

## *The Revenge of the Arcane Exclusion Clause: The Civil Registration of Marriage and the Royal Family*

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### I INTRODUCTION

Over the past few centuries – indeed since the early days of Parliament – there have been occasions when ad hoc legislation has been enacted in response to the need to clarify specific royal situations. Whether these were for the purpose of regulating the succession to the Crown,<sup>1</sup> or of royal marriages,<sup>2</sup> or lately for the creation of regencies,<sup>3</sup> they were generally marked by their political nature and by an element of expediency. The personal wishes of those to whom the laws applied rarely predominated or were even influential. They were primarily constitutional and political in nature.

These special laws were intended to cater for the peculiar requirements of the time, but many of them were also to have longer-term application. Especially important in this latter respect were the Royal Marriages Act 1772 (“the 1772 Act”) and the Act of Settlement 1701. The former was enacted to prevent members of the Royal Family from entering into unsuitable alliances by requiring royal consent to any marriage. This also was not primarily for their own benefit, but rather to prevent the Crown from passing to the descendants of people deemed unsuitable. Just as the succession was limited to those who were Protestants and not adherents of the Roman Catholic Church so the choice of spouse was regulated for what was seen as being the good of the country.

The 1772 Act presents little difficulty today for descendants of King George II. This is because standards and expectations – and the role of the monarchy and of the Royal Family – have changed considerably since 1772. Members of the Royal Family’s choice of spouse is much less likely to have political implications than it might have done in the late eighteenth century<sup>4</sup> – though this cannot be ruled out, and indeed the marriage of the Prince of Wales to Camilla Parker Bowles, though approved under the Act, did have political consequences. The Act of Settlement 1701 continues to cause occasional embarrassment to the Royal Family, who never sought its passage. It is ironic that critics of the Act now often suggest that its existence is a problem with the monarchy, when in fact it is Parliament, and not the monarchy, which bears responsibility for the Act – and which alone can amend or repeal it. Parliament chose to limit the Crown to Protestants for what it saw at the time as the good of the country – and so doing excluded many members of the Royal Family from the succession.<sup>5</sup>

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<sup>1</sup> Act for the Recognition of the title of Henry VII 1485 (Eng).

<sup>2</sup> Marriage Act 1536 (Eng).

<sup>3</sup> Regency Act 1943 (UK).

<sup>4</sup> Permission is nowadays granted to marry Roman Catholics (for instance Prince Michael of Kent, and the Earl of St Andrews) and divorcees (several members of the family of the Earl of Harewood). See also d’Olivier Farran, “The Law of the Accession” (1953) 16 MLR 140, where it is argued that the Royal Marriages Act 1772 (GB) now only applies to a small number of individuals, if any.

<sup>5</sup> See Cox, “The Law of Succession to the Crown in New Zealand” (1999) 7 Waikato LR 49.

Other pieces of legislation designed to prevent members of the Royal Family from entering into inappropriate alliances survive, but have generally been subject to much less public attention – until recently.

One of these less prominent provisions was in the Marriage Act 1836 (“the 1836 Act”, now largely re-enacted in the Marriage Act 1949), which instituted the civil registration of marriage in England. The 1836 Act did not apply to members of the Royal Family.<sup>6</sup> Although it is difficult to be sure of the reason for this specific exclusion, it is possible to speculate that it is related to concerns about the nature of marriage, the relatively limited purposes of the 1836 Act, and the establishment of the Church of England. Members of the Royal Family were expected to abide by the teachings of the Church of England, so could not generally be permitted to marry outside it, though strictly they might marry someone of any faith – or none – except Roman Catholic. The Act was also designed to provide an alternative registration process for non-conformists and Jews – not an alternative to marriage, as this was seen as a religious condition common to all – but one which was enacted outside of the ambit of the Church of England. Both before and since 1836, members of the Royal Family had invariably entered into marriage in a Church of England wedding, except for those marrying outside England,<sup>7</sup> as might be expected in a country with an established Church.

The Act of Settlement 1701 (which excluded from the succession those members of the Royal Family who were Roman Catholics or who married Roman Catholics) and the Royal Marriages Act 1772 (which required royal assent to any marriage of a descendant of King George II) receive the most attention of these special Acts and provisions because of their more obviously political nature. The result is that the implications of the 1836 Act seem to have been overlooked, or at least its effect was underestimated, despite advice in the 1950s and 1960s that it had the effect of precluding the civil registration of marriages for members of the Royal Family.

On 10 February 2005 Clarence House, the office and official residence of the Prince of Wales, announced that the Prince was to marry Mrs Camilla Parker Bowles in a civil ceremony on 8 April 2005.<sup>8</sup> Whilst most media and popular attention focussed upon the history of the couple’s relationship, in the days after the announcement there arose speculation that the proposed civil wedding was not in accordance with the law. This article explores this possibility.

The central issue in determining whether the widowed Prince of Wales could lawfully marry divorcee Mrs Camilla Parker Bowles in a civil ceremony was whether the 1949 Act (the only Act which provided for the civil registration of marriage) applied to the marriage of members of the Royal Family. It was reported that recent advice to the Government from four separate legal experts had confirmed that it did so.<sup>9</sup> However

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<sup>6</sup> Section 45.

<sup>7</sup> TRH Anne Princess Royal in Scotland, Prince Michael of Kent in Austria, and the Edward Duke of Windsor in France. Princess Anne married in the Church of Scotland, the established Church in that country.

<sup>8</sup> Announcement of the Marriage of HRH The Prince of Wales and Mrs Camilla Parker Bowles, Clarence House, 10 February 2005. Unusually this was an announcement by the Prince’s office, rather than from Buckingham Palace, which normally would announce the wedding of a son of the Sovereign. The Palace did however issue a statement welcoming the announcement; “The Duke of Edinburgh and I are very happy that The Prince of Wales and Mrs Parker Bowles are to marry. We have given them our warmest good wishes for their future together.”

<sup>9</sup> Rozenberg, “Civil marriage will be legal, say prince’s aides”, *The Daily Telegraph*, London, England, 15 February 2005.

several leading academics questioned this advice,<sup>10</sup> which also ran contrary to previous advice and the general understanding of the law.<sup>11</sup> The particular problem with the advice to the Government was that both the 1836 and 1949 Acts appeared to expressly exclude from the application of each Act members of the Royal Family. At first glance this would appear to invalidate a marriage of the Prince of Wales conducted by a superintendent registrar, with or without a licence.<sup>12</sup> Even if this interpretation – that the 1949 Act did not give members of the Royal Family the right to the civil registration of marriage – was incorrect, serious questions were raised about the marital state of the heir to the throne. These doubts might have been readily avoided had he chosen to marry in church, as indeed he was permitted to do.

There are several aspects to this question. First, there is the nature of marriage in general. Second, there are the statutory rules which apply to the civil registration of marriages, and third the specific rules which apply to royal marriages within the context of an established Church.

## II NATURE OF MARRIAGE

The laws of marriage are based on Roman law models and Judæo-Christian law as developed by the Fathers of the Church and mediæval scholars. Since mediæval times a distinction has developed between the legal status recognised by the State and the religious status of marriage. But the two remain linked, especially where, as in England, the law of the Church is regulated by the law of the State through the existence of an established Church.<sup>13</sup> This is not to say that the State defines what marriage is, but rather that it ensures some degree of conformity with Church rules on the nature of marriage.<sup>14</sup>

According to the 1662 *Book of Common Prayer*,<sup>15</sup> Holy Matrimony “is an honourable estate, instituted of God in the time of man’s innocency, signifying unto us the mystical union that is betwixt Christ and his Church”.<sup>16</sup> This does not mean that the object of matrimony is to signify this union. It means rather that it is an instance of the so-called “natural” order of things. That natural order reflects the heavenly order, in the

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<sup>10</sup> Dr Stephen Cretney, FBA QC, Emeritus Fellow of Legal History, All Souls College, University of Oxford, quoted in *ibid.* Le Grice, “Legal hitch to royal wedding”, *Daily Mail*, London, England 14 February 2005. Dr Cretney was Professor and Dean of the Faculty of Law at the University of Bristol, and Law Commissioner from 1978 to 1983 (when he was responsible for the Commission’s family law programme). Vernon Bogdanor, author of *Bogdanor, The Monarchy and the Constitution* (1995) also expressed doubts.

<sup>11</sup> In the 1950s it was not only expected that Princess Margaret would marry only with the blessing of the Church, but that if she contracted a civil marriage abroad she would lose her entitlement to a parliamentary annuity, and possibly even her place in the line of succession (though this would require a statutory change, since Peter Townsend was not a Roman Catholic, which alone would have the effect of depriving her of her statutory place in the line of succession).

<sup>12</sup> If a marriage were conducted with a licence, but not according to the rites of the Church of England, it would still be invalid, as such a procedure is provided for in the 1836 and 1949 Acts, and is therefore inapplicable to members of the Royal Family. If a marriage were conducted according to the rites of the Church of England, with a licence, it would be outside the scope of the 1949 civil registration procedures, but be a valid marriage in accordance with the law – for royalty and commoner alike.

<sup>13</sup> Watkin, “Church and State in a changing world” in Doe, Hill and Ombres (eds) *English Canon Law* (1998).

<sup>14</sup> Though this conformity is far from complete.

<sup>15</sup> Act of Uniformity 1662 (Eng) s 21.

<sup>16</sup> Solemnisation of Matrimony.

same way as mankind, being made in the image of God, should reflect something of the divine. Marriage is thus sacramental in character, though Article 25 of the Thirty-Nine Articles of Religion states that it (and others) “are not to be counted for Sacraments of the Gospel ... for that they have not any visible sign or ceremony ordained of God”.<sup>17</sup> The Roman Catholic position is that marriage is a sacrament,<sup>18</sup> but since this paper is concerned with the Church of England position, and the civil status of marriage in England, this distinction has no immediate relevance here.<sup>19</sup>

Marriage is not a contract. But it springs from a contract and is the union of one man with one woman for life.<sup>20</sup> The contract is one which must have been freely entered into by both parties to the marriage, and they must both have been free to make the contract, neither being already the spouse of another, nor suffering from any disability, such as lack of due age or unsoundness of mind. They must have been free to make the contract with each other, not being within the prohibited degrees of affinity, and it must have been their common intention that the union should last until one of them should die, and should be a union to the exclusion of all others.

“Marriage is intended by God to be a ... life-long covenant”.<sup>21</sup> It affirms its nature “according to the teaching of Christ”<sup>22</sup> as a “partnership between one man and one woman”.<sup>23</sup> The canon law of New Zealand has probably the most comprehensive and detailed presentation of the idea to be found in the Anglican Communion. Marriage is a “relationship which is part of God’s fundamental purpose for the human race”. It is “a creative relationship ... an invitation to share life together in the spirit of Jesus Christ”. Its purpose is “the full development of the personalities of husband and wife by the right use of the natural instincts”, through mutual help and comfort, “and the establishment of a home and family life”. The New Zealand canons also state that marriage and the conduct of married life “both have importance for the wellbeing of society”; “[t]he family is the basic human unit” and the “social and moral health of the life of any community is bound up with the quality of its family life”. As such, “[a]ll members of this Church share according to their circumstances in the obligation to uphold Christian standards of marriage in human society especially by care for their own families and by neighbourly care for the families of others.”<sup>24</sup>

In New Zealand as in England there is in general a legal obligation on a minister to marry those who are entitled by law to be married in his or her church.<sup>25</sup> However ministerial refusal to solemnise marriage is expressly provided for.<sup>26</sup> The minister must

<sup>17</sup> Though the regulation of marriage features strongly in the Bible; Ephesians 5: 21-33; Matthew 5: 31; Matthew 19: 3, 9; Luke 16: 18.

<sup>18</sup> See The Canon Law Society of Great Britain and Ireland, *The Code of Canon Law: in English Translation* (1983) canon 1055; Caffarra, “Marriage as a Reality in the Order of Creation and Marriage as a Sacrament” in Malone and Connery (eds) *Contemporary Perspectives on Christian Marriage* (1984) 119-132.

<sup>19</sup> Andrew Parker Bowles’ marital status in Roman Catholic law is of course important.

<sup>20</sup> “The voluntary union for life of one woman and one man to the exclusion of all others”; *Hyde v Hyde* (1866) LR 1 P & D 130 per Lord Penzance.

<sup>21</sup> *A New Zealand Prayer Book* (1989) 779.

<sup>22</sup> This affirms “the teaching of our Lord Jesus Christ”, Can G III 1.1.1.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.* See also Can G III 1.1.4: “In marriage the sexual act is recognised as the means of declaring the deepest and most complete personal exchange of love and its significance is fully experienced and expressed in a life-long commitment ... [it] symbolise[s] ... the complete committing of one human being to another”; see also *A New Zealand Prayer Book* (1989) 779.

<sup>25</sup> *Algar v Holdsworth* (1758) 2 Lee 515; *Davis v Black* [1841] 1 QB 900; *R v James* (1850) 3 Car & Kir 167, CCR (for the position in the Church of England, in England).

<sup>26</sup> “The discretion of a minister to decline to solemnise any particular marriage shall not be abrogated by this Canon; Can G III 2.9.3.

conform both to the laws of the State governing marriage, and to the laws of the Church.<sup>27</sup> Validity requires that the parties have a right under secular law to contract a marriage; that both parties freely and knowingly consent to the marriage, without fraud, coercion, or mistake as to the identity of a partner or to the mental condition of the other party;<sup>28</sup> that the parties do not fall within the prohibited degrees of relationship;<sup>29</sup> that the parties have attained the legal age for marriage; and where required in the case of minors, that their parents or guardians have consented to it.<sup>30</sup> These tenets are a combination of codified canon law, Church legislation, and secular regulation, in the context (in England) of an established Church.

### III THE LEGAL STATUS OF MARRIAGE – AND ITS DISSOLUTION

For centuries both Church and State were in agreement over the nature of marriage, for the secular law simply followed Western canon law in the matter.<sup>31</sup> But with the introduction of secular divorce laws by states a divergence became inevitable. Both agree that marriage springs from a contract. The State now maintains, in addition, that what results from this contract is a new status. The Church continues to maintain that what results is something more than status. It is something akin to the relationship existing between parent and child. It is “a God-made thing, which man cannot alter. God alone can bring it into being”.<sup>32</sup> If marriage is God-made, then clearly its dissolution by secular law is impossible, insofar as canon law is concerned. However, the secular attributes of marriage may be ended by secular divorce. Even in Roman Catholic countries civil marriage – that according to the laws of the State – is the sole legally binding form. Church marriages in these countries generally have no status in civil law.

In England the Marriage Act 1823, as re-enacted in the Marriage Act 1949, regulated marriage within the Church of England. There was not a parallel system of civil and religious marriage laws as in most other countries. The Marriage Act 1836, also re-enacted in the Marriage Act 1949, provided an alternative process to marriage by the Church of England, (that is civil registration of marriage) but not one which is in any way more legally valid than church marriage, which is also regulated by the 1949 Act.

Once a marriage is entered into the couple occupy a special legal and religious relationship – until the death of one of them. However, both State and Church recognise limited situations where what appears to be a legally binding marriage, registered or solemnised in accordance with State law, is not actually a marriage at all. Unlike a modern civil divorce, or dissolution of marriage as it is generally known, an order of nullity, or annulment, is made where what appears to be a marriage is not in fact such. Church and State are generally in agreement here.<sup>33</sup>

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<sup>27</sup> Can G III 2.4.

<sup>28</sup> Family Proceedings Act 1980 (NZ) s 31(1)(a)(ii).

<sup>29</sup> Marriage Act 1955 (NZ) s 15 (1), (4), and the Second Schedule.

<sup>30</sup> Marriage Act 1955 (NZ) s 18 (1).

<sup>31</sup> See Ingram, *Church courts, Sex and Marriage in England, 1570-1640* (1987) chapter 1.

<sup>32</sup> Sheed, *Nullity of Marriage* (1959).

<sup>33</sup> Apparent marriage may be void on any one of seven grounds. These include where one of the parties was already married at the time of the ceremony; where there was a mistake on the part of one of the parties as to the identity of the other; where one of the parties was of unsound mind and had been so found; where the parties were within the prohibited degrees of affinity or

A marriage is voidable, not void, for any of a number of grounds.<sup>34</sup> A wilful refusal to consummate is something which arises after the ceremony of marriage, and it is the only ground for nullity recognised by the secular law which does arise after the ceremony. It has at times been argued that theologically a marriage is not a fait accompli until consummation.<sup>35</sup> If this view were ultimately to prevail, the attitude of Church and State with regard to nullity would be reconciled.<sup>36</sup> A voidable marriage remains fully in existence until such time, if ever, that a competent court declares that it is void.<sup>37</sup>

Civil divorce *a vinculo matrimonio*, by which a legally and theologically valid marriage is terminated in respect of its civil aspects, was introduced in England by the Matrimonial Causes Act 1857. It is no more within the competence of the Church to declare that a man and a woman who have contracted a valid marriage are now no longer husband and wife than it is within its competence to declare that the relationship of parent and child is dissolved. It is, however, within the Church's competence to legislate with regard to incidentals, and to vary that legislation from time to time and place to place. The form, time, and place of the ceremony may be regulated. It follows that a husband and wife, though their secular relationship may now be that of strangers, remain, in the eyes of the Church, husband and wife. Each is therefore incapable of remarriage while the other lives. A second union is not theologically a marriage, whatever its legal consequences, and the marriage service cannot be used to hallow it.

The remarriage of a divorced person, whose spouse still lives, is subject to restrictions.<sup>38</sup> The strictness of these vary from province to province within the Anglican Communion. The canon law in New Zealand provides that "[a]ny Bishop or Priest shall be entitled to refuse to solemnise the marriage of a divorced person".<sup>39</sup> The Church permits remarriage where there are "good and sufficient grounds after full and adequate inquiry to believe" that (a) any divorced person intending marriage sincerely regrets that the promises made in any previous marriage were not kept, and (b) both parties to an intended marriage have an avowed intention to abide by the lifelong intent of the proposed marriage.

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consanguinity; where the ceremony of marriage was defective in form; where one of the parties was too young; and where the ceremony was, and was intended to be, merely a mock ceremony.

<sup>34</sup> That one of the parties is impotent; that the ceremony was induced by threats; that one of the parties was drunk at the time of the ceremony; that one of the parties was a mental defective or of unsound mind, though not so found, at the time of the ceremony or subject to recurrent fits of insanity or epilepsy; that at the time of the ceremony one of the parties was suffering from a communicable venereal disease; that at the time of the ceremony the woman was pregnant by another man; that, since the ceremony, there had been wilful refusal by one of the parties ever to consummate the marriage. See *Book of Common Prayer* (1662) marriage service.

<sup>35</sup> This is not recognised by the church as a ground for nullity because the canon law has always considered that it is essential for nullity that the ground on which such a declaration is based should already have been in existence at the time of the ceremony. Nothing arising thereafter can affect the validity of the ceremony in which the parties take each other for better or for worse until death do them part.

<sup>36</sup> Compare the English position; Lacey, *Marriage in Church and State* (1947) 198 et seq; the Report of a Commission appointed by the Archbishops of Canterbury and York in 1949 at the request of the Convocations, *The Church and the Law of Nullity of Marriage* (1955).

<sup>37</sup> The Roman Catholic Church annulled some 60,000 marriages in the USA annually, some three-quarters of the global total. More than 90 per cent. of these are void, the remainder voidable.

<sup>38</sup> "The Conference affirms that the marriage of one whose former partner is still living may not be celebrated according to the rites of the Church, unless it has been established that there exists no marriage bond recognised by the Church"; Lambeth Conference [hereafter LC] 1948, Res 92 and 94.

<sup>39</sup> Cans G III 4.1-2

In England, since 2002, the General Synod of the Church of England also has allowed remarriage, provided that the priest solemnising the marriage is satisfied that certain conditions are met. The most important is that the couple's relationship didn't contribute to the breakdown of the divorcee's previous marriage. The distinction between blessing a marriage previously registered in a civil ceremony, and remarriage solemnised in a church, is of great though perhaps uncertain significance.

The advent of divorce greatly increased the divergence between civil and Church attitudes to marriage – and concepts of its meaning. Civil remarriage has the effect of exclusion in certain cases from admission to Holy Communion.<sup>40</sup> Civil remarriage may however be blessed in church,<sup>41</sup> in which case the Church is recognising the marriage as some form of quasi-marriage.

The form of marriage registration commonly referred to as a civil marriage was instituted in England by the Marriage Act 1836. This Act, subsequently re-enacted as the Marriage Act 1949, allowed for couples to marry by certificate of a superintendent registrar, with or without a licence.<sup>42</sup> The couple might also use the rites of the Church of England, provided a licence was not issued,<sup>43</sup> and the 1836 Act also provided for the registration of Quaker and Jewish marriages. This legislation had general application – although the principal beneficiaries of the Act were non-conformists, who had objected in particular to the requirement for the reading of banns in church, introduced in 1754.<sup>44</sup> Only a small proportion of marriages in the years after 1836 were however conducted in front of registrars.

Although both the 1836 Act and the 1949 successor Act were of general application throughout England, the former clearly did not, and the latter appeared not to, apply to marriages of members of the Royal Family. This raised particular concerns when it was announced that the Prince of Wales was to marry in a civil ceremony on 8 April 2005.

The laws of marriage in Church and State were ostensibly the same, yet the Church continued to deny an automatic right of remarriage to divorced persons during the lifetime of their former spouses, holding to the teaching that marriage could not be dissolved. Members of the Royal Family, as communicant members of the Church of England (in practice, if not required by law), might be expected to marry in the Church, which was why the 1836 Act did not apply to them. The notion of the civil registration of marriage is difficult for the Church to accept, especially for the heir to the throne and future Supreme Governor of the Church of England.

The Act of Settlement 1701 preserved the Protestant nature of the monarchy, but the full recognition of non-Church of England weddings after 1836 led to a belief – it will be argued a mistaken belief – that this option was available to members of the Royal Family. While the Royal Marriages Act 1772 allows such marriages to be prohibited, in practice the freedom to marry which is accorded to everyone else in the kingdoms can scarcely be denied to the heir to the throne. Unfortunately such an option undermines the Church of England's position, not by allowing him to marry a divorcee, but by the very choice to marry in a civil ceremony (which the Church recognised as

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<sup>40</sup> “That in every case where a person with a former partner still living is remarried and desires to be admitted to Holy Communion the case should be referred to the bishop, subject to provincial or regional regulations”; LC 1948, Res. 96, which endorses LC 1930, Res 11.

<sup>41</sup> Can G III 3.5.

<sup>42</sup> Including special licences issued by, or in the name of, the Archbishop of Canterbury under the provisions of the Ecclesiastical Licences Act 1533 (Eng).

<sup>43</sup> For if a licence were issued, and the rites of the Church of England followed, this would then be a regular marriage under the Marriage Act 1823 (UK).

<sup>44</sup> Marriage Act 1753 (GB).

valid because the law required this, but which was scarcely in accordance with tradition). This emphasises the difference in the attitude of Church and State to marriage, ironical enough given that the present practice of the Church would have allowed a church wedding. The difference was more apparent than real, but damaging enough for all that.

#### IV SPECIFIC PROVISIONS FOR ROYAL MARRIAGES

The best known statutory provision with respect to royal marriages is the Royal Marriages Act 1772. Though subject to some uncertainty over the extent of its application to the descendants of daughters of the Sovereign,<sup>45</sup> this Act in essence provides that marriages by descendants of King George II may occur only with the consent of the Sovereign.<sup>46</sup> This is however subject to special provisions if the person wishing to marry is over the age of 25 years. It does not regulate the form of the marriage beyond the reference to “contracting matrimony”.

The reason for this absence of a specific definition of marriage is simply that marriage is a religious and civil condition well known to the law, and in 1772 there was no distinct concept of a “civil marriage”, or of civil registration. “Contracting matrimony” might be taken to also refer to common law marriages, which the law continued to recognise, at least in respect of members of the Royal Family, after 1754. A purported marriage is invalid even if it complies with the local requirements of another jurisdiction, if no prior consent is given by the Sovereign.<sup>47</sup> It is a criminal offence to solemnise a marriage in contravention of the Royal Marriages Act 1772, though solemnisation is a term which would probably not apply to members of the Royal Family entering into common law marriages, were such an option chosen.

Since the Sovereign’s consent to the marriage of the Prince of Wales was given – this can be inferred from the message of congratulation issued by Buckingham Palace – the Royal Marriages Act 1772 is not relevant to the present issue. Nor is the Act of Settlement 1701, which precludes marriage to Roman Catholics, relevant, since Camilla Parker Bowles is a communicant member of the Church of England.<sup>48</sup>

The first key statute with which we are concerned is the Marriage Act 1836, which created procedures for the civil registration of marriage (not civil marriage, which is a misnomer<sup>49</sup>). It is quite clear that the 1836 Act did not apply to marriages of members of the Royal Family. Section 45 states:

This Act shall extend only to England, and shall not extend to the marriage of any of the Royal Family.

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<sup>45</sup> See d’Olivier Farran, *supra* note 4, 140.

<sup>46</sup> The Royal Marriages Act 1772 (GB) requires that the consent be signified in Council under the Great Seal.

<sup>47</sup> *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034 (H.L.).

<sup>48</sup> Brigadier Andrew Parker Bowles is a Roman Catholic, and unfounded rumours had circulated that Mrs Parker Bowles was also a Roman Catholic. This is not, and has never been, correct.

<sup>49</sup> See, for instance, the Civil Union Act 2004 (NZ) which established “civil unions” which are not marriages but unions which have identical legal consequences to marriages without the theological or social aspects.

Thus members of the Royal Family<sup>50</sup> could not contract marriages under the provisions of the 1836 Act. This left them at that time only two principal options, if they wished to enter into a lawful state of matrimony. The first was a church marriage according to the rites of the Church of England (following the publication of banns,<sup>51</sup> or the grant of a special licence by the Archbishop of Canterbury).<sup>52</sup> The second was marriage abroad – including Scotland, Wales and Ireland. This second option would be valid in accordance with the general principle that a foreign marriage, validly entered into, is recognised provided that its nature is monogamous.<sup>53</sup> Both options however would be subject to the requirement that the permission of the Sovereign was first obtained.<sup>54</sup> The civil registration of marriage in England was clearly not available to members of the Royal Family – even if the rites of the Church of England were used for the service.<sup>55</sup>

There remained a third possibility, though one which is rather more doubtful, that of a common law marriage.<sup>56</sup> This was based on the concept that marriage is a relationship of sacramental character created by the couple and not by the Church. Generally common law marriages were abolished in 1754,<sup>57</sup> though the term “common law marriage” is still used colloquially to describe what is actually mere concubinage. The Act which abolished common law marriages did not apply to marriages of members of the Royal Family.

This third option is scarcely acceptable for a royal marriage – especially for a future Supreme Governor of the Church of England – and can be discounted as a practical alternative. Common law marriages, even allowing that they may technically survive for members of the Royal Family, present additional problems of their own. In particular these relate to the law of succession,<sup>58</sup> and of dignities.<sup>59</sup> Admittedly the former at least is probably of purely academic concern in the present circumstances, yet both are serious enough in their own right.<sup>60</sup> It might also be doubted whether an invalid statutory service would constitute a valid common law marriage.<sup>61</sup>

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<sup>50</sup> There is some degree of uncertainty as to the meaning of the expression “Royal Family”. In this context it is clearly not as wide as the scope of the Royal Marriages Act 1772 (GB) nor necessarily limited to princes and princesses bearing the style “Royal Highness”. But it would certainly include the Prince of Wales.

<sup>51</sup> Required after the passage of the Marriage Act 1753 (GB).

<sup>52</sup> Under the Marriage Act 1823 (UK) Ecclesiastical Licences Act 1533 (Eng) and the common and canon laws.

<sup>53</sup> The Princess Royal entered into a marriage according to the rites of the Church of Scotland in 1992, and the Earl of St Andrews’ marriage was registered in Leith Town Hall in 1988. Both of these were valid in accordance with Scots law, and since permission had been given in accordance with the Royal Marriages Act 1772 (GB) of the law of England also.

<sup>54</sup> Assuming that the Royal Marriages Act 1772 (GB) is still effective, despite the serious doubts raised by Farran. Consent is however essential; *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034 (HL).

<sup>55</sup> Assuming that no licence was sought, the granting of which would negate the requirement for civil registration for a marriage conducted in accordance with the rites of the Church of England.

<sup>56</sup> Though these were abolished by the Marriage Act 1753 (GB) this Act didn’t extend to royal marriages. See also Lemmings, “Marriage and the Law in the Eighteenth Century: Hardwicke’s Marriage Act of 1753” (1996) 39 *The Historical Journal* 339-360.

<sup>57</sup> Marriage Act 1753 (GB).

<sup>58</sup> See Cox, *supra* note 5.

<sup>59</sup> See Cox, “The British Peerage: The Legal Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand” (1997) 17 *NZULR* 379.

<sup>60</sup> The Legitimacy Act 1959 (UK) does not affect the succession to the Throne (s 6(4)). A declaration of legitimacy obtained pursuant to the provisions of the Legitimacy Declaration Act 1858 (UK) is however good for peerages and other dignities: *Amphill Peerage Case* [1977] AC

For more than a century there were no pertinent changes to the marriage laws in England. However in 1949 the original provisions as to the civil registration of marriage were largely repealed and consolidated. The Marriage Act 1949 repealed all of the 1836 Act except for section 45, and two other minor provisions which were concerned with the appointment of registrars.<sup>62</sup> It also stated that the 1949 Act was not to affect any law or custom relating to royal marriages.<sup>63</sup> The Act did not use terms which expressly limited this exclusion to the Royal Marriages Act 1772 and the Act of Settlement 1701 – which they might have done – but rather a section which was expressed much more broadly.

The 1949 Act preserved the provision that the 1836 Act did not apply to royal marriages,<sup>64</sup> and included a new subsection that the 1949 Act was not to affect any existing laws relating to royal marriages.<sup>65</sup> This combination of the two provisions strongly suggested that the purpose and intention of Parliament was that the 1949 Act was not to apply to royal marriages. If this is correct, royal marriages had to be either in accordance with the rites of the Church of England (after the reading of banns or the grant of a special licence), or validly contracted abroad. In either case royal approval had first to be obtained.

However, recent legal advice to the Government seems to have been that section 45 did not exclude the application of the 1949 Act to the Royal Family. This was presumably on the grounds that section 45 had little or no effect after 1949, since the 1836 Act only survived for very limited purposes. The argument would be that the 1949 Act would have created the right for members of the Royal Family to take advantage of the civil registration of marriages. The first part of this contention is plausible, since the surviving sections of the 1836 Act had no clear relevance to royal marriages, and it could be argued that section 45 itself merely excluded the Royal Family from the application of that residual Act. It might however be questioned why section 45 was preserved at all, since it would have had no practical effect.

However, section 79(5) of the 1949 Act, in stating that “nothing in this Act shall affect any law or custom relating to the marriage of members of the Royal Family”, suggests that the latter part of the contention (that the 1949 Act created the right to civil registration for members of the Royal Family) is not plausible. Unless it can be argued that the exclusion of royal marriages from the 1836 Act is not a law or custom affecting the Royal Family, a provision that “nothing in this Act shall affect any law or custom relating to the marriage of members of the Royal Family”<sup>66</sup> cannot readily be interpreted to confer a right or benefit on members of the Royal Family which was previously expressly excluded by statute.

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547. While the laws governing legitimacy have become more liberal since last century, they do not in general allow the inheritance of dignities by illegitimate issue.

<sup>61</sup> The exchange of promises to marry had – in theory – been sufficient to constitute a marriage (though it would not meet the requirements of the Royal Marriages Act 1772 (GB)): Brundage, *Sex and Christian Society in Medieval Europe* (1987); Brooke, *The Medieval Idea of Marriage* (1989).

<sup>62</sup> Section 3 [superintendent registrars of births and deaths were to be ex officio registrars of marriage]; section 17 [superintendent registrars may appoint registrars of marriage].

<sup>63</sup> Section 79(5).

<sup>64</sup> Though it had little relevance to the residual Act.

<sup>65</sup> Section 79(4).

<sup>66</sup> Section 79(5).

The 1949 Act did not purport to reform the laws of marriage, but was instead described as a consolidating Act.<sup>67</sup> Had it been merely a re-enactment of the 1836 Act the absence of a specific exclusion of royal marriages in the new Act might have been taken to suggest that they were now allowed. However the 1836 Act survived – albeit in an emaciated form – after the passage of the 1949 Act. The 1949 Act thus consolidated some statutory provisions, but deliberately preserved the royal exclusion in the 1836 Act.

Contentions that the 1949 Act is a wholly new Act that creates the right of members of the Royal Family to civil registration of marriage are untenable given the enactment of section 79(5) and the preservation of section 45. The 1949 Act must be read in conjunction with the surviving sections of the 1836, excluding members of the Royal Family from the application of the 1949 Act.

Where an Act of limited operation<sup>68</sup> is repealed by another Act that expressly re-enacts the earlier Act's provisions in an amended form, it is presumed that the operation of the re-enacted provision was not intended to be applied to classes of people previously not subject to it, unless the contrary intention is shown.<sup>69</sup> Thus it is presumed that the 1949 Act did not extend to the marriages of members of the Royal Family, unless a contrary intention was apparent. Such an intention is not apparent – indeed quite the opposite.

When an Act is repealed it ceases to be part of the body of law. The general principle is that, with the exception of transactions past and closed,<sup>70</sup> an Act or enactment that is repealed is to be treated after the repeal as if it had never existed.<sup>71</sup> However, the operation of that principle is subject to any savings made, expressly or impliedly, by the repealing enactment or by the general statutory provisions as to the effect of repeals. Repeal does not, as a general rule, revive anything from the past.<sup>72</sup> Repeal of the 1836 Act was not complete in 1949, as the exclusion provision was preserved, so the 1836 Act cannot be regarded as a dead letter after 1949.

Section 79(13) of the 1949 Act provided that nothing in that section (including section 79(5)) “shall be taken as prejudicing the operation” of section 38 of the Interpretation Act 1889,<sup>73</sup> which governed the effect of repeals. It would appear that the intention of the 1949 Act was to maintain the prohibition on royal marriages being conducted in accordance with the 1836/1949 procedures. There is nothing in the 1949 Act to suggest that its application is being extended to cover the Royal Family, and these two sections suggest otherwise.

Section 79(5), in stating that “nothing in this Act shall affect any law or custom relating to the marriage of members of the Royal Family”, did not revive anything not in force or existing at the time which the repeal took effect in 1949. It did not mean that members of the Royal Family could not necessarily enter into a “civil marriage”, only

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<sup>67</sup> Preamble: “An Act to consolidate certain enactments relating to the solemnisation and registration of marriage in England with such corrections and improvements as may be authorised under the Consolidation of Enactments (Procedure) Act 1949.”

<sup>68</sup> Such as one which governs the civil registration of marriages, but which does not extend to certain classes of person, such as members of the Royal Family.

<sup>69</sup> *Brown v McLachlan* (1872) LR 4 PC 543, 550.

<sup>70</sup> That is to say the repeal of an Act does not render illegal actions which were made legal by that Act.

<sup>71</sup> See *Canterbury University College v Wairewa County* [1936] NZLR 304, 306; [1936] GLR. 213 and *Tawhiorangi v Proprietors of Mangatu Blocks (Nos 1 3 and 4) Inc* [1955] NZLR 324, 329.

<sup>72</sup> *Barlow v Humphrey* [1990] 2 NZLR 373.

<sup>73</sup> Unless the contrary intention appears, repeal does not revive anything not in force or existing at the time at which the repeal takes effect, and affect the previous operation of any enactment repealed or anything duly done or suffered under any enactment so repealed; s 38 (2)(a) and (b).

that no rules existing prior to 1949 would be changed or abrogated. This again suggests that Parliament's intent was that the 1949 Act would not apply to members of the Royal Family, as this was not provided for under the 1836 Act.

The picture is further complicated by the repeal of the remainder of the 1836 Act by the Registration Service Act 1953. Although this latter Act purported to repeal the entire 1836 Act, in fact only sections 3, 17 and 45 had survived the passage of the 1949 Act, and were thus repealed by the 1953 Act. The repeal of the exclusion section meant that there was no express statement in statute law that the provisions of the 1949 Marriage Act extended, or did not extend, to the marriage of members of the Royal Family. As a matter of statutory interpretation it was a relatively straightforward question as to whether the repeal of the section in 1953 extended the application of the 1949 Act to royal marriages. The repeal of section 45 simply removed a section which said that the 1836 Act did not apply to royal marriages. It did not extend the application of the 1949 Act to royal marriages, since this would be contrary to the general principles of statutory interpretation.

Further, section 79(5) of the 1949 Act remained, and this expressly stated that "nothing in this Act shall affect any law or custom relating to the marriage of members of the Royal Family".<sup>74</sup>

If the procedures established by the 1836 and 1949 Acts did not extend to members of the Royal Family, the repeal of section 45 of the former Act would not have the effect of creating a right to civil registration which did not previously exist.

If the 1949 Act is seen as a wholly new piece of legislation it might be argued that it allowed members of the Royal Family to contract matrimony in front of a superintending registrar, as anyone else would be free to do. However, it is impossible to ignore the deliberate preservation of section 45 of the 1836 Act, and the enactment of section 79(5) of the new Act. Together these must be read as conclusively negating any contention that the 1949 Act extended the right to civil registration of marriage to members of the Royal Family.

These Byzantine statutory provisions with respect to royal marriages were considered in detail in the 1950s and 1960s, initially in relation to the possibility of a "civil marriage" for Princess Margaret in 1955,<sup>75</sup> and latterly, in 1964, with a view to the reform of the law. At this time advice received – including from Lord Kilmuir, the then Lord Chancellor – was that the civil registration of marriages were not available to members of the Royal Family, section 45 of the 1836 Act and section 79(5) of the 1949 Act being instrumental in this conclusion.

It is not clear why recent advice to the Government should have differed from that given in the past, given that the most recent pertinent change to the relevant statutes was in 1953 – and that was minor and immaterial to the present problem. The civil registration of marriage – royal or otherwise – is not a matter of the royal prerogative, the common law, canon law, or of the interpretation of Human Rights conventions, which have all evolved over the past 40 years. It is a creature of statute, and must have a clear statutory basis. As there have been no statutory changes since 1953 it is apparent that there is no statutory basis for the civil registration of marriage of a member of the Royal Family.

All editions of *Halsbury's Laws of England* have expressed the opinion that the civil registration of marriage was not available to members of the Royal Family. Both the 1911 first edition and the 1998 re-issue of the fourth edition stated that certain

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<sup>74</sup> Section 79(5).

<sup>75</sup> To Group-Captain Peter Townsend.

statutory provisions relating to marriages generally do not extend to royal marriages – including, for the 1998 re-issue, the Marriage Act 1949.<sup>76</sup>

The Lord Chancellor, in a written statement on 23 February, sought to explain the basis for legal advice that the marriage would be legal.<sup>77</sup> The basis of this advice was that, with the repeal of section 45 of the 1836 Act in 1953 nothing further remained of the original Act. Section 79(5) of the 1949 Act was a saving clause not an exclusion clause – preserving the Royal Marriages Act 1772 and similar rules but not excluding members of the Royal Family from Part III of the 1949 Act (that which provided for the civil registration of marriages). Further, the Human Rights Act 1998 required legislation to be interpreted in ways which were compatible with the right to marry,<sup>78</sup> and to enjoy this right without discrimination.<sup>79</sup> The 1949 Act should therefore be seen as not excluding members of the Royal Family from the civil registration of marriage.

It is difficult to accept that this reasoning is correct. First, section 79(5) itself is not an exclusion clause, but it preserves section 45, which is. It is difficult to see any reason for the preservation of the latter section except to preserve the exclusion of members of the Royal family from the 1949 Act. The fact that section 45 was repealed in 1953 is immaterial to the statutory intention in 1949. After 1953 section 79(5) remains, and the wording of the section strongly argues against any extension of the scope of the 1949 Act to cover members of the Royal Family. Second, the Human Rights Act 1998 would appear to be largely irrelevant. Members of the Royal Family are not being denied a right to marry – merely to have their marriages conducted in a particular way.

Following the lodging of various objections the matter was also referred by the Registrar-General, Len Cook, to Dame Elizabeth Butler-Sloss, retiring President of the Family Division of the High Court, for her advice.

Not only was the choice of a civil ceremony serving to highlight the differences – such as remained – between the Church and State on the remarriage of divorced persons, but it also raised serious legal doubts as to its validity. Given that serious doubts about the status of a royal marriage conducted before a registrar were widely raised, the alternative of a church wedding should have been re-considered.

## V THE MARITAL STATUS OF THE PRINCE OF WALES BEFORE 2005

The Prince of Wales was divorced under the laws of the State. The Church holds that marriage cannot normally be dissolved except by death. After his divorce his status, and that of his former wife, was distinct in Church law to that under civil law. One allowed re-marriage, the other (generally speaking) did not. However, upon the death of Diana Princess of Wales he became eligible for re-marriage in church. The status of the Prince of Wales changed from that of divorcee to widower. Widowers (and widows) have always been able to re-marry in church. The fact that he had first divorced his wife became immaterial. The difficulty in the present circumstance was that Camilla Parker Bowles' former husband was still alive. According to the (civil) law of the land their

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<sup>76</sup> Blackburn, *Halsbury's Laws of England* (4 ed, 1973) vol 12(1) "Crown and Royal Family".

<sup>77</sup> "The Marriage between HRH The Prince of Wales and Mrs Parker Bowles", Written ministerial statement by Constitutional Affairs Secretary and Lord Chancellor, Lord Falconer of Thoroton, 23 February 2005.

<sup>78</sup> Article 12.

<sup>79</sup> Article 14.

marriage was dissolved. She was therefore, in the eyes of the Church of England (which recognises the primacy of the legal marriage according to statute, common law, and Church of England canon law, and not the Roman Catholic sacrament of marriage), a divorced woman whose former husband was still alive. She might however re-marry in church in exceptional circumstances and only if she was not the guilty party (having caused the marriage break-up).

The relative flexibility of the Church of Scotland, which allowed the re-marriage of divorced persons, led the Princess Royal to marry in Scotland. Since that time the attitude of the Church of England towards the re-marriage of divorced persons was relaxed, and this option had become available to the Prince of Wales also.

There was no legal impediment to Camilla Parker Bowles re-marrying according to the rites of the Church of England, since she was not the guilty party. Furthermore, according to the law of the Roman Catholic Church both Camilla and Andrew Parker Bowles are free to marry someone else since their marriage was not annulled but rather void *ab initio* according to a decree of nullity. This was because Andrew, a Roman Catholic, did not seek a dispensation to marry Camilla, an Anglican.<sup>80</sup>

There was no legal impediment to the Prince of Wales and Camilla Parker Bowles marrying in church according to the rites of the Church of England. There are serious doubts regarding the availability of civil registration of marriage to members of the Royal Family. In this situation the only options were to marry in accordance with the rites of the Church by banns or by special licence; or to marry abroad (presumably in Scotland). Although irregularity can be corrected by subsequent Act of Parliament, it is inappropriate for this to be required when the marriage took place in the full knowledge that it was possibly irregular and unlawful.

The Prince of Wales was in a difficult position whilst he was a divorcee. When he became a widower, his remarriage presented relatively slight difficulties for the Church of England. He then married outside the Church – not indeed to a schismatic, heretic, apostate or pagan, but to a fellow Anglican. This civil marriage raised potentially serious difficulties for the future Supreme Governor of the Church of England.

## VI CHURCH AND STATE IN ENGLAND

In the Preface to the Thirty-Nine Articles of 1562 is a royal declaration. It states that:

Being by God's Ordinance, according to Our just Title, Defender of the Faith and Supreme Governor of the Church, within these Our Dominions, We hold it most agreeable to this Our Kingly Office, and Our own religious zeal, to conserve and maintain the Church committed to Our Charge, in Unity of true Religion, and in the Bond of Peace ... We have therefore, upon mature Deliberation, and with the Advice of so many of Our Bishops as might conveniently be called together, thought fit to make this Declaration following ... That We are Supreme Governor of the Church of England ...<sup>81</sup>

Article 37 makes this claim to royal supremacy more explicit:

The King's majesty hath the chief power in this Realm of England, and other of his Dominions, unto whom the chief Government of all Estates of this Realm, whether they

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<sup>80</sup> Canon Law Society of Great Britain and Ireland, *supra* note 18, canon 1124.

<sup>81</sup> *Thirty-Nine Articles of Religion*, enacted in 1562, and confirmed in 1571 by the Subscription (Thirty-Nine Articles) Act 1571 (Eng).

be Ecclesiastical or Civil, in all causes doth appertain, and is not, nor ought to be, subject to any foreign jurisdiction ... We give not to our Princes the ministering either of God's Word, or of the Sacraments ... but that only prerogative, which we see to have been given always to all Godly Princes in holy Scriptures by God himself; that is, that they should rule all estates and degrees committed to their charge by God, whether they be Ecclesiastical or Temporal, and restrain with the civil sword the stubborn and evildoers ... The Bishop of Rome hath no jurisdiction in this Realm of England.<sup>82</sup>

The sixteenth century (re-)iteration of royal *imperium* over matters religious as well as secular was to have a continuing effect upon the law of the Church. But it was not a novel concept.

The juristic theory of territorial sovereignty, with the king being supreme ruler within the confines of his kingdom, originated as two distinct concepts. These were that the king owned no superior in temporal matters, and that within his kingdom the king was emperor.<sup>83</sup> The former was stated as early as the mediæval statutes regulating foreign religious houses in England, and the recognition of papal instruments. The latter was common to most of mediæval Europe.

The Holy Roman Emperor either had legal supremacy throughout the West, or he did not.<sup>84</sup> If the former, theories of the sovereignty of kings were not needed, for they had merely de facto power and the Holy Roman Emperor had de jure sovereignty over the whole empire.<sup>85</sup> Some jurists argued that he did not.

*Imperium et regnum* (imperial and royal power) was a favourite theme of nineteenth and early twentieth century historiography. But mediæval jurists cared not whether the emperor had jurisdiction and authority over kings and princes, but focused on his power to usurp the rights of his subjects. Whether this power was de facto or de jure was relatively unimportant.<sup>86</sup>

Bartolus and Baldus<sup>87</sup> led the way towards formulation of a concept of the legal sovereignty of kings. The emperor had a genuine de jure sovereignty within the *terrae imperii*, the confines of the empire alone. Other powers could obtain true sovereignty on a purely de facto basis. But this was not merely power without legitimacy.<sup>88</sup> Indeed, because the monarch represented God's ministry of justice, and because he ruled as the vicegerent of Christ the king, the office of the monarch was seen as a holy office.<sup>89</sup>

In the later Middle Ages it was believed that England was an independent sovereign monarchy answerable only to God – in mediæval parlance an empire, self-

<sup>82</sup> Ibid.

<sup>83</sup> Ullmann, "This Realm of England is an Empire" (1979) 30:2 *Journal of Ecclesiastical History* 175.

<sup>84</sup> In Roman law it was originally considered that the emperor's power had been bestowed upon him by the people (as typified by the motto "Senatus Populusque Romanus", that is, "the Senate and People of Rome") but by the time Rome became a Christian State his power was regarded as coming from God. See Cary and Scullard, *A history of Rome down to the reign of Constantine* (3 ed, 1975).

<sup>85</sup> Canning, "Law, sovereignty and corporation theory, 1300-1450" in Burns, *The Cambridge History of Mediæval Political Thought c.350-c.1450* (1988) 465-467. Emperor Frederick I Barbarossa saw the advantages of Roman law and legal science for his ambitions and his inception of absolutism. This led to the growth of royal absolutism, and eventually to the emergence of opposition to this, throughout Europe: see Pennington, *The Prince and the Law, 1200-1600: Sovereignty and rights in the Western legal tradition* (1993) 12.

<sup>86</sup> Pennington, *ibid* at 30.

<sup>87</sup> Woolf, *Bartolus of Sassoferrato. His Position in the History of Mediæval Political Thought* (1913); Canning, *The Political Thought of Baldus de Ubaldis* (2003).

<sup>88</sup> Canning, *supra* note 85.

<sup>89</sup> Rushdoony, *The Institutes of Biblical Law* (1973) 70.

contained and sovereign.<sup>90</sup> The focusing of the Crown's activities almost exclusively on the realm of England after 1216 encouraged such thinking. Nor were the claims of the papacy to temporal and spiritual authority especially welcome.<sup>91</sup>

The English canonists Alanus and Ricardens Angelicus, and a Spaniard, Vincentius Hispanus, articulated unambiguous statements of royal independence from the emperor in the early thirteenth century.<sup>92</sup> *Regno suo est* became a commonplace in the mid-thirteenth century.<sup>93</sup>

Sir John Fortescue remarked that "from of old English kings have reigned independently, and acknowledged no superior on earth in things temporal".<sup>94</sup> This was a fundamental feature of English monarchy by the fifteenth century, based on precepts of Roman law.<sup>95</sup> They rejected a Holy Roman Empire that had been narrowly German for several centuries, and the temporal authority of the pope.

Even the scope of the religious authority of the pope was challenged. This authority was questioned in part because of uncertainty over the focus of authority in the Church. The bulk of mediæval canonists acknowledged the significance of the role of the sacred college of cardinals, but nevertheless rejected the view that the pope could not act, except in minor matters, without their approval.<sup>96</sup> The common opinion of the doctors of canon law was that the pope had the power to legislate for the universal Church even without the cardinals.<sup>97</sup> However, contrary views were not unknown, and in the fifteenth century those of Johannes Monachus, himself a cardinal, were particularly powerful. These stressed the *plenitudo* of the pope, but only with the

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<sup>90</sup> In 1485 Chief Justice Huse observed that the king was superior to the pope within his realm, and answerable directly to God: YB Hil 1 Hen VII fo 10 pl 10. Appeal to the papal courts, which was only abolished by the Ecclesiastical Appeals Act 1532 (Eng) and s 4 of the Submission of the Clergy Act 1533 (Eng) was prohibited, otherwise than with the royal assent, by the Constitutions of Clarendon 1164 (Eng).

<sup>91</sup> The *Decretals* of Pope Gregory IX (1234) show that since Gratian the law of the Church had become a separate science no longer inextricably conjoined to theology. Gratian developed a science of jurisprudence, and provided the Church with a theory of sovereignty, the papacy. The *jus commune* has become the *jus pontificium*; Archbishops' Commission on Canon Law, *The Canon Law of the Church of England* (1947) 25-30.

<sup>92</sup> Texts cited in Tierney, "Some Recent Works on the Political Theories of the Mediæval Canonists" (1954) 10 *Traditio* 615, 617.

<sup>93</sup> Kenneth Pennington, *supra* note 85, 30.

<sup>94</sup> Fortescue, *In praise of the Laws of England (De Laudibus)* (Chrimes ed, 1942). See generally Doe, *Fundamental Authority in late Mediæval English Law* (1990).

<sup>95</sup> Majesty, the sense of awe-inspiring greatness, in particular, the attribute of divine or sovereign power, was part of the legacy of Rome. The *maiestas* of the Republic or the people of Rome had become that of the emperor, the *maiestas augustalis*.

<sup>96</sup> For college of cardinals see Ferme, "Lyndwood and the Canon Law: The Papal *Plenitudo Potestatis* and the College of Cardinals" in Doe, Hill and Ombres (eds) *English Canon Law* (1998) 13-22.

<sup>97</sup> Rosate, *Lectura super Codicem* (1518) f. 47c:

*Utrum papa sive cardinalibus possit leges sive decretales facere. Laurentius tenet quod non generales ... communis opinio est in contrarium et etiam de facto servatur.*

consent of the cardinals.<sup>98</sup> Monarchus maintained that the position of the pope was akin to that enjoyed by the bishop in relation to his cathedral chapter.<sup>99</sup>

By discrediting the claims of the papacy to universal ecclesiastical hegemony, the Reformation left the field open for the secular rulers to claim that they alone were answerable before God for the good government of their respective kingdoms, and that neither outside influences such as the Church, nor the wishes of their subjects within their realm had any part to play in government.<sup>100</sup> Thus the claim of the Kings of England that the kingdom was “an Empire governed by one supreme head and king”<sup>101</sup> was an almost inevitable consequence of pre-Reformation thinking.

The Act of Supremacy 1558 was enacted “for restoring to the Crown the ancient jurisdiction over the State ecclesiastical and spiritual”, and in this the sense is of ‘order’ or ‘estate’. “The supreme executive power of this kingdom”, as Blackstone stated, was vested in the King.<sup>102</sup> He was “supreme Head in earth of the Church of England”.<sup>103</sup> That he was supreme head did not mean that he had any spiritual function or status.<sup>104</sup> The king could not be regarded as an ecclesiastical person per se.<sup>105</sup>

After the Reformation Parliament made laws for the Church, and State courts increasingly came to apply this law where applicable in secular actions. If the supreme government of the Church lay with the king, in practice it meant the subordination of Church laws to secular laws. In its most extreme form, in England, this meant Parliament made all laws, and convocation, the Church’s own Parliament, long lay dormant.<sup>106</sup> In New Zealand, and elsewhere where there is no established Church, but

<sup>98</sup> Barbatia, *De prestantia cardinalium, Tractatus Universi Iuris* (1549) f 365a:

*Nec obstat cum dixit dominus Domini camus non esse credendum Ioan. Monacho cum fuerit cardinalis ... ad hoc respondeo procedere quando solus Ioan. Monachus hoc dixisset. Sed quando habet multos illustres doctores contestes qui illud etiam affirmant, tunc ex confirmatione aliorum tollitur illa suspicio.*

<sup>99</sup> *Glossa Aurea (in libro sextum)* f 366: “Papa sic se habet ad collegium cardinalium, sicut alter episcopus respectu sui collegii”. Johannessen, “Cardinal Jean Lemoine: Curial Politics and Papal Power” (1989) UCLA PhD thesis; Steckling, “Jean le Moine as Canonist and Political Thinker” (1964) University of Wisconsin PhD thesis.

<sup>100</sup> Watkin, “Church and State in a changing world” in Doe, Hill and Ombres (eds), supra note 96, 86.

<sup>101</sup> Appointment of Bishops Act 1533 (Eng).

<sup>102</sup> Section 8: ‘The Queen’s excellent Majesty, acting according to the laws of the realm, is the highest power under God in the kingdom, and has supreme authority over all persons in all causes, as well ecclesiastical as civil’. See *The Canons of the Church of England. Canons ecclesiastical promulgated by the Convocations of Canterbury and York in 1964 and 1969* (1969) Canon A7; *Thirty-Nine Articles*, supra note 81, Art 37.

<sup>103</sup> Act of Supremacy 1534 (Eng) repealed by the See of Rome Act 1554 (Eng) confirmed by the Act of Supremacy 1558 (Eng).

<sup>104</sup> A king did, on one occasion (in 1628) pardon an ecclesiastical offence, marriage within the prohibited degrees: Russell, “Whose Supremacy? King, Parliament and the Church 1530-1640” (1997) 4 *Ecclesiastical Law Journal* 700, 701.

<sup>105</sup> This was expressly stated in Article 37 of the *Thirty-Nine Articles*, supra note 81. The Sovereign was traditionally said to be a canon or prebend of St David’s Cathedral, Pembrokeshire, Wales. This is clearly however the result of confusion between ownership of the temporality and personal spiritual authority. In some respects however the Sovereign remains, at least symbolically, a quasi-religious person. This is seen in the ceremonial of the coronation – particularly in the anointing, and in the royal robes and vestments (all of which are, in essence, decidedly pre-Reformation). See Legg (ed) *English Coronation Records* (1901) 127.

<sup>106</sup> In 1919 the Church Assembly, now called the General Synod of the Church of England, was created. This gave a large measure of legislative authority to the Church, far greater indeed than any authority which the Convocations had ever clearly possessed; Church of England Assembly (Powers) Act 1919 (UK).

some degree of practical quasi-establishment, it means that much of the administrative machinery of the Church is dependent on secular legislation. Yet it also means that the Church is unable to alter its basic theological principles without the use of restrictive procedures defined by Parliament, as it has chosen to state those principles in an Act of Parliament.<sup>107</sup>

But the Sovereign remains Supreme Head of the Church of England, as a temporal office and yet one tinged with theological overtones, although the Sovereign has never claimed spiritual status or authority per se. The Queen of New Zealand is not regarded in the Anglican Church in Aotearoa, New Zealand and Polynesia as Supreme Governor of the Church,<sup>108</sup> a position she still enjoys, as Queen of the United Kingdom, in England (though not in Wales, because the Church is not established there<sup>109</sup>).<sup>110</sup> This reason is sometimes used to explain why prayers are no longer customarily said in New Zealand for the Queen and members of the royal family,<sup>111</sup> though it might have been expected that the Church would continue to show due regard for the role of the secular Sovereign of New Zealand.<sup>112</sup>

The Sovereign's office of Supreme Governor of the Church of England is to be distinguished from the mere title of Defender of the Faith, which dates from 1521. In that year Pope Leo X conferred upon King Henry VIII the title of *Fidei Defensor*. In spite of its papal origin, the title was settled on the king and his successors in perpetuity by Act of Parliament in 1543.<sup>113</sup> The non-sectarian (though originally, and historically, Roman Catholic) style "Defender of the Faith" is used in New Zealand and Canada, as well as England, though that of Supreme Governor of the Church of England is not, since the Church of England is not established in New Zealand or Canada.

While the establishment of Church and State remains in England, it is necessary for the Sovereign to be in communion with the Church of England. This is because one of the Sovereign's duties is to preserve the establishment of the Church. Upon succeeding to the throne, the new Sovereign must take the coronation oath in the form provided by statute.<sup>114</sup> The requirement of section 2 of the Act of Settlement 1701 that the Coronation Oath shall be in accordance with the Coronation Oath Act 1688 has been repealed in New Zealand, as the oath has been amended in practice without legislative

<sup>107</sup> Church of England Empowering Act 1928 (NZ) Schedule I; Fundamental Provisions, A2; Const B5-6; for the historical background see Morrell, *The Anglican Church in New Zealand* (1973) 96ff.

<sup>108</sup> The Crown has not been involved since the appointment of bishops by letters patent ceased in the nineteenth century: Phillimore, *The Ecclesiastical Law of the Church of England* (2 ed, 1895) vol II, p 1786. See Conrad Earl Russell, supra note 104, 700-708.

<sup>109</sup> Welsh Church Act 1914 (UK), Welsh Church (Temporalities) Act 1919 (UK), Suspensory Act 1914 (UK).

<sup>110</sup> Act of Supremacy 1558 (Eng); cf Welsh Church Act 1914 (UK); Suspensory Act 1914 (UK); Welsh Church (Temporalities) Act 1919 (UK). See also Cox, supra note 5.

<sup>111</sup> In England the law allows alterations in the prayers for the royal family contained in the (otherwise unalterable) *Book of Common Prayer*; Act of Uniformity 1662 (Eng) s 21; cf *A New Zealand Prayer Book* (1989). Prayers were said in accordance with the *Book of Common Prayer* when that was in regular use.

<sup>112</sup> When the *Book of Common Prayer* (1662) is used, the prayers are retained. They are also occasionally used on national occasions.

<sup>113</sup> King's Style Act 1543 (Eng), repealed by the See of Rome Act 1554 (Eng) s 4, repeal confirmed by the Act of Supremacy 1558 (Eng) s 4.

<sup>114</sup> Act of Settlement 1701 s 2. In terms of this provision the form of the oath is provided by the Coronation Oath Act 1688 s 3, and must be administered by the Archbishop of Canterbury or York, or any other bishop of the realm appointed by the Sovereign for that purpose, in the presence of all persons attending, assisting or otherwise present at the coronation: s 4.

sanction.<sup>115</sup> The law of the United Kingdom has not however been amended in this respect, as there is now a significant divergence between law and practice in this respect. The title to the Crown is not however dependent upon the taking of the oath.<sup>116</sup>

As well as taking the coronation oath, section 2 of the Act of Settlement 1701 requires that every new Sovereign must make, subscribe and repeat, sitting on the throne in the House of Lords, either on the first day of the meeting of the first Parliament after the accession, or at the coronation, whichever shall happen first, a declaration of their religious orthodoxy.<sup>117</sup> This Accession Declaration should be in the form of section 1 of the Bill of Rights 1688. This is to the effect that he or she is a faithful Protestant, and will, according to the true intent of the enactments which secure the Protestant succession to the throne, uphold and maintain those enactments to the best of his or her powers according to law.<sup>118</sup>

The new Sovereign had to read out a declaration in which he asserted his own orthodoxy, and condemned the doctrine of transubstantiation. They also proclaimed from the throne that “the Invocation or Adoration of the Virgin Mary or any other Saint, and the Sacrifice of the Mass, as they are now used in the Church of Rome, are superstitious and idolatrous”.

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<sup>115</sup> *Report of the Justice and Law Reform Committee on the Imperial Laws Application Bill* (1988) Explanatory Material, 57-60.

<sup>116</sup> The form of the oath as at present administered differs from that provided by the act owing to the dis-establishment of the Irish Church by the Irish Church Act 1869 (UK) and by the provisions of the Union with Scotland Act 1706 (Eng) art xxv.

The latest form of the Coronation Oath may be seen in the Proceedings of the Coronation of Her Majesty The Queen, 2 June 1953:

Archbishop of Canterbury – “Madam, is your Majesty willing to take the oath?”

The Queen – “I am willing”

Archbishop of Canterbury – “Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Northern Ireland and the other realms and territories, according to the statutes in Parliament agreed on, and the respective laws and customs of the same?”

The Queen – “I solemnly promise to do so”

Archbishop of Canterbury – “Will you, to the utmost of your power, maintain the laws of God, the true profession of the Gospel, and the Protestant Reformed Religion established by law? And will you maintain and observe inviolably the settlement of the Church of England and the doctrine, worship, discipline and government thereof by law established in England? And will you preserve unto the bishops and clergy of England and to the churches there committed to their charge, all such rights and privileges as by law do or shall appertain to them or any of them?”

The Queen – “I will”

The election proper (the enthronement at Westminster Hall) was abandoned at the accession of Edward VII, but the religious equivalent persists, though the above is really only the confirmation of the election.

<sup>117</sup> Her Majesty The Queen made the declaration on opening Parliament on 4 November 1952.

<sup>118</sup> Bill of Rights 1688 (Eng) s 1; Act of Settlement 1701 (Eng) s 2; Accession Declaration Act 1910 (UK). The declaration was made by King George V at the opening of Parliament, and therefore the necessity for making it at the coronation did not arise: 7 HL Official Reports (5<sup>th</sup> series) col 4. The same was true in the case of Queen Elizabeth II. King George VI made the declaration during the coronation service: see *Supplement to the London Gazette*, 10 November 1937, 7054. For the purposes of any enactment requiring an oath or declaration to be taken, made or subscribed by the Sovereign on or after the accession, the date on which the Sovereign attains the age of eighteen years is deemed to be the date of the accession: Regency Act 1937 (UK) s 1 (2).

In 1910 a revised declaration, introduced by the Accession Declaration Act 1910, allowed the king to merely affirm that he was a faithful member of “the Protestant Reformed Church by law established in England”.<sup>119</sup> There was opposition even to this modest declaration, and a final revision, enacted on 3 August 1910, simply said that “I declare that I am a faithful Protestant and will uphold the Protestant succession”.<sup>120</sup> In New Zealand the Imperial Laws Application Act 1988 provides that the form shall, with effect from 3 August 1910, be in accordance with the Accession Declaration Act 1910, which is preserved as part of the laws of New Zealand.<sup>121</sup> As with the Royal Marriages Act 1772 this was not designed for the benefit of members of the Royal Family personally but to preserve the Protestant political establishment.

Apart from the requirement of taking the coronation oath and give the accession declaration, any person coming into possession of the Crown must join in communion with the Church of England.<sup>122</sup> In practice, the Sovereign has also joined the Church of Scotland, and worships in accordance with the rites of the Established Church in Scotland when residing in that kingdom. There is however no legal requirement that the Sovereign be a member of the Church of Scotland.<sup>123</sup>

However, it is provided as a fundamental term of the union of England with Scotland that every person who succeeds to the Crown must take and subscribe to the oaths for the preservation of the Established Church in England and the Presbyterian Church in Scotland.<sup>124</sup> These are separate oaths to the coronation oath and accession declaration.

The Reformation settlement was a juridical statement of royal authority over the proto-State (in all its aspects). This was not necessarily because the King’s had particular religious views. (Henry VIII probably died at heart a Roman Catholic.) It was because in a growing and evolving modern State, sovereignty could not be reconciled with the power of the pre-Reformation Church. By the time of the 1660 Restoration and the 1688-89 Glorious Revolution authority had effectively passed to Parliament. The

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<sup>119</sup> I [ xx] de solemnly and sincerely in the presence of God profess, testify and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the Protestant succession to the Throne of my Realm, uphold and maintain the said enactments to the best of my powers according to law.

<sup>120</sup> Hon Sir Harold Nicolson, *King George the Fifth His Life and Reign* (1952) 162-163.

<sup>121</sup> Section 3 (3): “Notwithstanding anything in subsection (2) of this section, it is hereby declared that the Accession Declaration Act 1910 (UK) came into force in New Zealand on the 3rd day of August 1910 (being the date on which it received the royal assent).” The Accession Declaration Act 1910 (UK) is one of those pieces of legislation listed in the schedule of the act which is to be deemed to be part of the laws of New Zealand.

<sup>122</sup> Act of Settlement 1701 (Eng) s 3.

<sup>123</sup> Nor, indeed, need they be a member of the Church of England, merely in communion with it. Kings George I and George II were German Lutherans. Members of the Sovereign’s family need not be in communion with, or members of, the Church of England. The Duke of Edinburgh, before marrying The Queen, was received into the Church, although as a member of the Greek Orthodox Church, he was already a member of a Church in partial communion with the Established Church in England.

<sup>124</sup> Union with Scotland Act 1706 (Eng) art xxv, and ss 2-5. The oath for the preservation of the Established Church of England is now administered as part of the coronation oath. The oath for the preservation of the Presbyterian Church in Scotland was taken by Queen Elizabeth II at a meeting of the Privy Council held immediately after her accession, the instrument being subscribed in duplicate, and one part sent to the Court of Session to be recorded in the Books of Sederunt, and afterwards to be lodged in the Public Register of Scotland, the other part remaining among the records of the Council to be entered in the Council Book: see the *London Gazette Extraordinary*, 8 February 1952, 861.

King had to be kept a Protestant to preserve the religious settlement. He was now to be kept a prisoner of the system, not its director or author.

This meant that not only must he be protestant, and not a Roman Catholic, but that his wife could not be a Roman Catholic. The spouses of members of the Royal Family were likewise not to be Roman Catholic. These marriages, even before Royal Marriages Act 1772, were not purely private alliances. They were of importance to the State, and were treated as such.

## VII THE IMPORTANCE OF REGULAR ROYAL MARRIAGE

The Prince of Wales and Camilla Parker Bowles are communicant members of the Church of England. As future Supreme Governor it is constitutionally important that the Prince of Wales remains in communion with the Church. To enter into a marriage without the Church, in circumstances in which marriage within the Church was possible, is constitutionally inappropriate, and placed the Prince of Wales in a difficult position with respect to the Church. An attempt to avoid one controversy – remarriage in church<sup>125</sup> – has created another, which might have consequences for the establishment of the Church of England, quite apart from possibly being illegal and requiring subsequent corrective legislation.

The advice that the Prince of Wales had received, that he should not enter into holy matrimony with the rites of the Church of England and might marry in a civil ceremony, has endangered his relationship with the Church. Historically the Church has often compromised in order to preserve Church-State relations. In this case no compromise was required, the Church already being sufficiently accommodating to allow a remarriage in church. Indeed the Church ought to have insisted that the Prince of Wales marry in a Church of England service, if it valued the continuing linkage of Church and State. Failure to do so weakened the link of monarchy and Church, since the Prince of Wales could be seen as having been denied the right to a church wedding.

## VIII CONCLUSION

The Marriage Act 1836 did not apply to the members of the Royal Family. The Marriage Act 1949 did not state that it did not apply, but expressly affirmed that it should not affect any law or custom relating to the marriage of members of the Royal Family, and also preserved the section of the 1836 Act which excluded members of the Royal Family from the application of the earlier Act. Although the remainder of the 1836 Act was repealed in 1953, there is no reason to believe that either then, or in 1949, the right of civil registration of marriage was thereby extended to members of the Royal Family, and there are good reasons for doubting that it was.

As future Supreme Governor of the Church of England it is important that the Prince of Wales remain in communion with the Church and conduct his life broadly in accordance with its tenets and rites. To enter into a marriage outside the Church, in circumstances in which marriage within the Church was possible, was constitutionally

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<sup>125</sup> Some of the more immoderate supporters of the late Diana Princess of Wales were bitterly opposed to any remarriage of the Prince of Wales. They were particularly critical of a church marriage to Camilla Parker Bowles.

inappropriate and placed the Prince of Wales in a difficult position with respect to the Church. This is especially so since it has long been his wish to marry in church. Section 45 of the 1836 Act was passed to ensure that members of the Royal Family continue marry in the Church of England. In the years since then the rationale for this expectation, if not formal requirement, has been forgotten, to the cost of the Prince of Wales, the Royal Family, and ultimately the Church of England itself.