum of knowledge but some points of more general interest emerged. Both sides, just, resisted the temptation to exploit, negatively or positively, the strong republican sentiment amongst Australians of Irish origin/descent. Individual Irish-Australians were prominent in the republican campaign (Paul Keating, Tom Keneally) but the Irish dimension of the campaign was not conspicuous. It so happens that the leader of the status quo faction, *Australians for Constitutional Monarchy* (ACM), Kerry Jones, was of Irish Catholic origin. Some community leaders accused the ARM of understating Irishness for fear of alienating the even bigger sector of the population of British origins. In 2002, discussing the Movement's future strategies, Professor Warhurst said:

> Given the popular misconception that Australian republicanism is nothing but an Irish-Australian plot it is surprising that Ireland's experience is not given more attention than it is. The explanation probably lies in sensitivity in the first half of the 20th century especially towards the sectarian divide between Catholics and Protestants in Australia.[46]

The monarchist camp did not push the issue in public, though the columnist, Michael Duffy, whom we have met before, sailed close to the wind in writing: 'the constitutional debate draws as much from Ireland's centuries-old resentment of England as from the real needs of 21st-century Australia.'[47] The prominent campaigning role played by the Roman Catholic Archbishop of Melbourne did not seem to cause any concerns though there was a last minute scare when a priest from Perth urged his co-religionists to vote for a republic on the grounds that the monarchy is a symbol of discrimination against Roman Catholics.[48] The

potentially bigger issue of the allegiance of the 'Ten pound poms' similarly generated little real dissension, though republican campaigners were far from happy that some three hundred thousand British settlers who had not taken out Australian citizenship were allowed to vote.

The campaign was not immune from dirty tricks and misinformation. The ACM denied having anything to do with an electronic raid on the ARM's Sydney HQ in which communications were blocked for three hours. Kerry Jones's assertion that a republican Australia would be required to reapply for Commonwealth membership[49] is, strictly speaking, correct, though since 1950 the procedure has been a formality, with the single exceptional case of South Africa in 1961. Monarchist campaigners were on weaker ground in suggesting that an Australian republic would be vulnerable to a military coup or dictatorship.[50] Ms Jones and others introduced something of a red herring in suggesting that a republic could not come into being until the legislation had been ratified by all the States, and that secession would be an option for any declining to do so.[51] Joh Bjelke-Petersen[a] argued that it would require a separate referendum to depose Elizabeth II as Queen of Queensland.[52] The Attorney-General, Daryl Williams, dismissed secession as nonsense, but conceded that States could, if they wished, preserve their own links with the Crown.[53] The practicalities of this actually happening were derided by Thomas Keneally:

> The monarchists argue that since Australia is a federal system you have to start by turning the states into republics before you can even think of having a federal republic - otherwise, you could have a republican Australia but a monarchical Tasmania. Some really think the monarch would welcome the chance of reigning over a section in a republican whole. It is nonsense, but it takes time to argue.[54]

A curious feature of the campaign, widely commented on, was the apparent reluctance of the monarchists to argue their case positively:

> They tie themselves up in knots to avoid mentioning the Royal Family, and they never defend the institution of the monarchy.

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[a] 1911-2005: Ultra-conservative, populist, authoritarian politician – Queensland State Premier 1968-1987 – eventually brought down by corruption scandals.

> The reason for this omission - so glaring that republicans have put up "Wanted" posters that refer to the Queen and the Prince of Wales as "missing in action" - is simple. There are few old-fashioned monarchists in Australia - too few to secure a "no" vote - - - for many Australians the Royals are a turn-off. Thus 10 speakers took to the podium at the Sydney Convention Centre yesterday without so much as a hint of the Q-word passing their lips. Eventually, an hour and 40 minutes into the rally, Tony Abbott, a government minister, described a fellow speaker as "a loyal servant of Her Majesty the Queen". A frisson ran through the hall, as if he had uttered a profanity. Rather than thump the tub for the Royals, the monarchists have adopted the extraordinary strategy of allying themselves to a splinter group of republicans who are so strongly opposed to the style of republic envisaged that they would rather keep the current system.[55]

Monarchists chose not to defend the institution, calculating that any attempt to do so would be counter-productive. The tactic infuriated the republicans but was, in the circumstances, effective and rational. As Kirby[a] put it:

> The strategy of the opponents of the alteration substantially left alone the committed monarchists who (according to opinion polls) numbered at least a third of the Australian population. Their votes were assured. The entire focus of the "No Coalition" was to address the multifarious concerns of those who, whatever their general inclinations on a republic as a constitutional idea, were opposed to, suspicious of, or uncertain about, the model contained in the proposal actually voted upon.[56]

The most unworthy stunt pulled by the republican side was, in the last days of the campaign, when it was fairly obvious that the cause was lost, they resorted to blitzing voters with a pamphlet featuring King Charles and Queen Camilla.

Full treatment of the role of the media in the affair would require a dissertation of its own, but British republicans might ponder that the failure of the project in Australia occurred despite overwhelming press support (notably from the Murdoch empire), an advantage that would not be available at home. It is also likely that the republican side enjoyed a financial advantage. Kerry Jones's assertion that the ACM was outspent six-to-one might be an exaggeration but there is no doubt that Malcolm Turnbull poured considerable resources into the campaign.

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[a] The Hon Michael Kirby was a founder of Australians for Constitutional Monarchy and served as a member of its National Council until his appointment as a High Court Judge.

The result was clear enough. Nation-wide, the Republic question was lost by 54.87 per cent to 45.13 per cent, and the Preamble question by 60.66 per cent to 39.34 per cent.[57] All six states voted 'no', including Victoria (by 0.2 per cent) where a provisional 'yes' had been indicated in early returns. The Republic question's lowest 'yes' scores were 37.4 per cent in Queensland and 40.4 per cent in Tasmania. Only the Australian Capital Territory voted 'yes'. Speculation that the preamble question would get through even if the republic failed proved well wide of the mark.

--- *the Prime Minister*

John Howard was accused of deviousness, and there is some foundation to the allegation, but, given his monarchist persuasion, of which he made no secret, it is not clear that republicans can have much to complain of in his conduct. First and foremost, he allowed the referendum to go ahead on his watch. To have reneged on a promise given by the previous Liberal leader would have been politically inexpedient, but he *could* have got away with procrastination. There were sound tactical reasons for him to adopt a comparatively neutral stance; there was suspicion that republicanism's day had arrived in Australia, and he could not ignore republican sentiment in his own Liberal (= conservative) Party – his own finance minister, Peter Costello, was a prominent republican campaigner and Peter Reith, the labour minister, was a direct-electionist. Other members of his administration prominent on the monarchist side were: Bronwyn Bishop (who excelled as perpetrator of anti-republican scare stories), Tony Abbott and Nick Minchin.[a] Cynics could argue that, gambling on inevitable defeat of the republican cause, he saw the referendum as a heaven-sent opportunity to put the issue in cold storage for a generation. If so, it was a high-risk strategy. As has been noted, he resisted the temptation to use the absence of a majority at the Convention for any particular model as a pretext for shelving the whole project.

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[a] Ministers respectively for Aged Care, Employment and Industry, Science & Natural Resources

At the time of the Convention *The Australian's* columnist speculated on the possibility that Howard might defect to the republican camp[58] though a, possibly ventriloquised, riposte (in the *Australian Financial Review*) concluded that there was little evidence that 'the leopard [had] changed its spots.' All that had happened was that he had shown he was 'capable of understanding the force of arguments by which he remained unpersuaded.'[59]

Nevertheless, some republicans were soon to show signs of excessive magnanimity (and self-delusion?) in the euphoria of the Convention's conclusion: 'My joy is shamelessly apparent, and in shameless joy, and with a certain gratitude to John Howard.'[60] Republican opinion turned decisively against him, however, when the referendum results were known:

> Conceding defeat at 9 p.m., Malcolm Turnbull, chairman of the Australian Republican Movement, pinned the blame on John Howard, the Prime Minister and a staunch monarchist. "History will remember Howard for only one thing," Turnbull declared. "He was the Prime Minister who broke this nation's heart. He was the man who made Australia keep a foreign Queen.[61]

The pro-republic *Sydney Morning Herald* editorialised:

> The deep division between direct-election and parliamentary-election republicans which Mr Howard and the monarchists exploited in Saturday's election will not continue. Mr Howard and the monarchists won the day by insisting that the republic was about models. But they missed the point.[62]

The point they were said to miss was that 'the republic is not about models',[63] but the writer perhaps missed another, that republicans chose the fate of their cause; the bipartisan model was not imposed upon them.

--- *post mortem*

What, Australian republicans asked themselves as soon as the polls closed, had gone wrong; and what lessons were to be learned for the future?

What might first be established is whether republicans were justified in their earlier optimism. By the eve of the poll defeat was widely predicted, but the

campaign had not started that way. Opinion poll data from 1995 had steadily showed about half the respondents in favour of a republic and between a quarter and a third against -the remainder undecided.[64] The numbers changed little throughout the Convention, campaign and referendum, and remained broadly similar as late as early 2006,[a] that is, when the issue had been off the active agenda for over six years. Preference for a directly-elected president, however, consistently stayed well ahead of the parliamentary-elected option; and even the 1998 poll showing a fleeting preference for the chosen model over the existing monarchy indicated a majority in only three States. The failing (see Chapter 4, -*Australia*) is important in view of the requirement for a Section 128 referendum to succeed in a majority of States (i.e. four out of six).[b] Mainstream republicans were firm in their resolve to stick to the model they had devised, confident that, even if the direct-electionists remained unpersuaded of the virtues of bipartisanship, they would reluctantly come round to support it against the *status quo*. They were mistaken; too many were persuaded by what the *The Australian*'s correspondent called a 'great hoax'[65] that there would be an early opportunity to vote for a directly-elected president. Malcolm Turnbull commented that voters had been hoodwinked by a deliberately misleading campaign suggesting that those who wanted a directly-elected president should vote 'no'.[66] In reality, the combination of circumstances that made the 1999 exercise possible was not likely to recur for a long time.

There are in essence, two post-mortem questions: (i) would another model have fared better? and, (ii) if it *was* the model that made all the difference, *why*? Predictably, much ink has been spilled in attempting to answer them. Some of the debate is reflected here.

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[a] The 'Newspoll' figures in January 2006 were: 'republic' 46%, 'monarchy' 34%. The republic score rose to 52% when the monarchical option was expressed as 'Charles III'. [*The Australian*, 21 January 2006]

[b] Votes cast in the Northern Territory, Australian Capital Territory, external territories and at diplomatic missions abroad are included in the aggregate total but not in the State polls. The Australian High Commission in London was the biggest single polling station for the republic referendum

Question (i), being totally hypothetical, can be answered only speculatively. Something approaching a consensus behind the 'model was to blame' hypothesis rapidly formed. In the immediate aftermath of the vote the British press entertained little doubt as to the explanation. According to the *Independent on Sunday*'s correspondent:

> It was Australians' deep-rooted distrust of their masters that Mrs Jones and her fellow campaigners exploited. They told the electorate that if a president was elected by the method envisaged … he or she was bound to be a politician. In a superficially attractive populist message, they said it would be far preferable for a president to be directly elected by the people.
> Republican campaigners tried in vain to point out that a candidate with cross-party backing was unlikely to be a politician, and that a directly elected president with a popular mandate would sit uneasily within Australia's Westminster-style system.
> It may seem strange that the monarchists were getting involved in this debate rather than concentrating on defending the Queen. But with few die-hard royalists left in Australia, and most people in principle supporting a republic, they knew that the only way to sink the referendum was by attacking the type of republic proposed.[67]

The *Sunday Times* leader took a similar line:

> The facts are plain. Most Australians do not want the monarchy. When asked the simple question about whether they wish to retain the Queen as head of state, nearly nine out of 10 said no. But thanks to the machinations of John Howard, the Prime Minister, this was not the question. The referendum asked the country's 12m voters to say yes or no to a proposal "to alter the constitution to establish the Commonwealth of Australia as a republic with the Queen and governor-general being replaced by a president appointed by a two-thirds majority of the members of the parliament". The sting was in the tail. The public has a deep distaste for professional politicians, and when cronyism is as much of an issue down under as it is in Britain, even many committed republicans could not vote for such a stitch-up. Given the choice between retaining the monarchy and having a president chosen by and drawn from Australia's political classes, voters reluctantly opted for the status quo.[68]

But not everyone was convinced of the 'model' explanation; as early as the 1998 Convention a *Sydney Morning Herald* columnist wrote:

> All the opinion polls indicate that the public would prefer an elected head of state. However, I do not believe the popularly-elected model could pass at a referendum. Despite all claims to the contrary, there is still no consensus on defining the president's powers, as would be required for the elected model, guaranteeing a scare campaign on the issue. I also believe the elected-president model would fail in the smaller states, where

> opponents could run a line that the president would always come from Sydney or Melbourne.[69]

Careful scrutiny of the results carried out at leisure over the following months and years convinced some observers that the 'model' explanation was an over-simplification and that there was no certainty that direct-election would have succeeded. It should not be overlooked that direct election, not being on offer, was given a free ride by anti-republicans. Had it been presented as the sole alternative to the status quo it would have drawn a lot more criticism, doubtless on much the same lines as that directed against it in 1998-99 by the ARM leadership. A study of the outcome published a couple of years after the event (here reviewed by Warhurst) suggested that one question was not guaranteed to gain more support than another:

> Mackerras and Maley[70] argue that the constitutional monarchy is a 'Condorcet winner'. That is, they believe that the monarchy is an option that "even if it is not supported by a majority, can garner enough support to defeat any alternative" (p 111). They see the two alternatives as being represented by two 'hostile camps' of republicans: "those concerned with national symbols and those concerned with popular empowerment" (p 111). The latter worked to defeat the brand of 'republic' on offer, since this was the only way to keep 'their' republic alive. Should 'their' republic one day be on offer, it is by no means certain that those who voted for a nominal republic in 1999 would support a substantive republic at that time.[71]

Giving oral evidence to the 2003/4 Senate Inquiry, Professor Craven came to a similar conclusion:

> There was an understandable tendency after 1999 for republicans to jump to the...solution: *'we lost with parliamentary election, therefore direct election will work.'* It will not work .... It will be divisive, with more problems. It will put a formidable array of opposition up against that particular model and it will lose again.[72]

Thus, it is argued, simple substitution of one model for another would not necessarily have the expected effect; the coalition of opposing forces would simply reform from different components.

The scepticism is, however, not shared by all. In a (statistics-based) study of the 1999 Australian Constitutional Referendum Survey Charnock identifies slightly

over half the 'no' vote as coming from direct electionists, and puts forward the surmise that most of that group would continue to adhere to direct election in a subsequent referendum if it were on offer. At the same tome, a large majority of both indirect-electionists and monarchists favour direct election as a second choice; a secular decline of the British-born element in the population also chips away at the monarchist vote (and helps direct-electionists amongst whom second and third generation Australians are heavily represented); and there is the prospect that in future the Liberal Party's leadership will be less hostile to a republic than Mr Howard. Charnock concludes that:

> some kind of direct-election method will eventuate in due course (with sufficiently tightly circumscribed roles for the President to satisfy the political elites).[73]

Mitchell's 2002 analysis conceded that the 'Condorcet winner' theory cannot be discounted, but 'that this outcome would require a significant, though not inconceivable, change in current public opinion',[74] concluding that no preference cycle can be identified and that 'the direct election option is majority-preferred over both alternatives.'[75]

One attempt to make sense of question (ii) when the referendum was fresh in the mind concluded that there was a correlation between voting 'no' (i.e. for keeping the monarchy) and opposition to the social agenda of the Keating administration – Aboriginal land rights, cosmopolitan immigration, multiculturalism, feminism, tariff reduction. Katherine Betts's analysis of referendum data for the Australian Election Survey using a nation-wide opinion survey in conjunction with the referendum results and those of the 1998 Federal General Election, did not meet with universal approval. The monarchists' campaign director argued that Dr Betts's conclusion could not be reconciled with 'yes' votes in Liberal-voting high income constituencies where the progressive agenda would not have been seen in a favourable light. A leading republican campaigner criticised the study as having established a statistical correlation without a causation mechanism. But the leader of *Conservatives for an Australian Head of State* conceded some validity in the thesis seeing a connection between the unpopularity of the republican cause in

rural areas and amongst blue-collar workers with the suspicions these groups are likely to feel towards the largely urban elite groups prominent amongst its proselytisers.[76] In a detailed post-mortem (making no claims for impartiality), Hon Michael Kirby, a declared monarchist, included this explanation (one of ten), labelling it 'the elitist error'; arguing that the republican proposal received little support outside city centres or amongst the victims of structural adjustment.[77]

Republicans' disappointment should be tempered by the realisation that Australian history shows that what they were trying to achieve was probably more difficult than it appeared on the surface. Irrespective of the issue, the constitutional 'conservatism' of the Australian public gives an edge to the status quo. A popular majority has been secured in only thirteen of the forty-four Section 128 referendums held since 1901 and even fewer (eight) propositions received the necessary 'double majority', i.e. by being carried in a majority of States.[78] Another hurdle is that no referendum has succeeded against the support of the Prime Minister of the day and, more predictably given the reported low esteem in which the political classes are reputedly held by the public, three referendums failed despite having bipartisan support.[79] In a post mortem published in March 2000[80] Helen Irving identified a partial correlation between support for a republic and formal education (hence, the 'yes' success in Canberra with its high proportion of graduate bureaucrats) but concluded that the results were too patchy to be convincing. The same analysis summarised some of the hypotheses that have been put forward for the low constitutional alteration success rate. These include 'federalist' suspicion of transferring power from the constituent States to the centre – though at least two of the successful exercises had this effect. Another is that voters are prepared to accept purely 'technical' measures, but are wary about those entailing changes of principle. Hence, setting a retirement age for judges succeeded in 1977, whereas variation of the parliamentary term (1988) and changes to the method of altering the Constitution itself (1974) both failed. But as Irving points out, the 1967 vote to overturn the 1901 Constitution's exclusion of Aborigines from the census count is far from 'technical'.

A contributory explanation, offered by Malcolm Turnbull,[a] is Australia's compulsory voting.[b] The argument runs that an apathetic voter with no interest in the proposition is inclined to punish those who championed it. Support is supplied by statistical analyses of the 1999 Referendum. Charnock concludes that: 'the question would have come much closer to obtaining an overall majority if voting had not been compulsory (and may even have passed)'[81] and Ian McAllister, one of the ACRS researchers, goes further:

> When asked if they would have voted if voting had been voluntary, 66% said that they 'definitely' would have voted. If these voters only had voted, the referendum would have attracted 53% in favour of the republic and 47% against.[82]

After concluding – very provisionally – that a non-technical alteration can succeed only with a powerful popular wind behind it and a meticulously prepared referendum campaign, Dr Irving contributed the following coda:

> The alternative is to wait until Britain itself takes the constitutional steps that will render the relevant sections of Australia's Constitution either redundant or inapplicable. A referendum in the wake of such a move would most likely succeed.

---an observation likely to confound British republicans.

Understandably, less work has been carried out on the failure of the Preamble question. That it should be rejected by voters who opposed the main republic question is predictable, but why some 'yes' voters rejected it is less obvious. The blandness of the prose did not succeed in minimising opposition. A post-facto study (by Bruce Stone) does not speculate directly on the reasons for the outcome but criticises the 'Howard' text for being no more than a statement of national values and falling short of celebrating the purposes of the Constitution.[83]

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[a] in video *'Stephen Haseler interviews Malcolm Turnbull' – 'Republican of the Year' Presentation, 9 May 2000*

[b] voting was made compulsory in Federal Elections in 1924 when turnout figures had fallen to 47% (the British General Election of 2001 - the lowest post-WWII figure - scored 59.4 %).

--- the way forward?

Picking over the corpse some three years after the event, the then Chair of the ARM highlighted republican disunity as a major handicap and identified the anti-elitism that had given (temporary) momentum to Pauline Hanson's *One Nation* as a contributory factor. [84]

In the same paper Professor Warhurst identified the following strategies to take the cause forward. Some of these were peculiar to the circumstances in which the ARM found itself, but others are of more general application:

- recruitment drive to compensate for the membership lost in the wake of the referendum defeat;

- to campaign for a plebiscite[a] asking the general question whether or not Australians support a republic;

- to take advantage of media opportunities to publicise the movement's message (while eschewing the temptation to go for, possibly counter-productive, cheap publicity; e.g. in response to gaffes by members of the royal family);

- where necessary to re-establish and to maintain co-operative relations with other republican groups;

- (*following on from the preceding bullet point*) to abandon commitment to any one republic model; 'rather it will accept the voters' verdict.' Following the plebiscite, 'resolution of republican differences would then become the highest priority'

- recognising that it is probable that whatever the outcome some republicans would remain unreconciled to the preferred model, the objective would be to secure a score of at least 70 per cent in the plebiscite.

- Against the background that progress is improbable so long as the Liberal/National coalition remained in office, the timetable for this plan of action is dependent on the Australian electoral timetable.

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[a] Australian usage is consistent in distinguishing between *referendum* (= request to the electorate to give formal and binding endorsement to a measure such as an amendment to the Constitution) and, *plebiscite* (= a non-binding test of opinion to guide legislators in formulating policy). By this convention, Britain's 1975 consultative vote on EC membership would have been labelled a plebiscite.

The issue was kept alive first by the 'Corowa People's Conference'[a] of December 2001 when 418 delegates, including government representatives, convened by Mr McGarvie and Jack Hammond QC, deliberated over nineteen proposals purporting to map out the constitutional future. It was officially restored to the national agenda in June 2003 when the Senate's Legal and Constitutional Committee was commissioned with recommending:

> (a) the most appropriate process for moving towards the establishment of an Australian republic with an Australian Head of State; and
>
> (b) alternative models for an Australian republic, with specific reference to:
>
> (i) the functions and powers of the Head of State
>
> (ii) the method of selection and removal of the Head of State,
>
> (iii) the relationship of the Head of State with the executive, the parliament and the judiciary.[85]

A series of public hearings began in April 2004 but the leader of the Labor opposition (then Mark Latham[b]) gave an election pledge that a government led by him would institute a three-stage process. An initial advisory plebiscite would test opinion on the principle of a republic and, if the response were affirmative, a second would ask voters to choose between models. Only then would the question be put in a Section 128 referendum. Predictably, the ARM welcomed a plan of action closely resembling its own 'step-by-step, constant pulse-taking' path, while monarchists dismissed it as a waste of time and, in a classic governmental reaction to organic reform, Prime Minster Howard reacted: 'we're more focused on things that are of direct relevance to people's lives'.[86] Less predictably, former ARM leader, Turnbull, opposed the initiative for being raised against the background of national controversy about participation in military operations in Iraq.[87] Such disputes were rendered obsolete, for three years at least, by the Liberal/National victory in the October 2004 general election.

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[a] Corowa, NSW, was the venue of an historic conference in July 1893 which set in motion the train of events leading to federation in 1901.
[b] Mr Beazley resumed the leadership in January 2005

--- coda

Lessons might be learned from another post-referendum happening. The comparatively subdued atmosphere of the royal visit of March 2000 has been referred to earlier in this Chapter, under -*Republicanism in Australia*. Yet another royal tour, in February 2002, unhappily coincided with a constitutional crisis concerning the Governor-General. The office was by then held by Peter Hollingworth who, as a former Anglican Archbishop of Brisbane, might have been supposed to be above reproach but allegations were made that he had connived in a cover-up of child abuse cases involving members of the clergy and lay employees under his jurisdiction.[88] To the extent that these initial questions related to perceived managerial shortcoming on his part, the pressure on him was resistible. The following year, however, shortly after a critical report of his conduct had been published in the Queensland parliament, it became public that he had been named in a civil suit alleging that he had assaulted a young woman at a youth camp in the nineteen-sixties.[89] The case was never brought to court, but by then Hollingworth's position had become untenable and his resignation rapidly followed.[a] Arguably, the affair, representing nothing but a personal tragedy, was without political significance. Republicans, however, were not slow to draw more general lessons. Greg Barns, Chairman of the ARM from 2000-2002 wrote:

> this sorry saga could have been avoided if the appointment of the governor general were not simply a matter for the Australian Prime Minister and the Queen. If Australia had voted in 1999 to become a republic, then the "skeletons in the cupboard" of any candidate for the office of president, such as those being revealed now about Mr Hollingworth, would be revealed by a transparent and democratic election process.[90]

Elective scrutiny can have some part in weeding out certain unsuitable candidates, but it is not infallible. All over the democratic world secrets have emerged from the past of persons in high office. Relevant to this thesis is the uncovering, while

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[a] The plaintiff committed suicide in February 2002 and the suit became public knowledge in May; Hollingworth strenuously denied the allegations but, his reputation gravely damaged, first 'stepped aside' and, two days after the case was dropped, resigned. The

he was President of Austria, and after he had been in the public eye as Secretary-General of the United Nations, of Kurt Waldheim's wartime service in the Balkans.

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[1] Hughes, 1987, pp. 190-191; Hawkesbury, N.S.W. City website; *South Sea Republic* website; Oldfield, September 1999 (New South Wales State Library website)
[2] Taylor, 1999, Ch. 6, *passim* & p. 158; McKenna, 1994, *passim; Alphalink* website*; Australian Nationalism Information Database* website.
[3] McKenna, 1994-5 Parliament of Australia website; (Bibliography, Miscellaneous)
[4] Australian Electoral Commission website.
[5] Marks, *Independent*, 16 March 2000, p. 1
[6] Zinn & Walters, *Guardian*, 17 March 2000, p. 5
[7] Marks, *Independent*, 26 March 2000, p. 26
[8]Cited in Warhurst, 16-17 November 2002, p. 3
[9] *ibid.*
[10] Harris, *Canberra Times*, 29 May 2003
[11] Warhurst, 1 October 2003
[12] Duffy, *Ottawa Citizen*, 24 August 1999
[13] Mack, *Sydney Morning Herald*, 23 February 1998
[14] Speech by Malcolm Turnbull, then Chairman of ARM at Deakin University, 6 August 1998
[15] Australian Electoral Commission website
[16] McGarvie, Paper 1
[17] Turbull, 6 August 1998, *passim*
[18] Craven, *The Australian*, 4 August 1999
[19] Mahlab, 29-30 Jan 1998, p. 2
[20] Lavarch, 20 April 1998
[21] Turnbull, *Sydney Morning Herald*, 1 December 1998
[22] *The* (*Weekend*) *Australian*, 31 January 1998.
[23] Ward, 2000, p. 119
[24] Marks, *Independent*, 24 October 1999
[25] Appleyard, *Sunday Times*, 7 November 1999
[26] Gordon, *The Australian*, 13 February 1997
[27] *The Australian*, 15 November 2002
[28] *AAP Newsfeed*, 9 October 1999
[29] Cumming, *Sun Herald* (Sydney), 15 October 1998
[30] e.g., Marks, *Independent*, 6 November 1999
[31] e.g., in Turnbull, *op. cit.*
[32] Winterton, *(Weekend) Australian*, 7 August 1999
[33] McGarvie, *Australian*, 25 August 1999
[34] Pearson, *Australian Financial Review*, 35 January 1999
[35] Harvey, *The Australian,* 11 February 1998, p. 37
[36] Keneally, *The Weekend Australian*, 14 February 1998
[37] Australian Electoral Commission website
[38] *The Age* (Melbourne), 16 February 1999
[39] Symons, (Sydney) *Daily Telegraph*, 30 March 1999
[40] Grattan, *Sydney Morning Herald*, 22 March 1999
[41] Goodall, *Japan Times*, 31 March 1999
[42] Gordon, *The Age*, 30 March 1999
[43] Franklin & Merryment, *Courier Mail*, 30 April 1999
[44] *Canberra Times*, 13 August 1999, p. 8
[45] Australian Electoral Commission website

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judge commented that the case had no chance of success without the main witness. [*AAP Newsfeed*, 23 December 2003]

[46] Warhurst, '*Constitutional Futures*', 16 November 2002
[47] Marks, *Independent*, 31 October 1999
[48] Watts, *The Times*, 1 November 1999
[49] Chipperfield, *Daily Telegraph*,10 October 1999
[50] Marks, *Independent*, 8 November 1999
[51] Zinn, *Guardian*, 11 October 1999
[52] Chipperfield, *Daily Telegraph,* 10 October 1999
[53] Zinn, *Guardian*, 11 October 1999
[54] Keneally, *Observer*, 15 February, 1998
[55] Marks, *Independent*, 2 November 1999
[56] Kirby, 2000, p. 529
[57] Australian Electoral Commission website.
[58] Milne, *Australian*, 2 February 1998
[59] Pearson, *Australian Financial Review*, 4 February 1998
[60] Keneally, (Weekend) *Australian*, 14 February 1998
[61] Ham & Morgan, *Sunday Times*, 7 November 1999
[62] cited in *Independent*, 13 November 1999
[63] *ibid.*
[64] *The Australian*, 13 February 1997
[65] Kelly, *The Australian*, 3 November 1999
[66] Campbell, *Guardian*, 5 November 1999
[67]Marks, *Independent on Sunday*, 7 November 1999
[68] *Sunday Times*, 7 November 1999
[69] Green, *Sydney Morning Herald*, 13 February 1998
[70] 2002, p. 111
[71] Warhurst, 1 October 2003
[72] Australian Senate Hansard; Legal and Constitutional References Committee (Perth Hearing), 18 May 2004
[73] Charnock, 2001, p. 290
[74] Mitchell, 2002, p. 145
[75] *ibid.*, p. 150
[76] Snow, *Sydney Morning Herald*, 13 November 1999
[77] Kirby, 2000, p. 526
[78] Australian Electoral Commision website
[79] Irving, *Australian Journal of Political Science*, 1 March 2000
[80] *ibid.*
[81] Charnock, 2001, p. 278
[82] McAllister, 2001, p. 266
[83] Stone, 2000, p. 294
[84] Warhurst, 1 October 2003
[85] Press release issued June 2002, posted on Australian Senate website
[86] Schubert & Saunders, *The Australian*, 21 April 2004
[87] *ibid.*
[88] Brace, *Guardian*, 24 February 2002
[89] Fickling, *Guardian*, 9 May 2003
[90] Barns, *Guardian*, 9 May 2003

Chapter 7: The British Head of State

Few could have confidently prophesised the wars and revolutions catalogued at the opening of Chapter 3, or their instrumentality in terminating the associated monarchies. If Britain went down such a path the monarchy would be amongst the least of its losses; it would be unprofitable to base an argument on that contingency. The deliberative, legislative route would also be unfeasibly hazardous *if (a) the present is taken as the starting point, and (b) the outcome is attempted in a single step.* The practical difficulties and normative objections to achieving a republic with no greater ambition than to preserve Britain's pragmatic arrangements would be formidable enough; those entailed in establishing a polity furnished with formal constitutional safeguards favoured by republican advocates are of an altogether different magnitude. None of the first six of the scenarios outlined in Chapter 3 (constitutional crisis, disrepute, devolution, the two relating to the EU and reluctance to serve) provides a particularly convincing route map to get from here to there. Any of them *could* unfold but, unless accompanied and reinforced by other unpredictable changes, would be unlikely to impart sufficient impetus to the process. Failure of the attempt to secure a peaceful and constitutional transition to a republic in the favourable climate which prevailed in Australia in 1999 underlines the difficulty of effecting the transition in a politically and socially stable parliamentary liberal democracy.

There remains one more possibility, that of the monarchy coming to an end at the culmination of a series of reforms each having the effect of incrementally chipping away at its powers, privileges and ceremonial trappings: a classic case of ending not with a bang but a whimper. This gradualist scenario is not consistent with the executive presidency option; whatever merits may be intrinsic to that form of government, successful transition could not be achieved without wholesale constitutional changes of a revolutionary rather than of an evolutionary character. Executive presidency is incompatible with survival of the office of Prime Minister in any recognisable form, and the interrelationship between Parliament and the

executive would have to be fundamentally recast. This 'eye' could not evolve in a Darwinian sense; without the intervention of something resembling intelligent design. But with the completion of each stage of 'downsizing', the inherent difficulties in achieving the remaining steps would become progressively more manageable. For example, pressure on the parliamentary timetable would look a lot less formidable than envisaged by Hennessy[1] if the royal prerogative had already been put on a statutory basis. No estimate is made of the absolute probability of this course of events; it is simply argued that it stands a better chance of being played out than the alternatives. The supposition hereafter in this study therefore is that if Britain is ever to achieve republican status (with or without a residual monarchy) the route taken will be a gradualist one. The thesis will consider the extent to which traditional practices might play a part in a future dispensation, discusses further the 'weak' v. 'strong' republic issue and, taking note of constitutional practice elsewhere, suggests features which might best suit British conditions.

--- 'Weak' v. 'Strong' Republic

Conditions favourable to 'republican' legislation could arise only when the position on the monarchy has already undergone a degree of attrition. At some point when the institution has come to bear some resemblance to, say, its Swedish counterpart, three options would arise: (i) to do nothing; (ii) to introduce legislation to implement a 'weak' republic, or (iii) or to go all the way to a 'strong' republic. Inactivity might be motivated by apathy or by republicans' acceptance that their aspirations were close enough to being achieved as to make no difference - in other words, acquiescence to the hypothesis, that 'a crowned Republic' was in place. Monarchists, in these reduced circumstances, might be reluctant to stir up an issue which could further jeopardise their favoured institution.

'Constitutional' republicans who believe that that mere removal of the monarchy would not create a true 'republic' would have to agree amongst themselves just what additional features would not be negotiable. They would also be obliged to

acknowledge that checks and balances are double-edged weapons which can frustrate desirable policy objectives as well as defending liberties.

Advocates of the 'weak' variant would seek to demonstrate that theirs was the superior option and not merely the one less likely to destabilise the project. They would, for example, be able to point to the very real practical problems of running a state in which rival centres of power contend one with another and where the central executive lacks the institutional authority to impose its will. Examples from American experience abound, but three will do to illustrate the point. (First) Probably the most spectacular is the refusal of Congress (strictly speaking, the Senate) in 1919 to endorse the USA's membership of the League of Nations – at the birth of which President Wilson had been the chief midwife. That decision was, given the perceived potential of a supranational body to infringe national sovereignty and against the background of the political balance in Washington at the time, accepted as rational. (Second) Failure to bring about a 'normal' level of control of the sale and possession of fire-arms has mystified foreign observers; and this in a country where numerous attempts have been made (with guns) on the lives of Presidents.[a] The contrast to the response of the British government and legislature to the Dunblane and Hungerford massacres (opposition was just not an option) could not be more stark. (Third) There is the ever-present and far from theoretical risk, inconceivable elsewhere, of normal government functions grinding to a halt while the executive and legislature haggle over the annual budget. On eleven occasions between 1980 and 1995 absence of funding brought about a partial shutdown of some federal services. The hiatus was usually of a symbolic nature but the crisis of late 1995 / early 1996 was undoubtedly real with 800,000 'non-essential' federal employees being sent home, closure of national parks and museums, suspension of services to veterans and social security recipients, inability of Embassies to pay bills – triggering a hold on diplomatic operations - closure of the Centres for Disease Control, shortage of vital supplies in prisons,

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[a] Four Presidents have been shot dead. Since WWII, bullet(s) struck Presidents Kennedy (fatally) and Reagan; shots were fired at or near Truman, Ford and Clinton. [[Waller (ed.), 1996, pp. 252, 334, 408, 442; Freedland, *Guardian*, 31 October 1994; Locy, *Washington Post*, 18 November 1994]

and default on interest payments on bonds avoided only by last minute emergency legislation.[2] Irrespective of the merits or drawbacks of these initiatives, the administration of the day was frustrated by either independence of the legislature, a difficult-to-change constitution, or both.[a]

The merits of American governance can be disputed on other grounds. Quite apart from the incidence of 'pathology of impasse' account might be taken of its disastrous record when transported (see Chapter 5). Bruce Ackerman[3] also takes his own nation to task for:

- the system's tendency to introduce distortion into the legislative schedule as a President attempts to make up for lost time when he enjoys what might be a fleeting full authority (i.e., Presidency and both Houses of Congress controlled by the same party);[4]
- the cult of personality engendered by personal rule counterbalanced only by the blunt instrument of impeachment,[5] and;
- weak collective cabinet responsibility.[6]

A counter-argument could, based on nothing more exotic than Britain's own experience, point to the deficiencies of a system with minimal safeguards. It might draw on such issues as the intimate connection between the British legislature and executive, *pace* Bagehot, citing perverse consequences arising from it: the capacity of government whips to exclude unbiddable members from select committees or to cajole them with offers of (or threats of exclusion from) office, cursory standards of parliamentary scrutiny of government legislation, hasty parliamentary endorsement of ill-considered government business, ineffectiveness of the second chamber, exclusion of even the cabinet - let alone other ministers or ordinary MPs - from the Budget prior to presentation of the Finance Bill,[7] and on impotence of

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[a] It is acknowledged that the anomalies arise largely from separation of executive and legislative power in the US Constitution and can therefore be seen as consequences of that structure, but the relevant characteristic for the purposes of this study is that contention for power is promoted by entrenched rights and functions for the various actors in the state – the 'strong' republic.

the Head of State, flowing from the unelected nature of the office, in exercising effective admonitory influence.

'Strong' republicans enquire what would be achieved by following the 'weak' road as outlined in Chapter 3: one (not vitally important) cog in the governmental machine would be brought under democratic control, but, as was said in connection with the frustrated Australian republican experiment, 'one must wonder whether it really amounts to a genuinely *republican* movement at all.'[8] In Britain, as in Australia:

> if the creation of a … republic does nothing more than endow the…government with an expanded authority to act in the name of the nation as a whole, the change might actually weaken the capacity of citizens to speak and act for themselves.[9]

Hilary Wainwright expressed a similar sentiment in the 1993 'Monarchy Debate': 'The abolition of … the monarchy would only create an opportunity for democratic republicanism. It would not mark its achievement.'[10]

From this angle, republicanism means more than absence of monarchy; simple abolition, accompanied by only minimal consequential provisions, would not, if Britain's existing constitutional structure is the starting point, produce a republic, except in name; a 'weak' republic would not better protect the civil rights of the citizen. The alternative is a 'strong' republic, in which power is exercised through democratic institutions and mechanisms and no longer through comic opera procedures inherited from the age of the divine right of kings where prime ministers are tempted to act as elected dictators.

While the 'strong' variant is likely to be more in harmony with the republican caste of mind the road to its implementation is strewn with real tactical pitfalls, prominent among them the sheer difficulty, as Australian experience amply illustrates, in obtaining agreement between adherents of all varieties of republicanism to one blueprint. The mechanisms usually put forward to seek consensus, such as deliberation in a Constituent Assembly or Constitutional Convention, are problematic enough, even before the structure of a republic comes

on the agenda. Issues such as the establishment of a constitutional court and securing agreement on its functions, the powers of the head of the executive, the scrutiny function of an upper chamber and the inclusion of a bill of rights (and its scope), and the method of presidential election, provide opportunities for interminable dissension and procrastination. The question of a written constitution and its entrenchment, potentially as big a topic as monarchy-abolition, would also arise. A Convention would be a forum for dissention between adherents of various republican models. It is far from self-evident how the body would be chosen. Recruitment of the House of Commons itself for the purpose has the virtue of simplicity. There are, however, potential objections. Even enthusiastic proponents of simple plurality over proportional electoral systems might concede that the chief merit of the system, its propensity to produce a working majority and, hence stable government, is of limited relevance in respect of a body convened, not to sustain an administration, but to debate a single issue. The more far-reaching the constitutional reforms smuggled into a Republic bill, the more occasion for delay or diversion would present itself. This would be all the more true if proposals on the agenda went as far as a full-blown codified constitution which is the logical conclusion of some reform schemes and true objectives of their advocates. Issues relating to codification are therefore discussed later in this Chapter. Such difficulties are in addition to those inherent in launching a 'weak' republic. Hence, there is a strong temptation to go for a 'quick fix' in the hope that, once the symbolic institution has been removed, other reforms can follow at leisure, a plan which proved to be somewhat elastic in the case of the 1911 Parliament Act, the preamble[a] to which envisaged an elected Upper House.

Two further categories of potential difficulty come to mind. The first is legalistic – i.e. uncertainty as to whether it is even possible to transform the British constitution into a republican format within the existing legal system. The second

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[a] 'And whereas it is intended to substitute for the House of Lords as it at present exists a second Chamber constructed on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation.'

is of a tactical nature – and presentational – and is vividly illustrated by Australian experience. The 1999 referendum did not fail manifestly because of absence of constitutional safeguards in the draft project, but the method proposed to choose a president – indirect election by parliament – was represented as being symptomatic of the 'quick-fix' approach, thereby raising the hackles of an electorate suspicious of and sceptical about professional politicians. Republicans might recall the fate of House of Lords reform in February 2003 when failure to line up behind any one agreed formula (a fully elected chamber, a fully appointed one, 80 per cent elected/20 per cent appointed, and abolition were on offer) resulted in the defeat of all the options.

--- *Options*

In the concluding section of this study some proposals are made for possible inclusions in the portfolio of a reformed British head of state. Features are assessed against political realities and national predilections and, as a test of workability, particular attention is paid to contemporary practice elsewhere. It is not intended to draft a constitution (though the desirability of a written constitution is discussed), but simply to ventilate proposals as to how a head of state might operate. Relevant issues are the need for a head of state at all, methods of selection, exercise of core constitutional functions, and the arguments for and against inclusion of such provisions as legislative veto, emergency powers and a military role and the authority to appoint members of the judiciary.

--- *"Tradition"; ceremony and honours*

> *'The handing down from generation to generation of the same customs, beliefs etc. especially by word of mouth.'*[11]

Since tradition is often called into service as a touchstone to test existing and proposed practices, it might be opportune to discuss its utility. There is clearly

some merit in retaining a custom that preserves its original motivation, but if it has become an empty ritual, the original purpose of which but dimly remembered, it might be questioned. Dressing up (take the search of the cellars of the Palace of Westminster by the Yeomen of the Guard) is innocuous, but tradition can be a threadbare excuse for holding on to outdated practices (*cf.* the House of Commons working arrangements, in force until 2003, designed to meet the needs of earlier generations of largely part-time members). Resemblance to existing practices, at least in their external forms, could play an important role in rendering a particular feature palatable for public consumption. It is in this context that consideration might be given to the elusive notion of 'tradition' - its meaning and relevance in the modern world. It is recognised that incompatibility between these considerations could be the occasion of compromise.

British Republicans, taking pride in the intellectual legacy of the likes of John Milton, Tom Paine, Robert Owen and Charles Dilke, feel themselves members of a 'good old cause' and thus have their own tradition. But this is a tradition of the lecture theatre and the debating chamber which has little resonance save amongst the converted; it plays no part as a prescription for a constitutional arrangement. Much more is made of the slippery notion of tradition when it is recruited to monarchist polemic. Thus, an institution which has existed, in one form or another, for more than a millennium is said to make a special call on the hearts and minds of the people. It is said to be: 'the product less of contrivance than of a response to fundamental needs, needs perhaps of an emotional kind, strongly felt but often not clearly articulated.'[12] To upset this delicate balance could, asserts Prochaska, be dangerous: 'no one can predict with any precision what would happen if the British monarchy, an institution so embedded in the nation's past and consciousness, were to be abolished,'[13] though he does not articulate what these, presumably negative, consequences might be.

Ceremonials are, almost by definition, 'traditional' or are presented as such even if their pedigree is short. The overarching royal ceremonial is the quasi-mystical ritual of the coronation in which elements of state pomp and religious ritual are

combined. A little lower in the hierarchy there are such events as the investiture to the Prince of Wales - invented[a] by Lloyd George in 1911 - royal weddings, royal and state funerals; next, the 'tradition' of the monarch's Christmas broadcast and the bestowal of honours; even conscription of a royal to present the trophy at a national sporting event represents some kind of tradition. Hankering after tradition is felt outside royalist circles. Hence, in the course of proposing transfer of a slice of the monarch's state duties to the Speaker of the House of Commons, Anthony Scrivener asserts:

> Old traditions are important - and I mean Black Rod knocking on the door and the Speaker's fancy clothes and all that. It reminds us of the past - the struggle our forebears had to obtain for us the rights we now take for granted.[14]

David Cannadine has argued [15] that ceremonies thought of as venerable are often unrecognisable from their earlier form, some are 'modern' fabrications; others, e.g., the Christmas broadcast, have become traditions simply by virtue of force of habit. One might question whether Black Rod's exertions would be much missed; and, *a fortiori,* the requirement for MPs to stand in the Lords' Chamber in the monarch's presence at the State Opening. To symbolise the House of Commons' capacity to exclude the monarch from its deliberations is all very well but here tradition detracts from the dignity of the elected House.[b] Whether the alleged attachment to, affection for, or even dependence on, tradition and ritual would survive the processes leading to the establishment of a British republic, or would provide a barrier to it, is problematic. Some regret would be felt for its passing, but perhaps not for long. Few tears were shed over the ending of presentation of debutantes at Court,[c] and the prestige of Parliament suffered little from Victoria's failure to preside over its Opening for most of her long widowhood. Ceremonial still played a part in burnishing the royal image:

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[a] but based on rituals followed at the Investitures of Henry, son of James I, in 1610 and his brother, later Charles I, in 1616

[b] Alan Watkins, then Political Editor of the *Observer*, wrote in *The Spectator* (16 May 1992) that the ceremony was 'pretty degrading to Queen and Commons alike'. [Holden, 1993, p. 290]

[c] last presentation, 1958

> It was a common view in the late nineteenth and early twentieth centuries that 'show' was the best way of transfixing the imaginations of the 'masses', who were suffering a rationality deficit.[16]

David Craig argues that it should be acknowledged that the attitude the foregoing represents, while not necessarily mistaken, owes a good deal to Bagehot who 'thought the 'masses' of England had remained intellectually stunted for centuries' and that 'the purpose of monarchical theatre was to reinforce the idea that the monarch was the source of all political power.'[17] New traditions can, if necessary, be invented, even without the full panoply of royal pomp; the presence of a mere President of the Republic does not noticeably detract from the bestowal of the regalia of the *Legion d'honneur*. It might thus be expedient to provide for a degree of ceremonialism which in time, would acquire a 'traditional' patina even in a republic; but there is no strong reason why republicanism should be inhibited by anxiety about abandoning royal ritual. What a presidential republic would *not* do is to contribute an element of the quasi-religious to state occasions, a loss that would be greeted with less than universal regret. As Edgar Wilson writes:

> According to one view, the religious myth satisfies a British love of processions, of uniforms and ceremonial,[a] which is 'the love of proximity to greatness and power, to the charismatic person and institution which partakes of the sacred'. Not everyone would agree that this sort of sycophantic tendency is healthy and desirable; not after the Nuremberg rallies, certainly.[18]

While there might be a good case for reforming Britain's antique and opaque honours system – and disappearance of the monarchy would probably entail changes of nomenclature – there is no obvious reason why the head of state should not remain the titular fount. Indeed, there is a case for partial depoliticisation of this power of patronage by transferring it from the gift of the executive to a democratic institution symbolising the state but at one remove from day-to-day politics.[b]

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[a] Cannadine argues that the 'love' does not antedate frantic (successful) late-Victorian attempts to refurbish state ceremonials. Earlier, 'the English regarded … petty one-upmanship with indifference.' [1993, p. 113]

[b] If seats in the upper house of the legislature remain a by-product of the honours system separate arrangements would have to be devised.

--- written constitution

A simple definition of a constitution is advanced by Anthony Barnett: 'the set of relationships that proposes how a country is run.'[19] More technically, it is (according to Roger Scruton):

> [t]he fundamental political principles of a state, which determine such matters as the composition, powers and procedure of the legislature, executive and judiciary, the appointment of officers, and the structure of officers which authorise, express and mediate the exercise of power.[20]

Alternatively, as Finer *et al.* have it:

> Constitutions are codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationships between these and the public.[21]

These formulae concentrate on the role of a constitution in describing essential governmental nuts and bolts and, except perhaps by implication, disregard the swathes of text found in most constitutional documents dedicated to citizens' rights. This thesis concerns itself primarily with structural issues but acknowledges that advocates of a 'strong' republic might often be motivated by 'rights' considerations.[a]

Any state in which government is not arbitrary can be said to have a constitution. But there are two further characteristics which interest students of constitutional practice: namely whether or not the constitution is written, that is, codified in a single document or inter-related set of documents; and whether the constitution is entrenched, that is, protected against repeal or amendment by a procedure more onerous than that by which other legislation can be repealed or amended. Some writers seem to take it as axiomatic that entrenchment is a defining characteristic

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[a] Of the 25 constitutions examined in this study, eighteen incorporate full formal statements of human rights; three (Austria, Iceland and Norway) include *ad hoc* provisions which, in practice, confer significant rights; two (France and the Czech Republic) give constitutional force to rights set out elsewhere; in Israel, Article 1 of `Basic Law: Human Dignity and Liberty` states that '`the basic human rights in Israel are based on recognition of the value of man, the sanctity of his life and his being free ...` ', leaving only Australia whose constitution is (nearly) silent on the subject.

of a constitution. It would explain why Ferdinand Mount,[22] for example, comes to regard the Israeli constitution as 'unwritten' even when that country's *Declaration of Independence*, *Law of Return*, *World Zionist Law* and eleven *Basic Laws* - taken together – are recognised as 'constitutional' by the Israeli Supreme Court. It falls short of codification and thus differs formally from standard international practice only in the absence of all-round entrenchment. As observed in Chapter 4, a fundamental reform was introduced to the structure of government in 1992 (direct, popular election of the Prime Minister) to be repealed in 2001 – both changes were effected through ordinary legislative process without a special majority. But even in Israel some limited protection exists in that in order to vary, suspend or make conditional any part of *The Basic Law: The Knesset* by emergency regulations, a majority of 80 (in a house of 120) is already required (by Section 44 and 45). Section 9a seeks to restrain the Knesset from extending its own term by the same mechanism. The provision governing the election system (*Section 4*) is provided with minimal protection against amendment by requiring an absolute majority of Knesset members.

Similar ambiguity surrounds the position of New Zealand's constitution which is still often designated as 'unwritten'[a] despite the *Constitution Act*[b] being passed in 1986, followed by a *Bill of Rights Act* in 1990.[c] Quite clearly, there *is* a written code, though enshrined in 'ordinary' law only. It can even be argued that it does take half a step in the direction of entrenchment in that it re-enacts provisions in the 1956 Electoral Act requiring a 75 per cent parliamentary majority or a referendum to be amended or repealed; there is however no entrenchment in the 1986 Act[23] *per se*. The more that practice elsewhere is scrutinised, the more difficult it is to resist the conclusion that Britain's ad hoc arrangements are not 'nearly' unique amongst liberal democracies, but absolutely so.

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[a] see, for example, Derbyshire & Derbyshire, 1996, p. 549

[b] See Bibliography, 'Miscellaneous; Constitutional Texts'

[c] Lord Chief Justice Woolf's 3 March 2004 lecture makes reference to there being three developed nations not having a written constitution; he was presumably alluding to Britain, Israel and New Zealand.

Commentary on constitutional practice often expounds *ad nauseam* on fine distinctions between written, unwritten and codified constitutions in the course of putting forward such semantically justified, but unhelpful, theses as, for example, that Britain has a written constitution because most of the nuts and bolts of one are identifiable in, say, ancient texts from *Magna Carta* via the *Act of Settlement*, sundry Parliament Acts, Representation of the People Acts to modern administrative documents such as *Questions of Procedure for Ministers*.[24] A hypothesised project of bringing these pieces of paper together into a single, coherent document can be portrayed as fruitless and tending to promote contention:

> … short of a huge drafting exercise succeeded by an endless production line of statutes to codify the 'grey ghost' (in the most unlikely event that cross-party agreement could be reached on the essentials, let alone the details, of a written constitution), the puzzle, the magic and the mystery will remain …[25]

though this is approximately what *was* done, starting from a similar background, in New Zealand in 1986.

Absence of a codified constitution has been explained in much the same terms as survival of the monarchy: 'In the period since the invention of the modern written constitution, Britain's political experience has been rough, but never so rough as to merit a fresh start.'[26] Some brief observations on the far-reaching topic might be pertinent. Puzzlement at Britain's arrangements, of which the role of the monarchy is a part, is found across a wide range of opinion. It is particularly evident - and to be expected - in the full-rig draft constitutions such as those essayed by the authors of *Charter 88* and *IPPR* pamphlets or by Tony Benn, but it also comes up as a part of wider arguments. Will Hutton can stand for a selection of them:

> The British state conforms to no agreed rules or clearly articulated principles; in other words, there is no written constitution, carefully setting out the functions of government and the rights and obligations of citizens. If the state is careless about its constitution and thus its relationship with those in whose name it purports to rule, it can hardly be a surprise that such carelessness imbues the whole of civil

> society. Notions of community, of membership, of belonging and of participation are established here or not at all.[27]

In his work on constitutional reform, Professor Bogdanor, a scholar not given lightly to advocating uprooting of established procedures, explores why what had in the past worked might not longer serve the purpose:

> Governments in Britain do, of course, accept limits upon their power. But these do not derive from statute, but from convention, from understandings as to how it is appropriate to act. It is, however, becoming increasingly doubtful whether such understandings are any longer sufficient to provide good government.[28]

He also draws attention to the international singularity of British practice:

> In the years immediately after the Second World War, the British Constitution was widely admired. In the 1950s and 1960s, the Westminster model was exported to the former colonies in Africa and Asia - for whom, indeed, it was the very touchstone of a democratic system. Today, by contrast, what was once an example to be imitated has become a warning of what to avoid. In the 1990s, not one of the new democracies of Central and Eastern Europe contemplated adopting the British system. Not one of them favoured a constitution providing for an omnicompetent government, chosen by the largest minority among the voters. All of the new democracies have codified constitutions with constitutional courts, judicial review of legislation and parliaments elected by proportional representation …[29 a]

And, from the radical corner, in a work which is essentially a sustained plea for putting the constitution in an unambiguous form comprehensible to the citizen, Anthony Barnett, a begetter of *Charter 88*, opines:

> The justification for writing down a British constitution is, negatively, to limit if not eliminate the corruption and incompetence of the old system, and, positively, to renew and greatly expand the indigenous spirit of liberty and democracy.[30]

What the author appears to have in mind, however, is not the 'machinery of government' aspects of a constitution, but the human and civil rights that appear in the vast majority of nations' fundamental documents. Others (here, Jonathan Freedland) see the uncodified constitution as another example of mumbo-jumbo such as that which surrounds the monarchy:

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[a] The quote is from *Power and the People* [1997, p. 11]; he wrote something very similar in the Conclusion to *The British Constitution in the Twentieth Century*, 2003, p. 689

> The superstitious nonsense of a constitution written in invisible ink, which so incensed Thomas Paine, is still with us, exerting the same effect now as it did then - casting government as the exclusive preserve of a set of initiates.[31]

Support of Britain's informal ways of doing things was more or less unanimous in the aeon stretching from Hallam, via Dicey to Jennings, and was still robustly defended in the nineteen-fifties by such luminaries as Lord Hailsham and Enoch Powell, the latter making the point:

> I wonder what Bagehot would have written down in order to ensure that you always secured a House of Commons in which there was a stable majority for one political party ....No constitutional device which won't have the most damaging side consequences in reducing the power of the electorate can avoid that.[32]

In our more sceptical times it is no longer an unchallenged position, though it has lingered in influential circles. Dr John Gray expressed some horror:

> Is it really being proposed that we exchange the inestimable advantages of a well-ordered constitutional monarchy for the rule-bound chaos of modern legalism?[33]

It is perhaps a ripe example of British exceptionalism to dismiss the practices of most of the rest of the democratic world as 'chaos'. More recently, in a public lecture expressing his uneasiness at the prospect of abolition of the ancient office of Lord Chancellor and transfer of the House of Lords appellate functions to a new 'Supreme Court' (of which more later), Lord Woolf, taking Dr Robert Stephens for his text, appeared to be arguing that constitutional change can be countenanced only if there is not much of it, and a span of years intervenes between the introduction of one measure and the next:

> "Traditionally the growth of the English Constitution has been organic, the rate of change glacial." By contrast, during the lifetime of this Government, prior to 12 June [2003], there had been already a torrent of constitutional changes. Let me remind you; the removal of the hereditary peers from the House of Lords, devolution, the incorporation into domestic law of the European Convention on Human Rights and the creation of a unified courts administration. This is by no means the whole story. There is hardly an institution performing functions of a public nature which has not been the subject of change. The changes have had an impact on the way in which our constitution operates. They have been introduced in separate legislation, but little attention has been paid to their cumulative effect.[34]

In states where formalised constitutional arrangements are in place constitutional amendments are infrequent – tinkering is intentionally discouraged by comparatively onerous amendment procedures. Furthermore, their 'cumulative effect' – within a document of finite dimensions – can be more clearly seen. In Britain they have been rare under most administrations but, it is implied, frequent during Labour governments from 1997. In the absence of a coherent body of constitutional texts no mechanism can satisfactorily ensure that attention is paid to the cumulative effect of discrete pieces of (constitutional) legislation. It might be supposed that the remedy lies in introduction of an agreed amendment procedure, but in the same speech, Lord Woolf presented the prospect of a written constitution not as an opportunity but as a threat posed by the government's persistence in testing the limits of the informal constitution, one with which his brother judges would be expected to be uneasy.

As has been observed (e.g. by Bogdanor as cited above and Mount[35]), there has been no queue of admiring new nations impatient to follow the British example. Even most of those reared in Britannia's imperial nursery have made significant modifications to the template bequeathed to them. The case for the defence of the status quo has become largely a matter of pragmatism and inertia. Hence, in the rhetoric accompanying 'New' Labour's radical (in the constitutional field) agenda in its early years of office reference to a 'written' constitution was avoided, an attitude symptomatic of the political establishment of all parties inclined to give other pet projects legislative priority. Small 'c' conservatives opposed to *any* constitutional reform, however overdue, can always argue that another agenda, usually of economic or social business, is more urgent.

The pragmatic case for not writing down the ground rules for government formation is essentially that, however carefully they are drafted, it is not possible to cater for all eventualities. Although not opposing a written constitution in principle Professor Bogdanor has advanced such an argument in the course of demonstrating compatibility of proportional representation with constitutional monarchy, opining that it is impractical to seek to constrain a head of state by

over-elaborate rules when exercising the role of government formation; in a democracy parliamentary arithmetic can always throw up unforeseen situations.[36] It might be mentioned in passing that he cites the (monarchical) constitutions of Denmark, the Netherlands and Belgium which give carte blanche to the head of state in presiding over the formation of a government, but contrary evidence is available from, for instance, Greece where quite detailed constraints are placed on the President. Absolute automaticity might be impractical but a wide variety of practice is possible. A similar point is made by Ward in a commentary on the failure of the 1999 Australian referendum to amend the Constitution. The author argues that a regime of vaguely defined reserve powers as exercised by the British monarch or her proxies in countries operating the Governor-General system is exceptional and that satisfactory codification is achieved in a raft of parliamentary republics (citing Czech Republic, Germany, Italy and Ireland).[37]

Much of the scepticism regarding reform of the "muddling through" and "good chaps" (both Hennessyisms) traditions of British constitutional practice is based to a large extent on unwillingness to take on what would undeniably be a heavy legislative task - one which would, like any attempt to tackle deficiencies in the machinery of government, be constantly sniped at on the ground that it is in some way 'irrelevant' to the nation's 'real' problems. Constitutionalism and republicanism are products of the same caste of mind; hence, when the case is being made for a reformed monarchy, codification becomes a central plank of the argument, and republican rhetoric is often based on opposition to the inadequacies of the informal constitution. In Will Hutton's view:

> … the placing of the monarchy in a constitutional role within a wider settlement, in which the principles of governance were articulated and agreed, would do more to legitimise the institution than a thousand speeches, well-intentioned princely gestures or sermons from the self-appointed guardians of the House of Windsor.[38]

A hankering after a more intellectually coherent system stretches to reformers who are unlikely to accept the label 'republican', however widely defined. Ferdinand

Mount, a Conservative and member of Margaret Thatcher's inner circle, comments:

> Constitutional reform can no longer be brushed aside as a middle-class hobby irrelevant to real politics, an activity somewhat comparable to growing organic vegetables. For our situation is not that of a ramshackle but pleasant old house …. Rotten timbers, however painstakingly lashed together, are unlikely to provide sure footing for long.[39]

The temptation then is for republicans to advocate ending, or domestication, of monarchy and codification of the constitution as part of the same package. In doing so, however, they might be creating insurmountable difficulties for their own cause. Simple writing down of the constitution would be a long, disputatious and uncertain process. In theory, it might be possible to achieve a document attempting no more than describing existing practice but there is too much ambiguity in British arrangements to achieve such an end uncontentiously.[a] It is difficult to imagine, for example, that a law preserving the existing composition a semi-reformed House of Lords would meet with wide acceptance, particularly if the same document made it more difficult to change. Even if ambiguities could be resolved many monarchists would find it difficult to accept circumscription of the monarch's role which, it would be felt, would flow even from the very act of defining it in law. If codification were an end in itself it might be worth the effort but, as Prof. Hennessy has also reminded us (Chapter 3, -*Legislative hurdles*), ending the monarchy would be equally tedious and hazardous. Though some of the labour-intensive elements of his scenario would fall away if the constitution had first been addressed it seems clear that achieving codification of the constitution and abolition of monarchy together, either one of them difficult enough, would be close to impossible through orthodox legislative procedures.

Beyond, and interlinked with, the practicalities of legislative management lies the question of entrenchment. Whatever route the republic project followed it is reasonable to suppose that its adherents would wish to protect legislation against

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[a] *cf.* The project to construct a European Constitution which started as a consolidation exercise but which, in the eyes of many - particularly Eurosceptic opponents - soon took on more ambitious characteristics.

early repeal arising from a change in the climate of parliamentary opinion, e.g. by some such device as a special majority in the lower house or ratification through referendum (an infinite number of variations is conceivable). Inevitably, the principle would be invoked that a British parliament cannot bind a successor,[a] but such a provision, it would be contended, would be *ultra vires;* a later parliament would be free to disregard it and repeal the measure on a simple majority. Mount presents a compelling critique of the conventional doctrine.[40] His argument rests to an extent on *political* restraint; a government with a compliant parliamentary majority might be tempted to seek repeal of an 'entrenched' provision by simple majority,[b] but in so doing would incur a very high political cost. He also cites de Smith and Brazier's (1989) conclusion that: 'if Parliament can make it easier to legislate, as by passing the Parliament Acts or abolishing the House of Lords, it can also make it more difficult to legislate.'[41] If that objection were overcome to the satisfaction of all concerned and it were resolved to seek entrenchment, contingent questions would arise. Strictly speaking, an entrenchment clause need not itself go through a process as rigorous as that it seeks to impose (e g. approval by the same special majority as would be required to repeal it) but there is no doubt that, for a controversial matter, overcoming such a hurdle would confer a necessary degree of popular legitimacy and moral authority that would otherwise be absent.

In practice, the case for a British republic is seldom advanced independently of a plea for some degree of codification but even a minimal move in that direction, such as bringing the prerogative within parliamentary ambit, could well generate an indigestible legislative and political problem. A republic in the context of an otherwise unreformed constitution would appeal only to some republican advocates – the 'cultural' faction chiefly motivated by visceral distaste for the hereditary principle and the sentimentality with which the monarchy is surrounded

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[a] "Parliament therefore is omnipotent to change, but cannot bind itself not to change, the constitution of which it forms a part" [Sir William Anson, The Law and Custom of the Constitution, 1886, vol. 1, p. 8]

[b] The conventional view is that, if this happened, the Courts would feel obliged to follow the later enactment.

than by ambition to promote democratic choice and control. Inexorably, we are brought back to the 'gradualist' transition scenario. Presented in Chapter 3, -*gradualist scenario* as the device by which monarchy could come to an end, it is also the one by which the paradox might be resolved. Hence, regularisation of the prerogative, for instance, could be tackled discretely and for its own sake at an early date, a course of action which looks increasingly realistic when even the Conservative Party can debate the subject calmly (see Chapter 1 – *Executive power migrates to the prime minister*). Other steps and developments, such as those sketched out in Chapter 3, -*gradualist scenario*, would make the final steps to a republic more manageable and plausible. The introduction of a full or partial written constitution might accompany gradual transition to a republic, but could hinder the process if attempted as a coordinated exercise. It might be possible to achieve a constitutional settlement based largely on codification of existing arrangements, or to secure election of the head of state, but the effort expended in securing both would be more than the sum of the parts.

There is prima facie evidence to suggest that a codified constitution would at least not be a vote loser. A 1995 poll conducted by MORI for the Joseph Rowntree Reform Trust found 79 per cent of respondents in broad agreement with the proposal '*Britain needs a written constitution providing clear legal rules within which government ministers and civil servants are forced to operate.*'[42] Whether this is a 'hard' majority or a soft one which would evaporate in the heat of a focused national debate is unknowable. It was not a passing fancy; a 2004 poll (also for JRRT but conducted by ICM) produced a similar result (approval 80 per cent but some haemorrhaging of 'strongly agree' to 'tend to agree').[43]

--- referendum

Irrespective of whether or not significant moves be made to erect a hurdle to discourage over-hasty constitutional reform, it would be necessary to form a view on whether simple monarchy-abolition *without* introduction of a fundamentally strengthened constitution would require endorsement by a referendum to achieve

popular legitimacy. Nothing in British law, and very little in historical practice, suggests that it would be strictly necessary. Indeed, the device has played only a small part in constitutional history at the national level; at the time of writing the only nation-wide referendum has been the 1975 endorsement of EC membership on the terms then available. Those on Scottish and Welsh devolution (unsuccessful in 1979 and successful in 1998) in which only those populations directly affected were asked to ratify significant constitutional change constitute a closer parallel. Referendum-mongering has however achieved a measure of modishness in circles (often, but not exclusively, on the right) normally suspicious of dilution of parliamentary sovereignty: hence, the eventual acquiescence, with varying degrees of enthusiasm, by the main political parties to referendums on the hypothetical issues of accession to the common European currency and, some years later, ratification of the European constitution. While the former undoubtedly qualifies as being of considerable importance as a question of public policy, the case for portraying it as a point of constitutional principle was always shaky. The clamour for a referendum on the latter rose to a crescendo long before it became clear whether the document in question would entail any significant redistribution of competences within the Union. The suspicion arises that pro-referendum agitation is often a tactic for elevating a policy preference to a point of constitutional principle, resting on the calculation that in a referendum the public's assumed preference for the status quo would have an edge. Although resort to referendums to test constitutional initiatives is understandably attractive to democrats[a] it might be wondered whether the outcome might be contaminated by an electorate resolved on punishing the government of the day for reasons quite unconnected with the question on the ballot paper.

It is conceivable that if monarchy-abolition became an active issue in the later stages of a gradual long-term decline, the institution could be despatched into oblivion by simple legislative process. If the question were to arise in other

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[a] In his critique of American separation of powers, Ackerman proposes the use of multiple popular referendums as a part of his prescription for treating the ills arising from separation of powers within the USA's presidential system. [Ackerman, 2000, pp. 666-668]

circumstances, there is a strong possibility that the call for a referendum would be difficult to resist. It must be doubted however whether much would be heard on the subject if it were generally believed that abolition would carry with ease.

That, of course, is not the end of the road. A 'late' referendum called to legitimise a widely accepted outcome would be straightforward, though the classical, and intractable, conundrum of devising a referendum question in suitably value-neutral language acceptable to all sides would arise. If the end-game were to be played out against a background of public dissension and controversy further considerations would have to be factored into the mix. Australian experience might support a case for holding successive referendums: one to secure endorsement of the principle of a (non-monarchical) republic, and another to choose between models. To introduce yet further complexity, decisions would need to taken on sequencing the question; could a sounding on the broad principle be dismissed by monarchists as offering a pig-in-a-poke (?), or could it be combined with a multiple choice of models(?); would it be necessary (as in Australia in 1999) to ask voters to choose between a preferred model and the status quo (?) thereby risking a 'Condorcet winner' advantage to the status quo, or would it be acceptable for the option achieving the greatest plurality to be declared the winner even if it had fallen short of support of half the voters? Absence of a written constitution or of a special category of law suggests that any national vote would be, in law, indicative rather than binding, and the final legal step would the taken by Parliament.

--- constitutional court

It is reiterated that this study does not purport to draft a constitution, but a few consequential issues arise. Prominent amongst them is establishment of a constitutional court. In a public debate covering such matters as judicial review of ministerial acts polemicists of both right and left challenge the ethical basis of

unelected judges[a] intervening in public policy issues. Tomkins extends this category of objection, arguing that 'legal constitutionalism' (reliance on an activist judiciary to safeguard political and constitutional liberties) is undesirable not only because it can be held to be undemocratic, but because it is ineffective. Judges, he observes, are accountable only to other judicial organs and, at the top, to no-one.[44] The kind of 'constitutional' issues appropriate for judicial intervention are, fundamentally, political. Access to the courts, he further observes, is not sufficiently widespread to satisfy democratic norms. As for effectiveness, the author cites a series of rulings in which, in his view, the judiciary has shown itself executive-minded and heedless of the interests of the small battalions. He begins the critique with judgments handed down in the reign of James I and continues to recent cases: the House of Lords decision against David Shayler to the effect that Section 1 of the 1989 Official Secrets Act did not breach the freedom of expression supposedly afforded by the ECHR; and the 1985 ruling upholding the then government's decision unilaterally and without consultation to withdraw trade union rights from GCHQ staff. It is striking, however, that the political classes do not view the judiciary in the positive light that might be expected for an institution supposedly well disposed to executive interests. In the reaction to the July 2005 bombings on the London transport system political leaders on all sides (along with right-of-centre commentators) came to an antithetical interpretation of judicial behaviour.

> Tony Blair yesterday accused judges of blocking Government attempts to crack down on Islamic preachers of hate. He hit out at the courts over their record of putting human rights ahead of the fight against terrorism.[45]

And the then Conservative leader, Michael Howard, wrote in the *Daily Telegraph*:

> …judicial activism seems to have reached unprecedented levels in thwarting the wishes of Parliament, it is time, I believe, to go back to first principles. The British constitution, largely unwritten, is based on the separation of powers.[b] Ever since the

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[a] it must be doubted whether Britain is ready for elected judges. Even in the USA (where 87 per cent of state court judges - in 42 States - and other judicial posts are elected) appointments to the Supreme Court are reserved to the President – subject to Congressional ratification.

[b] Not a description everyone would recognise

> Glorious Revolution established its supremacy, Parliament has made the law and the judiciary has interpreted it.[46]

A leader in the same newspaper concluded: 'To all intents and purposes, Britain is governed by judges.'[47]

It is customary to underpin a codified constitution with a body to interpret the texts. The options include establishment of a specialist court or leaving such matters to a branch of the existing judiciary. In a non-codified dispensation, obvious questions arise: - what would be the guiding star by which the justices could navigate? - would such a court have the competence to rule on matters customarily governed by precedent? Could the judiciary strike down legislation? Considerations such as these were, *inter alia*, presumably in the back of Lord Woolf's mind when he characterised the new body with which the government was proposing to replace the House of Lords Appellate function as a 'second class Supreme Court'. Compared with, say, the US Supreme Court 'second class' might be justified – within the existing constitutional framework a similar measure of autonomy is unlikely - but to the extent that 'supreme' is a comparative term alluding simply to its primacy within the British judicial system it is surely unexceptional. Mary Riddell observed:

> The court, he (Lord Woolf) suggested, would be less supreme than those of other countries and therefore inferior. Why? It would have the same jurisdiction as the Law Lords, while physically separating those who apply the law from those who make it. Woolf's remarks are explicable only if he was reflecting the views of conservative judges . . .[48]

This is not an appropriate place to engage further in that debate but it should suffice to observe that the court at the apex of the pyramid would, from time to time, be asked to deliberate on questions referred to it which happen to have a constitutional element, along with its workaday business. Shortly before introduction of the 2004 Constitutional Reform Bill, Professor Dawn Oliver commented:

> In the British system, where there is no written Constitution and the boundary between constitutional law and other law is uncertain, it would not be workable to establish a specifically

> and exclusively constitutional court. …the 'top courts' have important functions in developing the whole of the law.[49]

The Bill as published appeared to follow in the tram-tracks of her proposals, down to acquisition from the Judicial Committee of the Privy Council of the overtly constitutional area of jurisdiction in devolution issues. Voices have been raised against relying too heavily on bit-by-bit change. Michael Beloff has written:

> There are, of course, arguments in favour of giving judges overriding authority even in a democratic society: the United States of America provides the paradigm example where this has been chosen as an appropriate procedure for a free people. But, it seems to me, such changes should come about by choice and after long and anxious debate, not by stealth.[50]

The reality is that stealth is the most probable mechanism. Judicial activism in this area has been notable in recent years, hence, the Blair/ Howard/*Daily Telegraph* observations cited above. In the course of the twentieth-century judges moved from a position of absolute reliance on the sovereignty of Parliament to one where:

> On the whole, the expansion of public law took place without much philosophical justification. The courts determine the scope of official powers by reference to seemingly neutral principles of fairness or reasonableness, specified only by an empirically determined list of administrative sins, such as the failure to take into account relevant considerations; acting for an improper purpose; lack of a fair hearing or natural justice; manifest unreasonableness …Lord Diplock helpfully categorised three 'grounds' of judicial review: illegality, procedural impropriety and irrationality. … none of these … is explicitly justified by any particular constitutional imperative, or … overriding purpose.[51]

Willingness to take on Parliament has extended to statutes containing provisions purporting to protect the executive from judicial involvement.[52 a] One man's defence of natural justice is another's interference in the democratic will of Parliament. A written constitution might appear to be the solution that best resolves the dilemma but until one is put in place there is no obvious alternative to a limited range of constitutional matters coming within the purview of the highest court currently available, although that might not be a completely satisfactory arrangement. Of particular relevance in the context of this thesis is, of course, that

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[a] Jowell cites Padfield *v.* Minister of Agriculture, Fisheries and Food [1968] AC 997, and Anisminic v. Foreign Compensation Commission [1969] AC 147

it would provide, *inter alia*, an independent check on the exercise of whatever reserve powers it is thought fit to award to the head of state.

It is reiterated that a 'weak' republic could, in theory, be established without attention being given to these issues (including entrenchment of civil rights legislation). Since, however, the republican case is frequently informed by the objective of achieving a polity founded on 'strong' republican principles – not simply absence of monarchy – its advocates should be aware of the complexities that lie in wait once reform of the informal constitution is embarked upon.

--- *Republican models*

In Chapter 2 of this study a tripartite classification of presidencies as they exist in the real world was presented. In this section the morphology is extended to encompass theoretical models.

--- *a headless state?*

A preliminary question to be addressed here, if only for the purposes of elimination, is whether it is absolutely necessary to have a head of state at all. If, it might be asked, the functions of the office are exiguous would it not be possible to dispense with it completely? Adam Tomkins, an academic lawyer, more or less proposes headlessness as a solution:

> Parliament could legislate to place the queen's powers on a statutory basis to be exercised on Parliament's behalf by the Speaker of the House of Commons. … .Constitutionally, we do not need a queen. Nor do we need any presidential head of state to replace her.[53]

And Matthew Parris, a former Conservative MP, wrote in the columns of *The Times*, a newspaper once considered synonymous with conventional opinion:

> Why do we need mascots, bones, relics, arks of the covenant, princes or presidents, pieces of honorific fluff to be for us the nation? Our ancestors and our descendants, our past and our future, are the nation! We are the nation.[54]

The strictly accurate answer is that core constitutional functions could, in theory, be transferred elsewhere (perhaps to the Speaker, but without conferring the title of head of state on the incumbent); and ceremonial duties, or those still deemed necessary, could be redistributed among other state officials. While, for example, it is customary for ambassadors to be accredited by one head of state to another, there is nothing to stop any country from adopting an alternative practice.[a] Though political leaders are not averse to letting a little of the prestige rub off from presiding over a state function some of them, feeling uncomfortable carrying them out, prefer to delegate these duties to a specialist, particularly when they involve dressing up. A head of state provides at least the illusion of continuity at the time of a change of government and a legal persona in whose name governmental acts can be performed. It must also be doubted whether the bulk of the population is psychologically ready for the headless state.[b] In reality, schemes purporting to bring it about amount to merging the dignity with another office.

--- *the crowned republic*

The 'crowned republic' is a confection which comes in a number of flavours. Perhaps the most 'republican', and therefore, not altogether typical, example is the highly residual and exiguous monarchy that history has bequeathed to Sweden. Though other continental European monarchies perform a more active role in the political process, they all operate firmly within the constraints of codified constitutions which allow little ambiguity concerning their roles, and none of these countries could be accused of having 'a constitution written in invisible ink'. A (theoretical) variant that can just scrape into the 'republican' category is that proposed by the Fabian Society in 2003. This did not entail inscribing the whole constitution in a single document but did purport to place the monarchy under legal control through removing political responsibilities from the head of state and

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[a] The Vienna Convention on Diplomatic Relations (1961) which governs practice in this area is silent about the addressee of letters of credence, concerning itself only (Article 13) with the date on which the ambassador is considered to have taken up his duties.[Berridge & James, 2001, p. 259]

[b] Lord (Richard) Holme purports to discuss the topic in his contribution to *Power and the Throne* [1994, pp. 116-120], but does not really set out the 'headless state' case.

transferring prerogative powers to parliament. In a like manner, the model proposed by Graham Allen retains a ceremonial monarchy within a codified constitution and creates an institution known as a 'presidency' though occupied by a someone still entitled 'Prime Minister' who might, under one option, be directly elected (as in the pre-2001 Israeli structure) or chosen by parliament, as in South Africa – where the incumbent is called President and additionally fulfils head of state functions. A similar structure was advocated by some contributors to the Australian debate, for example, Mr Andrew Nguyen giving evidence to the 2004 Senate Inquiry:

> Hence, the reserve and non-reserve powers of the present Governor-General would be transferred to the Prime Minister (who would become President of Australia), the Speaker of the House of Representatives and the President of the Senate.[55]

Moving back to the real world, there is the orthodox executive presidency as exemplified by the United States. Again, numerous variations on a theme are possible but the essential features are popular election of a head of state who is also chief executive, and a legislature that makes laws and scrutinises the executive without purporting to govern. Under the South African form of executive presidency the head of state-cum-chief executive is elected and appointed by parliament. Next on the list is the dual executive, as exemplified by Fifth Republic France, where a president (directly-elected since 1962) shares power with an assembly-sustained prime minister and where the balance of power between them depends on shifting political factors, chiefly on whether or not they share partisan allegiance.

At the other end of the continuum can be found the 'ceremonial (or formal) presidency' in which the president performs symbolic duties and certain 'core constitutional' ones, usually in connection with seeing fair play on the occasion of a change of government or loss of confidence by the assembly in the government. Functionally, if not emotionally, the role is similar to that of a constitutional monarch. Ceremonial presidents may be elected by the legislature (or by a somewhat wider electoral college), or by popular election. It is possible to

distinguish between a directly-elected ceremonial presidency in a unitary state (such as Ireland) where the institution has the potential to constitute an alternative pole of allegiance, and in a federal state, such as Austria, where significant dispersal of power is already in place; the 'ceremonial'/ 'dual' dividing line is not set in concrete. There is a group of states, often ex-CMEA/Warsaw Pact members (e.g. Poland, Hungary) in which the presidency possesses eclectic powers, or has been granted pre-eminence in certain areas, going somewhat further than those normally held by a ceremonial president. Though no longer in force, the 1992-2001 Israeli system by which the prime minister was directly elected should be catalogued here. Some analysts (e.g. Scrivener and Freedland) have advocated the minimalist arrangement of conferring the dignity of Head of State on the presiding officer of the legislature (i.e. the Speaker of the House of Commons), while others, such as the Fabians, favour the Speaker carrying out the 'core constitutional' functions – such as they are - but leaving the formal headship of state where it is (on the Swedish model). The models referred to are tabulated in appendix 2.

--- direct or indirect election?

There are lessons to be learned from the 'yes' defeat in the November 1999 Australian referendum. A more nuanced discussion is presented in Chapter 6 but it can be said that there is at least *prima facie* reason to suppose that the proposed method of election made a contribution to the outcome, and it can be said that the electorate was, to an extent and perhaps unconsciously, reacting to the issue of legitimacy. At one level, it was questioning whether the person chosen by an assembly which was itself primarily elected to make laws and hold the executive to account possessed the authority to represent the nation.

The related view, also held in some circles in Britain, that since it was not intended that the presidency would be an office with a significant political role, it would be an extravagance to stage a nation-wide election, might be founded on genuine regard for economy, but cuts little ice with "conspiracy by the political classes"

faction. To the extent that there is a case for the head of state to have some powers, however modest, the case for nation-wide election strengthens, *pari passu*. If a president were to be embroiled in a constitutional crisis – an occupational risk – it would strengthen his/her hand if the incumbent were in a position to claim the legitimacy deriving from popular election. A president who felt obliged to question an item of legislation could be expected to feel more confident in taking on the legislature if s/he had an autonomous democratic base. Endorsement by the people as a whole would also enhance the head of state's position in discharging his/her symbolic role. Opposition to popular election proceeds from the other side of this coin. A president enjoying the legitimacy derived from direct election, it is contended, might be tempted to test his/her powers to the limit in a crisis, that is, to get involved when it might be wiser to stand aloof. This is, of course, precisely the debate that arose in Australia in 1999, one which prompts the same responses as it did there. The first is that technical opposition to direct election is of little consequence if it conflicts with popular predispositions. This does not prejudice the preferences of the British public regarding presidential models – it is all rather theoretical, but should the topic ever become imminent, allowance would have to be made for public opinion to crystallise in a similar way to that in Australia, namely, reluctance to delegate the solemn act of choosing a head of state. Alternatively, a cantankerous public might resent being put the trouble of electing an office-holder without significant powers. The lesson for republicans is that they ignore public opinion on even apparently secondary issues at their peril. If a popular-election bandwagon were to start to roll the second response applies: that is, the need to ensure that the head of state's powers are tightly defined in law so as to head off political ambition. In the absence of a body of constitutional law no such project can be fireproof. 'Ordinary' law could go some way to addressing the issue, and the constitutional council mechanism discussed below in this Chapter (under – *restraint on presidential power; Constitutional Council / Council of State*) could be made available.

A notable feature of the Australian debate (before, during and after 1999) from an external point of view is the intensity of attachment demonstrated to a particular

election mechanism. While that favoured by the leading British pressure group, *Republic*, is direct election of a ceremonial president[56] - in the Irish manner – it is not known whether anti-monarchists in Britain would see this as a negotiable issue if a constitutional convention were to favour, say, election by Parliament or by a German-style college. British republicans who operate in a hypothetical context have other priorities; but it is entirely possible that, were a real choice imminent, matters once viewed as mere detail would suddenly acquire new significance.

--- Presidential powers; exercise of core constitutional functions

If it is accepted that, at least for the foreseeable future, *someone* is to be head of state (and the executive presidency and dual executive models are ruled out) the question of what that someone should do arises. That s/he should be formally charged with state ceremonial duties is common ground, though it might be noted that the framers of the 1975 revision of the Swedish Constitution did not regard it necessary to spell out even this. It is conceivable, though improbable in a British context, that a scaled-down monarchy could, at the end of a long road, find itself in these reduced circumstances but it would be pointless to draw up a president's job description in such terms. In Sweden, an institution, the monarchy, already existed which it was inexpedient to abolish but to which it was considered inappropriate to allocate substantial functions. The next item on the agenda is that schedule of powers referred to variously in this study as 'core constitutional' or 'long-stop' functions as summarised in Chapter 1 – *Residual royal powers and functions*. The range of options is:

(a) *delegation to* an officer of parliament, typically *the Speaker*, in his/her own name and acting on his/her own authority. The case for the model has been advanced by Jonathan Freedland:

> For those who suspect a directly-elected president with a national mandate would be too strong a rival for the rest of our politicians - chiefly the Prime Minister - to tolerate, then indirect election is the obvious alternative. At present MPs, who we vote for, choose the Speaker - and that person could easily double as head of state, even taking on the weighty task

> of picking which leader should form a government from a hung parliament[57]

Another member of the same school of thought, Anthony Scrivener, has written:

> the usual argument against change is what could we put in its place? Can we imagine having Mrs Thatcher or Tony Benn as president? I suppose the short answer is that it is easier to get rid of an elected someone than an hereditary monarch as the French and Russian revolutions demonstrate. In fact the Speaker of the House of Commons is the obvious candidate.[58]

The next option is: ---

(b) ---*maximised automaticity*. Minimal discretion would be allowed to the officer, again usually the Speaker, carrying out Benelux-style *formateur* soundings and enquiries and presiding over negotiations, but acting in the name of the head of state. Tomkins suggests that Parliament enact that one of its members commanding a majority in the Commons should assume the premiership subject to that support surviving.[59] Tony Benn's *Commonwealth of Britain Bill* enumerates, *inter alia*, powers to dissolve Parliament and 'to invite persons to form an administration' amongst various functions assigned to the President, for which 'the exercise of such … shall require the assent of the House of Commons[a] before having effect.'[60] The IPPR's proposal – while stopping just short of republicanism in the 'absence of monarchy' sense (see Chapter 2,-*Republicanism*)) – is similar in intent:

> The Head of State shall -
> 1. on the report of the Speaker of the House of Commons, appoint as the Prime Minister the person elected to that office by the House of Commons;
> 2. accept the resignation of the Prime Minister when tendered by the Prime Minister;
> . . .
> 7. prorogue and dissolve Parliament. [Article 36.1.1 & 2 of IPPR draft Constitution][61]

As befits its gradualist ethic, the Fabian Society also tends to favour retention (in a very truncated form) of a monarchy whose residual powers have been delegated. In a 1996 pamphlet, Paul Richards wrote:

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[a] Post facto ratification by the House of the President's choice would satisfy this requirement. – information supplied orally by Mr Benn to the author.

> It should be the role of the Speaker of the House of Commons, who acts as parliamentary referee on all other matters, to adjudicate when the electorate do not deliver a clear mandate

and

> As well as acting as adjudicator in unclear general election results, the Speaker of the House of Commons could take some of the other functions currently exercised by the Monarch in relation to the legislature, for example giving the Assent to Bills.[62]

In 2002 the Society's General-Secretary prescribed the same medicine[63] and, lastly, the report of the Fabian Society's '*Commission*'[64] on the monarchy concluded that:

- The dissolution of Parliament should be regulated by statute....
- The appointment of the Prime Minister should be a matter for Parliament…the Speaker should manage the voting process… .
- Royal assent to legislation should no longer include the possibility of discretionary action on the part of the Head of State. If not already given, the monarch's assent should be deemed to have been given after seven days.[a]

The remaining option is -

(c) *intelligent exercise by a head of state* (who may or may not possess other powers/functions) using his/her discretion, but within guidelines laid down in a legally binding code.

The virtue of option (a) is that it confers responsibility for government formation (and related functions) on a political professional who can be expected to have a sound knowledge of the issues and the personalities involved, but who no longer harbours personal ambition for high political office and has a proven record of partisan impartiality. The article by Jonathan Freedland cited in the proceeding paragraph continues:

> Some would say that would give the Speaker too much power, especially if Britain were to adopt proportional representation. But that power already exists - resting in the hands of a hereditary monarch nobody chooses and nobody can remove,[65]

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[a] Unless abolition of the veto is unambiguously spelled out a seven-day rule would not prevent it being exercised actively within the law.

which invites the riposte that, whatever the objections to monarchy, the Queen does not also preside over the House of Commons.

The 'Speaker model' can be made to work; something like the Fabian prescription has operated in Sweden for some three decades. As Freedland argues, it has the advantage of being a quick fix,[66] but simplicity is not the only consideration. In the British context it is the kind of proposal generally favoured by those with long service in the House of Commons, or a romanticised appreciation of the virtues of that institution, and is not without its opponents. Peter Hitchens points out: 'The government already intervenes far too much in the selection of this supposedly independent figure. If the post took on greater importance, there would be more intervention.'[67] Concentration of power in even fewer hands is surely a step in the wrong direction. 'Parliamentarians' assert that power, authority and prestige having slipped away from the House of Commons, have migrated to the executive. This might well be so but it might be supposed that the remedy lies in a fundamental rethink of the relationship between those two branches of government and not in accrual of new functions by the chamber which, history suggests, would, in practical terms, inexorably revert to the executive. In the course of a commentary on the reserve powers held by contemporary continental monarchies, Bogdanor illustrates Hithchens's concern by reference to a tendency apparent in Sweden since 1974 to select as Speaker:

> not a respected politician who remains above the battle, but a skilful political operator who can be relied upon to offer advantage to his or her party in the battle over the appointment of a prime minister.[68]

Bogdanor also mounts a telling criticism of projects attempting to replace the head of state's discretion in the process of government formation with automaticity - such as in the *IPPR*'s draft UK 1991 *Constitution.*[69] The precise nature of the objection (relating to the possibility of a deadlock that could arise when no party or combination of parties is able to command the support of the House of Commons) is less important than the underlying argument that, however much the rules strive to cater for all eventualities, a parliamentary system can always throw up something that was not envisaged; intelligent interpretation by *someone*

possessing authority, and preferably endowed with some common sense, gets around the problem. It might be mentioned in passing that this objection is operative only for as long as the choice of head of *government* is dependant on parliamentary arithmetic; it would fall away with the adoption of direct election of either an executive president or of a 'prime minister' in the former Israeli manner.[a]

A process of elimination brings us therefore to option (c) – and the conclusion that there is little to be gained from any model that does not award core functions to a head of state. Intelligent contribution to the process by a responsible individual also entails the least departure from existing practice, one which is open to criticism mainly on the ground of the legitimacy of the person making the choice.

--- *other powers*

A question arising from the foregoing is what further powers, if any, the head of state might be granted. From the observations on constitutions in the real world in Chapter 4 and 5 it is evident that it is possible to incorporate various functions into the head of state's responsibilities without significantly compromising the essentially formal nature of the institution. But it is equally true that there is a tipping point at which the accretion of functions nudges it towards one of the other categories, *viz*, 'dual' or even executive. Furthermore, disuse of powers by dual-executive incumbents leads to atrophy and ultimate slippage into the 'formal presidency' category. Something like this has happened, or is in the process of happening, in Greece and Portugal, and is conceivable in Estonia, Czech Republic and Poland. A test which might be applied to determine the nature of the office is whether reserve powers are purely constitutional, or encroach into policy areas. A head of state who is accorded special status in, for example, foreign policy is clearly a political actor, even if s/he does not exercise day-to-day surveillance over the foreign ministry. However, powers restricted to constitutional functions such as reference back of legislation for reconsideration or judicial review might still be

[a] Though even then it would be necessary for an authority, probably judicial, to adjudicate in the event of a disputed election.

seen as 'formal' and apolitical even if they are quite extensive in their scope. The distinction becomes blurred when a veto power is not explicitly linked to formalism, i.e. when the head of state can exercise it simply because s/he disagrees with the measure under consideration without suggestion of constitutional infringement. Circumscribed authority does not altogether guarantee disinterested behaviour; a head of state possessing legal competence only might betray political partiality in his/her choice of interventions, but misuse would be subject to democratic sanction.

--- *legislative delay*

Perhaps the most important function identifiable from current practice is that of legislative delay. This does not allude to the power to *veto* legislation outright which is quite rare and can arguably be taken as a hallmark of an executive, or dual-executive system - but to the power to ask the legislature to *reconsider* measures or to refer them to a constitutional court or similar deliberative body. Amongst the countries whose constitutions are analysed in the foregoing paragraphs, power to insist on reconsideration exists, though perhaps only notionally, in Norway, and more certainly in Greece, Hungary, Italy, the Czech Republic, Estonia, and Bulgaria. In others, e.g. Ireland, Portugal and Turkey, it is limited to referring questionable measures to the adjudication of a constitutional tribunal.

Given the low resonance of a full (US-style) executive presidency with British consumers and incompatibility with the gradualism that has been proposed as the only realistic avenue of approach, the starting point must be that the choice is between a head of state with few, if any, formal powers, and one holding a limited range of reserve powers. The preference of contemporary British republicans for a presidential model in which authority would derive from *ad hominem* charisma and the dignity of the office rather than in formal provision makes sense insofar as it most closely resembles existing monarchical practice, but here the experience of Central Europe appears relevant. It might seem fanciful to suggest that initial

conditions in a British republic would have much resemblance to those in, say, Poland in 1989 but there would be a common experience of entering uncharted waters; a similar reluctance to entrust comprehensive power to a single institution could assert itself. Hence, there is a case for the head of state retaining a last-resort reserve power, not one of absolute veto of ordinary legislation, or even of short-term delay which runs the risk of drawing the incumbent into partisan controversy, but a capacity to refer measures to independent review (to, for example, a constitutional court, should one exist) could provide reassurance to a hesitant public.

--- *emergency powers*

Provision for regulating states of emergency (state of siege, martial law) often appears in constitutions. Typically, they empower named organs in the event of a perceived internal or external threat to public order or the integrity of the state to suspend specified legal processes while investing extraordinary powers in the executive for a prescribed period – usually subject to confirmation and renewable when the legislature has had the opportunity to deliberate. In an executive presidency such powers will invariably fall to the president. In *any* state they are likely to be exercised in the name of the head of state, but even in some regimes where political power is in the hands of an assembly-sustained prime minister there is some ambiguity about the role of the head of state. It is possible to cite Estonia where (*Article 129*) Parliament may declare a State of Emergency 'on proposal by the President of the Republic.' It would seem, therefore, that the President's compliance in initiating the process is a *sine qua non*. In Bulgaria the power to impose a state of emergency is specifically reserved to the National Assembly. Here the relevant motion must be tabled by the Council of Ministers or the President (*Article 84 (12)*). In Greece the Presidential role is, formally, responsive comprising executive acts implementing parliamentary resolutions. Hungary's constitution empowers the President to declare an emergency when 'Parliament be obstructed' from acting normally (*Article 19A (1)*), and to take executive action during the emergency (*Article 19C (2)*) until such time as

Parliamentary authority can be resumed; and in Turkey a specified presidential function (*Article 104(b)*) is:

> to proclaim martial law or state of emergency, and to issue decrees having the force of law, in accordance with the decisions of the Council of Ministers under his or her chairmanship.

Given that the states, excluding presidential executives, which have deemed it necessary to entrust significant emergency powers to their head of state are ones where, in general, it would be difficult to argue that the democratic tradition has a long pedigree, comparative 'best practice' does not point to such an arrangement being introduced in Britain. This does not mean, of course, that there is any intrinsic difficulty in emergency measures, should they be required, being enacted in the name of the head of state. Situations, such as envisaged in Hungary, where the usual organs are 'obstructed' from exercising their normal functions could, in principle, occur anywhere giving rise to the need for the executive to assume extraordinary powers. There is, however, no clear reason why the instigator of such powers should be anyone other than the usual head of the executive, i.e. the prime minister. To enhance presidential (or royal) authority in this respect can make sense only in the context of a fully developed dual executive in which the competences of the two branches are spelled out unambiguously. The conclusion therefore is that responsibility for initiating emergency powers should remain with the executive.

There might, looking at the other side of the coin, be a case to be made for providing the head of state with a veto power when confronted with emergency instruments initiated by the executive. Some might find the temptation to argue on these lines in response to measures like the 2005 Prevention of Terrorism Bill to be strong. The difficulty, however, is in preventing the head of state from abusing such powers and not conceding unintentional competences to him/her. A safer solution lies in submission to some kind of judicial review as argued above under *–legislative delay*, though, given the circumstances in which such questions would arise, there would be an argument for a fast-track procedure being made available.

--- *military*

Designation of the head of state as commander-in-chief of the armed forces is a common practice – found in about half the constitutions analysed in this study. It must be supposed that the intention is usually symbolic, in that it identifies a person embodying the state to whom the military can owe allegiance, as well as being an excuse to put the head of state in a Ruritanian uniform when s/he reviews the national day parade. The case for keeping him/her away from real command is strong; the probability of an incumbent head of state having military expertise of any kind, let alone the calibre required for high command, is small.[a] If a conscious decision has been taken to confer a degree of executive authority on the head of state, defence might be a suitable field, but it would constitute a decisive step away from formalism. If military command is written into the constitution and it is not flagged up that the appointment is not serious there must be a finite chance of an incumbent attempting, for example, to impose his/her ideas of grand strategy in the event of war.

The role of the civil power in exercising political oversight of the military is not in question and it is clear that the efficient (in the Bagehotian sense) part of that responsibility should be exercised by the head of the executive. The balance of advantage would seem to be with retaining a nominal role for the head of state in relation to the armed forces, if only because a fundamentally conservative cadre is likely to feel more comfortable with owing allegiance, however nominal, to an individual rather than to an abstraction.

--- *historic functions; established church*

While it would doubtless be possible to devise machinery which would enable an elected president to inherit the British monarchy's role in respect of the Church of

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[a] in practice, monarchs - for whom a spell in the military is often seen as a way of passing the time more or less usefully before accession - are more likely to have personal military experience than elected presidents, unless the army was a route to office.

England, whether it would be in response to any significant demand is open to question. It is unlikely that establishmentarians would feel that the 'almost wholly symbolic and ceremonial role'[70] founded on the peculiar historical relationship between the crown and the state church could be satisfactorily carried out by an elected president, particularly if there were no requirement for membership of that church. It is equally unlikely that an electee would be comfortable in such a role. Thrones sometimes retain religious dimensions; presidencies do not. Survival of the role of 'Supreme Governor' in a scaled-down monarchy is, of course, less inconceivable but even then the arrangement might not survive a major constitutional spring-clean, especially if the Church's professional leadership had gone cool on the arrangement. Such must be the implication of remarks made by Dr Rowan Williams before and on assuming office (December 2002) as Archbishop of Canterbury. In a broadcast interview, he commented that disestablishment: was not 'a single thing which you could remove at one stroke... there are a million little silken cords that bind the Church and social structures tighter'[71] but also endorsed investigation into the practicalities of loosening Church/State links.

> Dr Rowan Williams, who was yesterday ceremonially confirmed as successor to Dr George Carey, has urged the respected Constitution Unit at London University to draw up a detailed blueprint for the Church's disestablishment.[a] A draft copy of proposals for the new Archbishop, obtained by *The Times*, state that the measure would have "huge symbolic and real practical benefits - only gilded vested interests would lose."[72]

A more pressing question (depending on Queen Elizabeth II's longevity) could be reconciliation of the heavily religious elements of the Coronation ceremony with the secular assumptions of twenty-first century Britain where observant Anglicans are probably matched in numbers by congregations at Friday prayers in the nation's mosques, let alone indifferent non-believers.[b]

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[a] Contrary to any inference that might be drawn, Dr Williams had no part in commissioning the study which was on the stocks before his appointment, and which goes beyond the question of establishment; and thus would be in no way be bound by its findings.
[b] The issue is explored in Madeleine Bunting's *Guardian* article; 21 April 2006

--- historic functions; commonwealth and overseas dominions

The British monarchy's role in relations to the Commonwealth has two distinct strands, both of them legacies of Britain's imperial past. The Queen is, through the mediation of on-the-spot Governors-General, still the nominal head of state in a number of independent territories formerly ruled from London; *and* she enjoys the title of 'Head of the Commonwealth'.

--- 'dominions'

The fifteen former colonies in which the British monarch remains head of state encompass the former so-called settler territories[a] – where the population still has a significant British (or Hiberno-British) element - if no longer overwhelmingly so - and a sundry group of third-world states of which nine are in the Caribbean[b] or adjacent thereto and three in the south Pacific region. In all fifteen the constitutional role of the head of state is performed in the name of the British sovereign by a Governor-General. Since 1930 (in implementation of decisions taken at the 1926 Imperial Conference and later formalised by the 1932 Statute of Westminster) Governors-General have been nominated by the 'local' government and since, generally speaking, the nineteen-fifties have usually been local citizens.[c]

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[a] Nominally, republican sentiment in Canada is of a similar order to that in Australia. "Polls appear regularly: according to the latest … nearly half of Canadians want to replace the Queen as head of state, while 37 per cent favour retaining her." [Treble, *Maclean's*, 7 April 2005, p. 54]
The level of republican support in New Zealand is somewhere between that in Britain and Australia. In the 1990s it oscillated in the 30-35 per cent range. "… NZ's more homogeneous (compared with Australia) and largely British immigrant population, its relative slowness at shaking off other relics of colonialism …" [Miller & Cox, 2001, *passim*]. In January 2006 a poll put support for retention of the monarchy and appointing a NZ head of state at 47% each. [*Sunday Star-Times*, 29 January 2006]

[b] The larger Caribbean territories have been gradually distancing themselves from the club. Trinidad & Tobago assumed republican status in 1976. In September 2003 the Prime Minister of Jamaica announced an intention to follow suit [AP, 23 September], though his target date, transition by 2005, was not met. The Prime Minister of Barbados announced a similar plan in 2005 [*Toronto Globe & Mail*, 27 January 2005];the Attorney General was instructed to prepare a Bill for parliamentary debate in March 2006 [*New York Amsterdam News*, 27 January 2005]

[c] 1. In 1930 George V grumbled at the nomination of Sir Isaac Issacs, an Australian citizen with whom he was not acquainted; later, three of the four G-Gs nominated by

Inevitably, Governors-General have on occasion become personally embroiled in local governmental (or constitutional) crises. Celebrated examples are Sir Malcolm Kerr's dismissal of Gough Whitlam in 1975, Sir Patrick Duncan's refusal of a dissolution to the South African Prime Minister, Herzog, in 1939 and (in Canada) Lord Byng's refusal (1926) of a dissolution to Mackenzie King followed by the embarrassment of having to grant one to the opposition leader, Arthur Meighen, after minor parties had reneged on promises of support. To the extent that in none of these did the sovereign become embroiled in controversy the machinery worked as it should but the exercise, however conscientiously, of a sensitive role by an unelected official who derives his/her authority from an hereditary monarch of another country half a world away is, *prima facie*, extraordinary. There is no reason to believe that the institution would not survive reduction of the British monarchy to exiguous proportions; for as long the vicarious monarchy retains the confidence of the governments in question the issue would not arise. Codification of Britain's constitutional arrangements might prompt the overseas monarchies to reconsider the most unsatisfactory aspect of the system, namely the capacity of the prime minister to dismiss an inconvenient Governor-General subject to little, if any, restraint.[a]

It is, however, inconceivable that the system could survive if Britain were to take one more step, the one that leads to a presidential republic. The historical, family and emotional links might still be there and could be formally expressed in fellow membership of the Commonwealth but it would be unrealistic to suppose that a brand new domestic British institution would have resonance, or command

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Robert Menzies were British. In some territories, the last colonial Governor 'stayed on' as G-G until the hoops had been gone through to establish a republic.
2. Arising from the 1926 Conference, the Balfour Declaration (not to be confused with the similarly entitled document of 1917 promising a Jewish homeland in Palestine) regularised the removal from Governors-General of the counterpart function of representing the British government in the dominion, a reform opening the way to the exchange of diplomatic representatives between Commonwealth countries.
3. Parliamentary endorsement of the government's choice of Governor-General is required in Papua New Guinea, Tuvalu and the Solomon Islands
[a] "An interesting circular system" – Notes to the US Constitution, drawing on 'Comparative Politics', Greg Mahler, Prentice Hall, 2000. [*The US Constitution on Line* website]. The three Pacific states listed in the preceding footnote are exceptions.

allegiance, elsewhere. It is unlikely that the monarchy could survive in the Dominions if it had faded away in Britain.

--- historic functions; – 'Head of the Commonwealth'

The remaining Commonwealth members do not adhere to the Governor-General system but have their own head of state, in most cases a president - though there is a clutch of 'domestic' monarchies (Swaziland, Tonga, Malaysia, Brunei). Despite some foreshadowing in the somewhat anomalous relationship Ireland had with the Crown and other members after 1937, what has subsequently become the Commonwealth norm dates from 1947 when newly independent India, aspiring to sever *con*stitutional link with the British crown, nevertheless wished to retain some kind of *in*stitutional link with the Commonwealth as a whole. Hence, the membership agreed to change the convention in force since 1926-1931 to admit a republican member (effective from 1950). Minimal codification was achieved by the 1949 heads of government conference which agreed to the honorific of 'Head of the Commonwealth' for George VI, a title conferred separately on (not formally inherited by) Elizabeth II shortly after accession in 1952 (and incorporated into British law in 1953). The British monarch from time to time delivers speeches in the capacity of Head of the Commonwealth and usually opens Commonwealth Heads of Government Meetings (CHOGMs). Duties are light. Royal visits to Commonwealth republics in which the Queen can be viewed as travelling in the capacity of British Head of State or as Head of the Commonwealth are hybrid events not readily classifiable. Charles Douglas-Home commented:

> The position of Head of the Commonwealth has no hard substance. There is no hallowed procedure to be followed. It has no constitutional foundations based on ritual and precedent. It is an ornament without any plinth of support from ministers or politicians who act in accordance with convention.[73]

He might have mentioned that even modest moves towards injecting some substance into the role can have unexpected consequences. Thus, when in 1983 the Queen made what many would view as an uncontroversial identification of the north/south gap as the world's greatest problem, she succeeded in arousing the

wrath of Enoch Powell (endorsed by the *Sunday Telegraph*) who categorised the speech as favouring poor, developing countries against Britain's interests.[74]

A radical revision of the position of the British monarchy would not put in question the exiguous Head of Commonwealth role; nor would a series of incremental changes be the occasion of a pronounced reaction. Retention of the Commonwealth's nominal headship by a presidential British Head of State is less likely. Such a figure would not possess the symbolism of a monarch and would inevitably be identified to a much greater extent with the British government of the day. There are undoubtedly difficulties in identifying a completely satisfactory alternative arrangement; a revolving leadership on the model of the EU presidency, for example, is not really suitable for such a large organisation, and more formalised structures are not consonant with the organisation's ethic, but objections of this kind would be problematic only if it were thought fit for the holder to play a more proactive role than hitherto (chairmanship by the host of the next scheduled CHOGM is a possible way out analogous with G7/8 practice). A major reform of the British monarchy, or its abolition, would not put the existence of the Commonwealth in jeopardy. It is easy to make out a case that it is an ineffective body founded on a network of illusions, with a membership no longer united by adherence to a single political head, to democracy and the rule of law, or even, since the somewhat anomalous admission of Mozambique, to a shared history and language. To Edgar Wilson it is 'the Cheshire Cat remnant of British colonial power.'[75] Nonetheless, support remains remarkably robust encompassing, on the right, a tendency to see it as a substitute for Empire and, on the left, admiration for the world's biggest multiracial body short of the United Nations. Indeed, removal of a peculiarly British institution at its heart could even strengthen the adherence of some members. Constitutional change in Britain might well be the occasion for a reappraisal but if the membership remains committed to the organisation it will be able to rise to the challenge.

--- restraint on presidential power; Constitutional Council / Council of State

A conscientious monarch, it might be safely assumed, is unlikely to succumb to the temptation of overreaching the powers retained in the constitution. S/he appreciates that the monarch's authority is founded solely on its symbolic function which would be jeopardised if an attempt were made to convert it into political influence. An elected president, particularly if elected directly, might however feel emboldened by the political legitimacy resting on the democratic process to test the limits. A device sometimes used to counter such ambition is to invest responsibility for making certain constitutional decisions (on, for example, whether to invoke veto/delay competence or to refer a measure to a constitutional court) in a collegiate body. The head of state might be a member of such a body and preside over it holding a casting vote; its decisions would be made in the name of the head of state. Bodies with *some* of these characteristics exist in France ('*Conseil Constitutionelle*' – Title 7 of 1958 Constitution) and Turkey (*Article 155; Article 174*).[a] The template is more recognisable in the Councils of State of Portugal (see Chapter 5, -*Portugal*) and Ireland (see Chapter 4,-*Ireland*). This kind of institution has been proposed in the course of the republic debate in Australia. Giving evidence to the 2003-4 Senate Inquiry former High Court Judge, Sir Gerald Brennan suggested the establishment of a Constitutional Council:

> to formulate an informed view as to whether there were reasonable grounds on which that opinion could be formed. If they did so certify, that would be the end of it. There would be no prospect of litigation to follow.[76]

Sir Gerald's motive for the proposal was to circumvent egregious involvement by the courts in constitutional affairs, to discourage the President from acting 'idiosyncratically' and to protect him from legal challenge; only if the Council declined to certify a presidential action would it become justiciable. A specific attraction for establishing a body of this kind in the British context is to provide a check on political ambitions of a directly-elected president without the need for a written constitution to spell out the rules, formulation of which would be

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[a] the Turkish Council of State exercises certain judicial functions.

problematic. The chief objection is that it would, if the membership were appointed, introduce a non-democratic element into the constitution, or, if it were elected, generate a separate raft of people's tribunes who could be viewed by the irreverent as 'mini-presidents'. It is also open to the objection that it might he seen as a sledge-hammer to crack a nut; in a properly run state the kind of controversy likely to cause these procedures to be invoked should be vary rare indeed.

In the real-world examples, the Portuguese Council comprises up to about twenty members, including the serving Prime Minister and five elected by Parliament. The Irish counterpart is of a similar size, depending on the number of retired Presidents, Prime Ministers and Chief Justices available at any given time; there are no are elected members. The Brennan proposal is for a leaner body of three persons nominated by the Prime Minister at the beginning of each parliamentary session and drawn from a pool consisting of former Governors-General / Presidents and senior retired judges. Whether such an office would have an appeal to a British audience would depend on numerous other contingent factors, such as the degree of legal restraint imposed on the head of state by other means and the method of election. It would also be necessary to form a view on whether reference of questions to the Council would be automatic, or an option available to the head of state. If the notion proved attractive in principle a model which might find favour is recruitment from a pool of eminent persons (retired Lords of Appeal and former Speakers of the House of Commons might be suitable candidates) but untrammelled appointment by the Prime Minister is sure to be viewed with suspicion. A possible compromise is to parallel the system of nominations to the US Supreme Court, that is, for incumbents to be appointed for life (or until a statutory retirement age) with the serving administration having the right to nominate vacancies as they occur. The establishment of a council of state is not postulated here as an essential feature of the British republic but put on the table as an option to be pursued if, as a result of other aspects of a new settlement, it were thought that an additional safeguard were needed. The question of interposing a constitutional council into a monarchical system is more problematic. It is not inconceivable, but in order to distance the throne from actual or suspected political

intervention its operation would have to he kept organically separate from the head of state.

--- *Summary of Head of State Functions*

A description of the role of head of state in a reformed dispensation is becoming closer. Firstly, there would continue to be a person recognised as head of state who would carry out whatever ceremonial duties are considered necessary, including nominal command of the armed forces; and unless a conscious decision were made to reconstruct the symbolic role, he or she would probably also remain nominal head of the civilian public services and have a formal relationship with the judiciary. S/he would probably be chosen by direct election - though indirect selection is an option if there were no public appetite for the extension of popular democracy. S/he would exercise core functions, most conspicuously at the time of a change of government, but would operate within ground rules which might be spelled out in a written constitution or enshrined in law by other means. The head of state would make appropriate 'political' decisions that come within his/her sphere (e.g. choosing an individual to form a government) though his/her actions would be subject to review by a court with constitutional competence. Unless a deliberate decision were taken to endow the head of state with some measure of executive competence the head of state would have a power of veto or delay over legislation and governmental acts as a matter of policy preference. However, in order to give a degree of muscle to such rhetorical phraseology that might be employed – e.g. "guardian of the constitution" - s/he would have the right (and duty) to refer doubtful measures to the appropriate branch of the judiciary. Exercise of this competence could be autonomous or through the mediation of a constitutional council.

If it were decided to retain an hereditary constitutional monarch, however much 'slimmed-down' and however constrained legally, there would be no automatic need to disturb the relationships with the Church of England or the Commonwealth. The establishment of a presidential republic, however, would

undoubtedly occasion a fundamental reappraisal of both relationships. The title of "Supreme Governor" would go, and it is improbable that establishment could be preserved in a different form. The governor-general system could not survive and it would be inappropriate for the elected head of a British state to be *ex officio* symbolic head of the Commonwealth.

--- monarchy or presidential republic?

The final question is to consider whether such a role would be better performed by an elected president, or by an hereditary constitutional monarch. A president would (or should) be less socially divisive, be in a position to claim legitimacy based on election, and be proof against the genetic lottery through which the hereditary system can produce a totally unsuitable individual. A conscientious monarch, on the other hand, should be unencumbered by political baggage and be uncontaminated with partisan contention at the time of accession. And s/he is also endowed with what might be called negative virtue; though no-one would have voted *for* him/her no-one will have voted *against*. Whether one of these sets of arguments, or perhaps more properly, attitudes, is more convincing than the other depends to a great extent on the temperament of the observer; some of the psychological factors have been alluded to in Chapter 2. A debating advantage enjoyed by monarchists is, paradoxically, the comparative political impotency of the institution. Hence, persons normally affronted by the spectacle of unearned privilege observe wearily that as the Palace is of no great political significance there is little to be gained from going to the trouble of evicting its inhabitants and upsetting a lot of people in the process (a mindset to be found amongst Labour MPs). It is arguable that the more the final constitutional prescription edges away from purist ceremonialism as reserve powers accrete, the more popular election would be needed to confer legitimacy and an hereditary institution would become inappropriate.[a] Though it might be possible to graft on a constitutional tribunal

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[a] And, by the same token, the more extensive such powers might be, the stronger the case against direct election unless there is a conscious act of will favouring an executive element in the Presidency.

procedure, a legislative veto - even one that could be readily overridden - would be difficult to defend in terms of the unelected nature, and hence the fundamental legitimacy, of the institution. Subject to the proviso therefore that fairly strict limits are not transgressed the head of state function *could* be exercised by an hereditary monarch as well as by an elected president.

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[1] Hennessy, 1995, p. 71 (passage quoted at the head of Chapter 3 of this thesis)
[2] Walker, *Guardian*, 15 November 1995, p. 19; 16 November, p. 17; Freedland, 4 January 1996, p. 8; 5 January, p. 9; Brogan, (Glasgow) *Herald*, 30 March 1996, p. 13
[3] Ackerman, 2000
[4] *ibid.*, p. 651
[5] *ibid.*, p. 657
[6] *ibid., passim*
[7] Mount, 1992, p. 121
[8] Fraser, 1993, p. 37
[9] *ibid.*, p. 39
[10] Barnett(ed.),1994, p. 147
[11] Collins, 1990, p. 1621
[12] Bogdanor, 1995, p. 303
[13] Prochaska, 2000, p. 226
[14] *Guardian*, 7 December 2000
[15] 1983, p. 101-164, *passim*
[16] Craig, 2003, p. 170
[17] *ibid.*, p. 169
[18] Wilson, 1989, p. 129
[19] Barnett, 197, p. 129
[20] Scruton, 1982, p. 92
[21] Finer, Bogdanor and Rudden, 1995, p. 1
[22] Mount, 1992, p. 11
[23] *ibid.*, p. 259
[24] Hennessy, 1988, *passim*
[25] Hennessy, 1995, p. 33
[26] Tomkins, 2002, p. 740
[27] Hutton, 1995, p. 286
[28] Bogdanor, 1997, p. 12
[29] *ibid.*, p. 11
[30] Barnett, 1997, p. 8
[31] Freedland, 2000 (b), pp. 79-80
[32] cited at Hennessy, 1996, p. 28
[33] *Sunday Telegraph*, 23 September 1990, cited in Mount, 1992, p. 10
[34] Woolf, 3 March 2004
[35] *op cit.*, p. 11
[36] Bogdanor, 1997, pp. 182-183
[37] Ward, 2000, p. 121
[38] Hutton, 1995, pp. 287-288
[39] Mount, 1992, p. 218
[40] *op cit.*, pp. 190-197
[41] *ibid.*, p. 196, citing de Brazier and Smith, *Constitutional and Administrative Law*, 6th edition, 1989, p. 91
[42] Barnett, 1997, p. 112;
[43] Joseph Rowntree Reform Trust website
[44] Tomkins, 2005, pp. 25-31

[45] Brogan, *Daily Mail*, 27 July 2005
[46] Howard, *Daily Telegraph*, 10 August 2005
[47] *Daily Telegraph*, 13 August 2005
[48] Riddell, *Observer*, 7 March 2004
[49] Oliver, 2003, p. 348
[50] Beloff, 2000, p. xii-xiii
[51] Jowell, 2003, p. 391
[52] *ibid.*, p. 386
[53] Tomkins, 2005, p. 140
[54] Holden, 1993, p. 323; citing Parris, *The Times*
[55] Australian Senate Hansard; Legal and Constitutional References Committee (Brisbane Hearing), 29 June 2004
[56] Meadows (ed.), 2000 p. 23
[57] Freedland, *Guardian*, 6 December 2000
[58] Scrivener, *Guardian*, 7 December 2000
[59] Tomkins, 2005, p. 140
[60] Art 14 (1) (b) in Benn & Hood, 1992, Appendix 1
[61] IPPR, 1991, p. 31 of '*Constitution*' text
[62] Richards, 1996, pp. 11 & 12
[63] Jacobs, *Independent on Sunday*, 7 April 2002
[64] Fabian Society, 2003, pp. 135-6
[65] Freedland, *op. cit.*
[66] Freedland, 2000, p. 68
[67] Hitchens, 2000, pp. 96-97
[68] *op. cit.*, 1995, p. 174
[69] IPPR, 1995, p. 55
[70] Douglas-Home, 2000, p. 220
[71] Baldwin, *Times*, 3 December 2002
[72] *ibid.*
[73] Douglas-Home, *2000*, p. 215-6
[74] Wilson, 1989, p. 69
[75] *ibid.*, 1989, p. 67
[76] Australian Senate Hansard; Legal and Constitutional References Committee (Sydney Hearing , 13 April 2004 (Australian Parliament website)

Conclusion

This thesis has sought, firstly, to identify the route by which Britain could adopt a style of government meriting the label 'republican' and, secondly, to sketch out the attributes of the office of head of state in a reformed dispensation. Analyses of the constitutions of a range of contemporary states illustrate practices devised to address similar questions; the comparative approach tests the practicality of proposals in real world conditions. The thesis has not intentionally taken sides on the pro/anti monarchy question.

The debate is not simply a question of disagreement between, on one hand, monarchists with unlimited faith in the status quo and, on the other, 'republicans' confidently expecting the toppling of the throne before the passing of the year, decade or century; such views exist but the full line-up of opinion is more multi-faceted. Both camps contain, according to their lights, optimists and pessimists. Many monarchists reluctantly accept that their favoured institution will eventually succumb to change, the precise probability of that outcome being proportionate to the timescale on offer, but do not usually suggest how the change might be effected. Some republicans subscribe to the same long-term prognosis, differing only in so far as, for them, that outcome is to be welcomed – but are similarly vague, or unrealistic, about causative mechanisms.

The British monarchy, having survived the crises of the seventeenth century, avoided egregious errors of judgment (notwithstanding involvement in several controversial incidents) and, being spared catastrophic upheavals, reached the twentieth - and the era of mass democracy – intact, its popularity apparently impregnable but with most (but not all) of its powers having migrated to politicians. Republicanism, by contrast, its image first tarred with the brush of association with the Cromwellian Protectorate and then by perceived republican excesses on the continent, enjoyed only intermittent and fleeting popular appeal, notwithstanding distinguished intellectual endorsement. But the absence of a fresh start deprived the country of a thorough constitutional shake out. Hence, a

typical critique dwells on the 'monarchical' nature of an executive–driven state equipped by default with prerogative powers inherited from an undemocratic past, an argument which quickly becomes entangled with more wide-ranging criticism of Britain's constitutional arrangements. A different, but partly overlapping anti-monarchical school of thought, ever-present, but emboldened and encouraged by the late twentieth century's death of deference and by successive royal *bêtises*, bases its objections on non-acceptance of the hereditary principle along with the elevation of privilege with which it is accompanied. These two strands, the thesis has argued, have contributed to the formation of a body of contemporary opinion which, though still representing a distinct minority, is significant enough to be taken seriously, and has dented British monarchism's previously unshakable self-confidence.

The British monarchy, judged purely as a political device, is in the international mainstream. It has more power and influence than some other European monarchies and less than others, and it occupies a similar position when compared to formal presidencies. Where it is unique is in its grandeur and scale, more appropriate to the imperial autocracies of the *grande epoque* than for a computer-age democracy: the only survivor of the pre-1914 Great Power European thrones. Whether the level of pomp and ceremony at which the British monarchy operates is an essential concomitant of the institution is a question which divides monarchists. A pragmatic faction is relaxed about the prospect of an informal monarchy on the lines of Scandinavian counterparts, but ultras would rather abandon the enterprise than adopt such a tawdry remnant. There is a mirror-image divide amongst republicans, some of whom could be reconciled to what might be characterised as an hereditary presidency, that is, a monarchy retaining the dignity befitting a state institution but stripped of layers of medieval ritual, of deference going well beyond the call of duty, of gilded coaches and knee-breeched footmen, and with imperial titles all consigned to museums. Purists on that side of the fence, for whom republicanism is a positive aspiration, would baulk at such a compromise. The driving force of this mind-set is traced in the thesis by reference to the ideological significance of republicanism, the slipperiness and wide scope

of the meanings attributed to it which, significantly, can include certain examples of constitutional monarchy. In these circles a republic is not defined as simply, or even, absence of hereditary monarchy. The thesis, therefore, has endeavoured to make clear what is signified by any given allusion to 'republicanism': *viz*, whether what is intended is hereditary monarchy constrained within formal constitutional arrangements, or a presidential system of some kind.

The thesis has drawn attention to the commonly expressed opinion that, irrespective of the desirability of the outcome, the probability of Britain becoming a presidential republic by deliberative, constitutional means is negligible. History demonstrates that in the rest of the democratic world transition from one condition to the other has invariably been a consequence of social revolution, a catastrophic war, or both, and there is no reason to suppose that different rules apply to Britain. It has taken note of the argument that the practical problems of delivering a presidential republic are enormous, and probably insurmountable. It might be possible to devise simple legislation which does not clog up the parliamentary timetable and which could be enacted before the momentum - fuelled by what might be a fleeting mood of contingent disillusion with the crown - had dissipated. It is, however, probable that the kind of republic that would emerge from this procedure would be viewed as unsatisfactory by that strand of opinion for which a richly woven constitution equipped with checks and balances is synonymous with republicanism. The thesis has examined a series of variously plausible background scenarios against which a realistic transition to a presidential republic could take place. These include crises of public confidence in the monarchy, controversial political behaviour by a monarch, personal disinclination on the part of an heir, and events consequential to either Britain's international commitments in Europe or internal anomalies arising from devolution. It concludes that some of these scenarios could impart some short-term impetus to republican sentiment but insufficient to convert sentiment into achievement; none, it is argued, is robust enough to overcome the inherent difficulties.

To further illustrate the difficulties inherent in effecting a transition a detailed case study is offered comprising a description and analysis of the attempt in 1999 to establish a republic in Australia where the consequential referendum failed despite a level of pro-republican public sentiment broadly favourable to the enterprise, and much stronger than anything that has been encountered in Britain. While this episode might not prove an iron law to the effect that monarchies cannot be pensioned off in 'normal' circumstances, it goes a long way to demonstrating the difficulties of the process, not least in a country sharing many features of Britain's political culture. The thesis has therefore endorsed much of the sceptical prognosis. It parts company, however, by identifying a false premise, asserting that many of the objections hold good only if the intention is to transform the body politic from one condition to another in a single step. Different considerations would apply if transformation to republican status is the end-state (or even a transitional state) in a gradual, cumulative process. The thesis is not a prognostication that the British monarchy *will* fade away, but more a speculation that *if* Britain is ever to become a republic, in whatever sense of the word, the gradualist route is the least implausible. It is contended that at a point when the monarchy has been reduced to a purely formal institution with a much reduced capacity for ceremonial grandeur, one of two consequences is likely to ensue; the notion that Britain is already a 'republic' would gain credibility and possibly wider currency, or monarchists would no longer be so inclined to defend an institution from which Bagehot's magic and mystery had been stripped and thus failed to provide the psychological symbolism that imparted much of its resonance. At whatever point the process came to a temporary rest, or continued to a predictable destination, the urge to review and regularise Britain's constitutional arrangements would strengthen.

A future debate about the role of the monarchy could encompass the whole gamut of topics that have been the subject of intermittent constitutional debate in recent decades, including the powers and functions of the second chamber, relations between the central state and the nations incorporated in Britain, organic relations with the European Union, independence of the judiciary and the public service and

the electoral system. The thesis has contended that the foregoing, and other, topics probably would arise and have to be addressed (or consciously ignored) whatever the future of the monarchy. It has therefore focused on those aspects of the constitution that directly relate to the role of the head of state. These include the exercise of royal prerogative powers, adoption of a codified constitution, the crown's traditional roles in respect of the Commonwealth and the established church and merits of inserting judicial oversight, for example, in the form of a constitutional court, into the process.

If the step to a presidential republic is taken, it would not be enough to decree a republic *tout simple*. Decisions would have to be made on the model of republic to be adopted and, if Australian experience is anything to go by, that would be the beginning of a new debate, not the end of an old one. Models identified and discussed in this thesis are (a) the executive presidency, (b) ceremonial presidency and (c) the hybrid variant ('dual executive') on the French pattern. In order to establish and to illustrate the range of options available the thesis has analysed the head of state provisions in the constitutional texts of some two dozen contemporary democracies drawn from across the spectrum, including other monarchies. In addition to these real world examples, the thesis has also discussed proposals put forward as theoretical exercises in constitution-making by writers, politicians and think-tanks. Drawing on these precedents, the thesis has assessed the merits of electing a president, wherever he or she may be located on the power spectrum, by the popular vote of the electorate, or indirectly, e.g., by a legislative assembly.

The thesis has made the assumption that public opinion would be more accepting of an elected head of state interpreting his or her duties actively than it would an hereditary monarch, provided encroachment onto policy areas was avoided. Some features that could be included in a portfolio of duties have been discussed. An important consideration here is whether the head of state should adopt an active or passive role in government formation, resignation etc. This is also the context in which the thesis has dealt with the merits of according a wider role to the

presiding officer of the legislature (the Speaker) and whether he or she might adopt what are customarily head of state functions. Another option assessed is the desirability of a presidential initiative to veto or delay Bills or other governmental instruments, to send them back (to the legislature) or refer them (to a constitutional court or commission). Consideration has been given to the head of state's role in presiding over states of emergency and to the extent to which his or her command of the armed forces should be purely nominal or substantive.

If a 'republic' were to emerge, the gradualist process, established earlier as a sine qua non, would pre-empt an executive head of state; and the dual executive variant – a structure shown by comparative analysis to arise only in response to particular circumstances – would also be improbable (or at least, unpredictable). Suppression of the office of Prime Minister is unlikely to receive public approval. It follows, therefore, that a ceremonial head of state is the most probable outcome, a conclusion which holds good for either a 'monarchical republic' or a presidential one. If the process did continue to the establishment of a presidential republic, the British people could be expected, like their Australian counterparts, to react suspiciously to appointment of a head of state by the political elite and demand popular election. Comparative analysis has shown that there is no strong correlation between the degree of authority invested in a president and the method by which he or she is elected. A largely ceremonial presidency would not therefore be incompatible with direct, popular election but it must be acknowledged that a president who came to office by that route might suppose that he or she possessed the legitimacy to get involved in something more than opening hospitals, and might contemplate intervention in some way in public affairs. While acknowledging the political risks, the thesis has argued that these are acceptable and there could be a case for intervention, provided that presidential powers remain restricted to procedural matters, for example, delay or reference to establish legality of a measure under consideration – and excluded from policy areas. The working assumption is that there could be no certainty that a fully codified constitution, the achievement of which being every bit as hazardous as the establishment of a republic, can be assumed to be available. The

thesis has therefore envisaged that in order to rein in excessive involvement in political life by the ordinary judiciary, a specially constituted body with legal authority (but not necessarily made up solely of lawyers) might play a mediating role.

Although it might be possible to lay down notionally comprehensive guide-lines governing the dissolution of parliament, the selection of a new prime minister and related matters, it must be recognised that the unexpected can arise; there is a case therefore for a responsible individual to be empowered to interpret the guidance and to preside over these matters. It is argued that a separately elected president would be a more suitable candidate for the role than the Speaker whose office could be vulnerable to undesirable politicisation. It has been proposed that the head of state might be more appropriate than the head of government as the donor of state honours. In accordance with widespread, but not universal, international practice, the head of state should remain nominal (but not effective) head of the armed forces. The Governor General system could not survive the end of the monarchy, and it is unlikely that it would be deemed appropriate for a British president to retain automatic nominal headship of the Commonwealth. Similarly, the monarch's role in connection with the established religion is one that would not be inherited.

To summarise this conclusion, this thesis has tried to avoid absolute prediction but has argued that if Britain is to transform itself into something which could be called a republic the only feasible route to that end is a gradualist one. Such a process might run out of steam having reached a stage resembling contemporary Scandinavian monarchies, but it could continue further to the extinction of the monarchy. Either eventuality would necessarily stimulate examination of wider constitutional arrangements. Since it is unsafe to assume that it would be practicable to devise, agree and implement a codified constitution, the ad hoc approach would necessarily apply. The thesis has concluded that the model with the best prospect of emerging in Britain is that of the ceremonial presidency, and it is predictable that there would be popular pressure for direct election. In addition

to purely ceremonial duties the incumbent would play an active role in presiding over core constitutional activities and would enjoy sufficient legitimacy to assume the role of a constitutional watchdog. The mechanism for implementing such a role could be referral of questionable measures to a specially constituted council which might not be an exclusively judicial body but which would have a judicial component and exercise legal functions. The president would almost certainly have to relinquish the monarch's role in connection with the overseas Dominions and the wider Commonwealth, and continued institutional connection with the churches is unlikely to be considered desirable by either party. He or she might remain the fount of honour, possibly in an enhanced capacity, and serve as nominal head of the armed forces.

Appendices:

Appendix 1

Constitutions – Analyses

Feature	Sweden	Denmark	Norway	Spain	NL	Australia	Germany	Austria	Italy	Ireland	Iceland	India	Greece
Includes Declaration of Rights?	x	x	®	x	x		x	x	x	x	x	x	x
Presidential/Royal powers													
Office of Prime Minister exists?	x	x	x	x	x	x	x	x	x	x	x	x	x
Direct election of Head State?								x		x	x		
Strong veto power													
Limited veto (short delay or refer to Court)										x	#	x	x
Veto unused		x	x			x							
May request reconsideration only									x				
Appoint PM/Ministers at discretion					x						x		x
Dissolve Parliament - on advice					x		x		x	xx		x	
Dissolve Parliament - on own initiative			?					x			x		x
Appoint officials(nominal)		x	x			x	x	x					x
Appoint officials (actual)											x		
Appoint judges (nominal)						x	x	x					
Appoint judges (actual)													
Initiate referendum (nom)										x			
Initiate referendum (actual)													
Commander in chief (nom)			x	x		x		x	x			x	
Commander in chief (act or unstated)													
Confers honours under constitution – autonomously													x
Confers honours - confirming government choice			x			@			x				

?*ambiguous*

 # Pres of Iceland may call for a referendum
**for Australia powers listed are those of Gov-Gen*
Xx Irish President may refuse premature dissolution

®: non-specific stmt only

@but not mentioned in Constitution

Feature	Israel	Hungary	Czech R	Bulgaria	Turkey	Portugal	Finland	France	Poland	Estonia	S Africa	USA
includes Declaration of Rights?	x	x	<	x	x	x	x	>	x	x	x	x
Presidential/Royal powers												
Office of Prime Minister exists?	x	x	x	x	x	x	x	x	x	x	%	
direct election of Head State?				x		x	x	x	x			x
Strong veto power					?			x	x		x	x
Limited veto (short delay or refer to Court)		x		x		x	x					
Veto unused										x		
may request reconsideration only												
appoint PM/Ministers at discretion					x	x		x	x	x	x	
dissolve Parliament - on advice	x	x	x	x						x		
dissolve Parliament - on own initiative					x	x		x	x	x	x	
appoint officials(nominal)		x	x	x		x						
appoint officials (actual)			x				x	x	x	x	x	x
appoint judges (nominal)						x						
appoint judges (actual)	x	x		x	x		x		x	x		x
initiate referendum (nom)											x	
initiate referendum (actual)					x			x			x	
commander in chief (nom)				x			x		x			
commander in chief (act or unstated)			x									x
confers honours under constitution - autonomously									x		x	x
confers honours - confirming government choice	x	x	x							x		

? ambiguous

> preamble reasserts the Declar of Rts of Man
%S African V-President performs duties akin to PM

<designates Charter of Fund Rights as part of Constitution

Appendix 2

Type	*Form of Election* 'D'-irect or 'I'-ndirect	*Example or Advocate*	*special features*	*Conspicuous minus factors*
"Crowned Republic"	n/a	Sweden	fully codified constitution	underemployed monarch ; politicised Speaker
"Crowned Republic"	n/a	Fabian Society	Partial codification	some constitutional ambiguities unresolved
"Crowned Republic"	n/a	Graham Allen	Partial codification; PM to be formally elected (by electorate or parliament); to assume *executive* 'presidential' functions Resemblances to S Africa & former Israeli system	some constitutional ambiguities unresolved
Executive Presidency	D	USA	Highly developed separation of powers	risk of inter–branch deadlock
Executive Presidency	I	South Africa	Head of State/Govt elected by Parliament	overlap of legislv & exec branches
Intermediate ((Exec-Dual)	D	Poland	President retains reserve powers	ambiguity
Dual Executive	D	France		risk of President *v* PM friction during *cohabitation*
Dual Executive	I	Turkey	'intermediate' case: some dual exec Characteristics but edging towards ceremonial	unstable presidential role in Constitution
Ceremonial Presidency	D	Austria	Federal state Elected president represents addnl power base to Fed & State Govts	temptation to exploit prestige
Ceremonial Presidency	D	Ireland	Unitary state	temptation to exploit prestige
Ceremonial Presidency	I	Germany		
Ceremonial Presidency	I	Israel (1992-01)	PM directly elected	
Ceremonial Presidency	I	Scrivener Freedland	Speaker of HofC to double as Head of Gov/State	politicisation of Speaker; confuses legislative & exec arms of government.
Headless State	n/a	no serious commentators(?)	Head of State functions carried out by various office holders e.g.,PM, Speaker of legislature	lacks emotional appeal

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