

“The law of succession – a lesson in how not to reform transnational law”

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On 28 October 2011, proposed reforms to the succession to the throne were announced during the 2011 Commonwealth Heads of Government Meeting in Perth, Australia. The heads of government of the 16 Commonwealth realms agreed to change the rules of succession by replacing male preference primogeniture with absolute primogeniture, in which the first-born child of a monarch would be heir apparent regardless of gender. The change would only apply for persons born after October 2011. It was also proposed to end both the ban on marriage to Catholics and the requirement for those in line to the throne to gain the permission of the sovereign to marry. However the requirement for the sovereign to be in communion with the Church of England was proposed to remain, as well as the specific ban on Catholics sitting on the throne.

Depending on individual constitutional arrangements, the proposed reforms needed to be approved by parliaments of most of the realms. However, in some realms such as Papua New Guinea and Tuvalu, the reforms would not require direct legislation and would become automatic if and when the changes are implemented in the United Kingdom. New Zealand chaired a working group to determine the process for reform.

In December 2012, it was announced by the Deputy Prime Minister of the United Kingdom that all the realms had agreed to implement the proposals that had been outlined and that the new legislation would also end the ban on anyone in the line of succession marrying a Roman Catholic. The United Kingdom’s proposed legislation was published on 13 December 2012, and passed early in 2013.

Outside the United Kingdom, the local news media has tended to regard this as a matter for the British authorities, or as one which can somehow be resolved by non-legal means.<sup>1</sup> But it is a debate which does raise important issues for all the realms. The succession laws are not merely rules invented to amuse constitutional lawyers. They are rules which are in certain respects central to the constitution.

At a meeting of the Council of Australian Governments (COAG) in mid-December 2012, Prime Minister Julia Gillard and the premiers of five states agreed each state legislature would pass a law permitting the federal parliament to alter the line of succession for the Commonwealth and all the states. However, Queensland Premier Campbell Newman disagreed, citing Section 7 of the Australia Act 1986 and concluding from it that each state is sovereign and each should therefore pass its own legislation affecting the succession laws in its jurisdiction. Accordingly, the Queensland state government introduced its own Succession to the Crown Bill in the Queensland Legislative Assembly on 13 February. The federal government stated that if Queensland were to proceed, it would override the state’s legislation in favour of national legislation. Following an agreement at a COAG meeting in April 2013, Queensland on 2 May amended its bill to add permission for the Commonwealth to act and the bill passed the same day. The other state legislatures are in the process of passing enabling legislation.

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<sup>1</sup>Though this is more a reflection of the absence of in-depth reporting which does not rely on overseas agencies for news stories.

The Canadian government's Succession to the Throne Act, 2013, was tabled in the Canadian House of Commons as Bill C-53 on 31 January 2013 and passed by that body on 4 February. It was then approved by the Senate on 26 March 2013 and received Royal Assent on the following day. It will come into force on a future date to be fixed by order of the Governor General-in-Council, in a similar manner to the United Kingdom legislation.

The Act gives assent to a bill that had been laid before the United Kingdom Parliament and which, as later amended, was given Royal Assent there on 25 April 2013 as the Succession to the Crown Act 2013. The position taken by the federal Cabinet was that Canada's monarch is automatically whoever is monarch of the United Kingdom and the Canadian Parliament need only assent to the changes made to the laws of succession in the United Kingdom by that realm's parliament, which can be achieved by ordinary legislation, without the approval of the provinces.

However, as in Australia, there is disagreement over this process, mainly on whether the rules of succession involve the office of the Queen thus requiring a constitutional amendment under Section 41(a) of the Constitution Act, 1982; whether, by the principle of either received law, by statute law, or both, the Bill of Rights 1689, the Act of Settlement, the Royal Marriages Act, and the conventions related to royal succession are a part of the Canadian constitution; and whether the Canadian law assented to the Succession to the Crown Bill 2012 as had been presented to the United Kingdom parliament or as amended by that body and passed into law.

The law is being challenged in the Quebec Superior Court over its alleged failure to "follow the amending procedure" set out in section 41 of the Constitution Act, 1982.<sup>2</sup> If the case proceeds, it is unknown how the succession reforms will progress for the Commonwealth realms, in general. The process could either be put on hold until the Canadian courts give their rulings or continue regardless of the court challenge in Canada; though, that might result in, if the Canadian law is found to be unconstitutional, Canada having a different line of succession to the other realms.

According to the Lord Wallace of Tankerness, who sponsored the British government's Succession to the Crown Bill in the House of Lords, the governments of Jamaica and Belize had outlined that neither country will require domestic legislation to give effect to changes to the lines of succession to their thrones, as those lines were left by Belize's and Jamaica's constitutions to law of the United Kingdom. Tankerness expressed on 13 March 2013 that the British government expected that the parliaments of Jamaica and Belize would not be consulted further by their governments.<sup>3</sup>

Of Antigua and Barbuda, Barbados, the Bahamas, Grenada, Saint Lucia, Saint Vincent and the Grenadines, and Saint Kitts and Nevis, it was also said by Tankerness: "We believe that it

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<sup>2</sup> Rhéal Sèguin (7 June 2013). "Changes to royal succession face legal fight in Quebec". The Globe and Mail. Retrieved 7 June 2013.

<sup>3</sup> Lord Wallace of Tankerness. Parliamentary Debates (Hansard) (United Kingdom: House of Lords). col. 310. 13 March 2013.

would be open to the other Caribbean realms to take a similar view [as Jamaica and Belize], but it is, of course, for them to decide how best to give the changes effect.”<sup>4</sup>

This is a classic example of politically-driven reforms – approved by leaders of government in Perth – which are being pushed through without due consideration for the technicalities involved. Any errors arising would delay the implementation of the changes, and worse, doubts expressed about the process being followed in several countries raises doubts about the effectiveness of the whole process. This could result in a potential division in the person of the Sovereign in the future, but for the present presents us with an unsavoury example of how poor a process law reform can become if it is led by politicians without the benefit of prior legislative backing and without adequate consideration of the complexities involved.

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<sup>4</sup> Lord Wallace of Tankerness. Parliamentary Debates (Hansard) (United Kingdom: House of Lords). col. 310. 13 March 2013.