

A person's access to justice is a guaranteed fundamental right under the Constitution and particularly Article 21."⁴¹

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The monarchy and politics¹

☞ Constitutional law; Politics; Prince of Wales; Queen

There is a tension in the British constitution, and it concerns the role of the monarchy in political affairs. On the one hand, the monarch is expected to be politically neutral. On the other hand, the monarch is entitled to be politically active; she is permitted to express her political opinions in confidence to the elected government. Can this tension be resolved? Should it be resolved? This essay will explore both of these questions. The aim is not to try to settle these questions once and for all, but rather to think about how we might develop responsible arguments for the main answers that could be offered.

These issues have been made vivid by the disclosure, in the summer of 2015, of the Prince of Wales' so-called "advocacy" correspondence to the government. Although the Prince of Wales is the heir to the throne, one day he will be King. It is fair to say that the disclosure of his correspondence has intensified the public debate about the monarchy's role in British political life.

A final clarification. Throughout this essay I will refer to "political" opinions or "political" matters. By this I do not simply mean matters of party politics. A question may be party political one day but not the next. It is not easy to draw a firm boundary between political and non-political matters, but for our purposes the former includes both matters of party politics and those concerning the governance of the state in general.

The tension

I began by suggesting that there is a tension concerning the monarchy's role in politics. It would be helpful to say more about what this tension is.

The constitution expects that the monarch is both politically neutral and politically active. Let us take neutrality first. Claims about the monarch's political neutrality have been advanced by the government in cases before English courts and tribunals.² The claims abound in official publications as well;³ one such claim

⁴¹ *Imityaz Ahmad* (2012) 2 SCC 688 at 699.

¹ I am very grateful to an anonymous reviewer for valuable suggestions.

² For example, *Evans v Information Commissioner* [2012] UKUT 313 (AAC) at [54], [59] and [62].

³ The claim may be found on the official website of the British Monarchy; see <http://www.royal.gov.uk/MonarchUK/HowtheMonarchyworks/Whatisconstitutionalmonarchy.aspx> [Accessed 27 April 2016].

is that it would be unconstitutional (although not unlawful) for the monarch to vote in general or local elections.⁴

But the constitution also seems to assume that the monarch is not politically neutral. According to a constitutional convention that has been called the “tripartite convention”, the monarch is entitled to be consulted, to encourage and to warn her government.⁵ One forum in which this may take place is during her weekly audience with the Prime Minister.⁶

So is there a tension here? The answer may seem obvious, but we should look more closely to make sure. In particular, we should ask ourselves what political neutrality even requires, at least in this context. It cannot mean that the monarch is forbidden from holding political opinions; it cannot purport to regulate what she thinks. Rather, it must be concerned with the monarch’s acting on her political opinions.

Our constitutional settlement certainly aims to prevent the monarch from wielding political power on the basis of her political opinions. Governing is left to the elected government—hence, for instance, the so-called “cardinal convention” according to which the monarch exercises her prerogative powers on the advice of her government. It also seems that neutrality in this context requires that the monarch refrain from acting on political opinions in the sense of voicing them in public or official settings.

In light of all this, one way to locate the tension is as follows. It is public knowledge that the monarch holds a weekly audience with the Prime Minister at which she is entitled to express her political opinions (as per the tripartite convention). The content of the meetings, however, is secret. By contrast, even though voting is by way of a secret ballot, the monarch publicly refuses to vote, the reason being that she “must remain politically neutral”.⁷ This occasion of acting on political opinion is thought to be unacceptable—despite the fact that it is also protected by secrecy. In both cases the monarch will be acting on her political opinions and seeking to make a difference politically.⁸ Both activities are secret. Yet one is permissible and the other is not.

⁴ For example, <http://www.royal.gov.uk/MonarchUK/QueenandGovernment/Queenandvoting.aspx> [Accessed 27 April 2016].

⁵ Confusingly, the convention is sometimes described as the monarch’s right *and* duty to be consulted, to encourage and to warn. As regards consultation, the monarch’s right to be consulted (if understood as a Hohfeldian claim-right) means that the *government* is under a corresponding duty to consult with the monarch; in this sense, the right to be consulted might sometimes be framed both as a right (for the monarch) and a duty (for the *government*). However, there is a difference between the monarch’s having a right to encourage or to warn (understood here as a permission to encourage or to warn), and the monarch’s having a duty to encourage or to warn. It is unclear whether the convention does extend to the latter. Nonetheless, we do not need to settle this here; for our purposes (namely, demonstrating that the constitution assumes that the monarch is politically active), it is enough that the monarch is constitutionally permitted to encourage and to warn.

⁶ The monarchy’s official website states: “Although she is a constitutional monarch who remains politically neutral, The Queen retains the ability to give a regular audience to a Prime Minister ... at which she has a right and a duty to express her views on Government matters ... These meetings ... remain strictly confidential. Having expressed her views, The Queen abides by the advice of her ministers”, <http://www.royal.gov.uk/MonarchUK/QueenandGovernment/QueenandPrimeMinister.aspx> [Accessed 27 April 2016].

⁷ See <http://www.royal.gov.uk/MonarchUK/QueenandGovernment/Queenandvoting.aspx> [Accessed 27 April 2016].

⁸ It should be noted that the weekly audience also makes it possible for a monarch to have political influence even where she does not seek to do so. One person can of course influence another without seeking to do so (or without seeking to do so *in that particular way*).

Can the tension be resolved?

It seems, then, that the constitution expects the monarch to be both politically neutral and politically active. Can this tension be resolved?

Republican arguments call for the abolition of the monarchy, and this would be one way to solve things—namely, by removing the nucleus around which the tension materialises. But the prospects for abolition are not good, at least for the foreseeable future. On the assumption that the monarchy is here to stay, we should think about how we might resolve the tension in a way that reflects our considered judgments about the monarchy’s proper role in political affairs.

Two solutions suggest themselves. According to the first, the monarch should be politically neutral, and the constitution should therefore expect that she withdraw from politics more fully.⁹ According to the second solution, the monarch ought to let go of the claim to political neutrality and should instead be public about her political activity (which should aspire, as ever, to be responsible). I will address each of these solutions in turn. The aim is not to determine which is better, but rather to draw out and reflect on some of the considerations in favour of either solution.

Let us turn to the first possible solution. The idea here is that the political neutrality of the monarchy is essential and that the constitutional entitlement of the monarch to be politically active should tend to give way. On this approach, the tripartite convention—the monarch’s right to be consulted, to encourage and to warn—could be abolished. Equally, we might say, the weekly audiences with the Prime Minister should cease.

If these steps were taken, the political activity of the monarchy could be reduced. The monarch would continue in her role as Head of State, standing above the political fray and, for that reason (among others), well placed to represent all the peoples of her nation. For those who support the monarchy, these are valuable aims, and perhaps better served by reducing the monarchy’s role in political affairs further.

One may think that, while there may be shortcomings (as far as political neutrality goes) with the tripartite convention and the weekly audience, the benefits outweigh the costs. But what are the benefits? Those who are sceptical will question why another voice is necessary in an already congested political arena. Indeed, one worry is that the monarch is not merely one voice among others; she has access to government in ways that the ordinary citizen does not. Furthermore, her involvement in politics consumes government resources. The government corresponds with the monarch regularly in order to keep her informed about developments, and this may form the basis of discussions in the weekly audience, itself a draw on the Prime Minister’s time.

The most fundamental question, however, is this. At base, is the quality of government improved by the monarch’s exercise of her consultation right, or her

⁹ Absolute political neutrality may be impossible. The monarchy may be taken to support its own continued existence, and whether we should have a monarchy is of course a politically charged question. (See further fn.12 below.) In addition, situations may arise where, for instance, the monarch must act alone in exercising her prerogative powers rather than on the advice of ministers. Hence the modesty of this first solution which calls for the monarch to withdraw *more* fully from politics. I will at times in this essay speak about “resolving” the tension, but such statements should be read with this qualification in mind. It is also worth adding that none of this means that the task here is futile. The aim of the first solution is to further the monarch’s political neutrality and thereby minimise the specified tension, and this is certainly feasible.

rights to encourage and to warn? (I am assuming here that these rights are being used.) For the sceptic, it is hard to know that governmental decision-making would be worse without the monarch's involvement. While a great deal of political debate is sensational rather than sober, there is no guarantee that the monarch's contribution will be one rather than the other. There is no certainty that the monarch will be a careful and beneficent influence on government. The principle of hereditary succession in our monarchy means that whoever sits on the throne depends on a natural lottery.

Any claim that monarchy necessarily has a beneficial impact on government is therefore a strong one, and difficult to verify. The implication is that political systems lacking a monarchy of this sort are—*all other things being equal*—worse off, in terms of the quality of governmental decision-making, than political systems with such a monarchy.

But what if it is *sometimes* true that monarchy improves the quality of government? This is no good, the sceptic will insist, because too much is left open. It might mean that on rare occasions the impact is beneficial, but mostly it is not—hardly a glowing recommendation. The response might be that this is unlikely, or that monarchical involvement is beneficial more often than not. Such responses, however, would still need to overcome challenging probative hurdles. Demonstrating beneficial impact will generally be tough given that a veil of secrecy shrouds the monarch's political activity. While ex-Prime Ministers may extoll the helpfulness of the weekly audience,¹⁰ it would be preferable if we could reach our own assessment.

If this first solution were adopted, one additional worry might be that the strictures of political neutrality could impose a greater cost on each individual monarch. For instance, on a sympathetic reading of the Prince of Wales' advocacy correspondence, it is understandable that he cannot help but speak his mind if he believes that there is call for it. The nature of his office means that he meets many people, and it is proper and humane that he wish at times to voice his genuine concerns about matters that come to his attention. Although the Prince of Wales is the heir, these points would apply with just as much force to the monarch. Nonetheless, sympathy will be in short supply among those who take the first solution seriously. One cannot have one's cake and eat it, they would say. The rigours of the monarch's political neutrality serve important constitutional ends of their own; and if a monarch finds these unpalatable there is always abdication. King Edward VIII's abdication in 1936 in order to marry the American socialite, Wallis Simpson, is a well known precedent. Giving up the throne for love might capture the imagination more than abdicating in order to voice concerns publicly about legislative proposals or planning decisions. But the point is that there is a way out.

So this is the first solution. It calls for the monarch's role in political affairs to be minimised by doing away with the tripartite convention and the weekly audience. And it shores up the monarch's claim to political neutrality.

The second solution is to let go of that claim. This is not to say that the monarch should govern; that remains the preserve of the elected government. It means,

¹⁰ See, for example, *Evans* [2012] UKUT 313 (AAC) at [80] where the tribunal referred to Rodney Brazier's witness statement which described the views of former Prime Ministers.

simply, that no claim to political neutrality is advanced — and instead the monarch publicly acknowledges her political activity. It would, on this view, remain possible for the content of at least some of her political contributions to be confidential. She would nonetheless be open about *making* political contributions in the first place. This sort of approach is not wholly unprecedented. For example, the official description of the Belgian monarchy’s role publicly acknowledges the “political action” of the King of Belgium, whose (confidential) meetings with political and other leaders are candidly depicted as providing “a precious source of information for [the King] and *a means of allowing him to exert his influence*”.¹¹

The second solution would also permit the monarch to make non-confidential contributions to political discussions. Either way, the monarch’s contributions need not be party political. We tend to recognise the presence in civil society of organisations which can make political contributions (confidential or otherwise) while eschewing—or being perceived as eschewing—party politics. Examples might include the Institute for Fiscal Studies or professional bodies such as the British Medical Association. The second solution permits cautious, well-judged interventions which would, at present, be publicly disapproved given the concern for political neutrality. It is frequently said of Queen Elizabeth II that she has accrued vast political experience—12 British Prime Ministers and counting. Might there not be circumstances when such experience could be put to good, sensible use in political discussions? She would also be free to refrain from political interventions if she wishes, as would be the case with any other monarch.

Moreover, for all the worry about neutrality and the perceived benefit of being able to stand outside the political fray, we know that the monarch cannot but hold political opinions and that these may differ from our own. There is, at present, merely a constraint on expressing such opinions publicly. Indeed, there is one big, controversial political question on which the monarch is (publicly) not neutral: the question whether we should have a monarchy as opposed to a republic.¹² We know all this, and yet it is still claimed by many writers that the monarch is able to represent all the peoples of the nation.¹³ (Would this include those who are of republican inclination as well?)¹⁴ If that claim continues to be advanced, in spite of all that we already know, we might ask why the avowed freedom to make even occasional, modest contributions to political debate would be constitutionally menacing.

Perhaps a different worry might be raised, and it centres on the arbitrariness of hereditary succession. Whoever is born into the monarchy depends on a natural lottery. Since monarchs do not earn their position, we have no guarantee about the merit of their political contributions (whether confidential or otherwise). The

¹¹ See <https://www.monarchie.be/en/monarchy/royal-office> [Accessed 27 April 2016].

¹² This may be queried in the following way. Just as it may be possible to have an anarchist judge—a judge who takes his oath of office seriously and applies the law, all the while harbouring a secret commitment to philosophical anarchism and preferring the end of the state—it may be possible to have a monarch with republican beliefs. Or the monarch may simply be undecided about whether to retain or abolish the monarchy. These would, I think, be more marginal cases. Furthermore, regardless of any personally held beliefs, the monarch publicly acts so as to uphold the monarchy, which is precisely what stands against neutrality.

¹³ For example, V. Bogdanor, *The Monarchy and the Constitution* (Oxford: Clarendon Press, 1995).

¹⁴ By way of comparison we might mention, for instance, the rule prohibiting Catholics from ascending to the throne under the Act of Settlement (1700). Interestingly, Bogdanor describes that prohibition as “deeply offensive to Catholics, not only in Britain, but also in those Commonwealth countries with large Catholic populations such as Canada and Australia”, and calls for it to be abolished; see Bogdanor, *The Monarchy and the Constitution* (1995), p.59. The Succession to the Crown Act 2013 does not repeal this rule.

concern is more acute because their potential influence is great; a monarch's access to the government, including the Prime Minister, is considerable and she has an established platform. Given this worry there may be hesitation about publicly admitting even modest political activity on her part.

The worry may, however, be exaggerated. The Prime Minister could have a sibling with whom he is close and in whom he confides regularly, including on political matters. The sibling's privileged level of access to the person who happens to have become the Head of Government is also the outcome of a natural lottery. One might claim that the sibling does not, at least, have access to the whole government in the way that the monarch does; but this cannot be the gist of the complaint, for critics would continue to protest even if the monarch had access to the Prime Minister only. Should the constitution require that the Prime Minister consult with, or confide in, only those who are thought to have earned or in some way "merited" their access? This does not seem sensible. Furthermore, it may rather limit the range of voices and interests to which the Prime Minister may be exposed.

In light of all this, proponents of this second solution—that the monarchy should no longer worry about the strictures of neutrality and should instead become more publicly political (in the way that has been suggested)—will argue that it poses no great constitutional threat. The monarch is, after all, already entitled to make political interventions in secret. And in the end the government can always choose whether to pay attention. That is the ultimate corrective.

These are the two solutions that I have canvassed: first, the monarchy should become less politically active and more ceremonial, and second, the monarchy should become more publicly political. The second solution—calling for the monarchy to give up its claim to political neutrality—will seem more odd to many eyes, and more difficult to justify. Nonetheless, the aim has been to develop a responsible set of arguments for both solutions.

Should the tension be resolved?

Another approach, however, is not to seek to resolve the tension. Instead, we could allow the tension to persist by leaving things the way they are. Should a solution even be attempted? Again, the aim is not to promote one answer over another, but rather to consider different sides of the debate and reflect on how a responsible case might be made for each.

One response is to say that the tension should indeed be resolved because the existing state of affairs is unsatisfactory. To be clear, the mere fact that there is a tension need not in itself be the crux of the complaint. Inconsistencies between constitutional rules are unavoidable, and while courts or other actors may at times be required to resolve them, constitutions make do—and must make do—with continuing tensions.

The real worry, one might argue, is that the tension is papered over with a kind of constitutional dishonesty. Many of us know, as does the monarch, that she is politically active. The tripartite convention and the weekly audience put this beyond doubt. So the claim that she is politically neutral cannot be a mistake or an oversight. It is nothing other than dishonest, and that should worry us in a way that certain other constitutional tensions do not. There are other constitutional

tensions that emerge accidentally. Even where they are not (entirely) accidental, it may not be that they are designed to convey a known falsehood to the public at large. That is the case with the monarchy's claim to political neutrality. This is thought to enable the monarch to stand for the whole nation. But there is a (known) tension that means that the claim rings hollow.

Furthermore, it may be argued that resolving the tension need not be especially difficult or unpalatable. This takes us back to the earlier discussion of two possible solutions to the tension. One solution called for the monarchy to let go of the claim to neutrality and instead be more publicly political. It is true that many will regard this as inappropriate. On the other hand, the other solution that we considered—that the monarchy should withdraw from politics more fully—is visibly modest in its proposed reorientation of the monarchy's relationship with the government. It would mean doing away with the tripartite convention and the weekly audience in the service of political neutrality. The ease with which this could be achieved tells in its favour.

So these are possible reasons why we ought to resolve the tension. But we must also consider the alternative view that the tension should *not* be resolved. I will focus on one main line of argument which, in my view, may hold greater promise. (Whether it is in fact promising is left open.)

Earlier, the monarchy's claim to political neutrality was characterised as dishonest. A more charitable description, however, would be say that it is a fiction. There are many fictions in the law, and they are not all meritless. This particular fiction is maintained in part by secrecy; the claim to neutrality depends on the monarch's political activity (during the weekly audience, for instance) being hidden from view.

As the argument would run, this fiction is not bereft of value. But we would need a clear account of where the value lies. Many of the reasons that are given for the value of political neutrality, *or* for the value of the tripartite convention and the weekly audience, will not quite do here. We need a reason that stands for *both simultaneously*. For instance, it is not enough to claim that government benefits from having a safe space for frank conversations. This would be a reason for retaining the tripartite convention and the weekly audience. It is not a reason to allow the tension to persist.

So the task before us is as follows. We need to demonstrate that there is something valuable in having a person, the monarch, with whom the Prime Minister can have confidential political conversations—while, *at the same time*, keeping up the fiction that the monarch is politically neutral. Of course, this assumes that there is already value in both the monarch's claim to political neutrality and her political activity. What is required, though, is an account of the conjunction of the two in order to understand why we need both, and therefore why the tension should not be resolved (by preferring one over the other).

One possible account runs as follows. There is something special about the Prime Minister's being able to speak to, and confide in, the monarch at the weekly audience. The Prime Minister has many advisers (whether elected or not) on whom he can call. Advisers are usually people of one's choosing. By contrast, the monarch is not chosen by the Prime Minister. She is someone to whom the Prime Minister must speak, and repeated meetings build confidence and trust. In addition, the

monarch *purports* to speak for the nation as a whole, and this in itself distinguishes her from other figures—the Prime Minister’s advisers, business leaders, or significant public figures in other fields—on whom the Prime Minister may call. (Purporting to stand for the nation as a whole is of course distinct from actually doing so.)

It may be quite rare in our political system to have a figure like this—someone who has a large number of public engagements,¹⁵ claims to represent the whole nation, and has no (overt) party political agenda. Much of what I have just said may be thought to support a resolution of the tension—that is, by having the monarch become more overtly political while letting go of the claim of political neutrality. But this is not the case. It is the monarch’s very claim to political neutrality that makes her well placed to be the figure that we have just described. That claim allows her to present herself as representing the nation as a whole. Making good on the claim does not matter a great deal (for these purposes); it is the claim itself that is distinctive. This, coupled with the fact that she is not chosen by the Prime Minister as well as the experience of public engagement that comes with her office, means that the weekly audience is a political space that stands apart from others. And it is only made possible by a constitutional fiction.

So the argument is that the tension should not be resolved (and that the secrecy that papers over the tension is therefore useful). It is worth reiterating that this argument rests on the assumption that there is already value in both the monarchy’s claim to political neutrality *and* the monarchy’s political activity. This makes the argument a rather challenging one to defend. Sceptics will (amongst their array of attacks) continue to throw doubt on those underpinnings in order to undermine the argument as a whole—for instance, by asking whether there really *is* value in the monarchy’s political activity. Nonetheless, the goal here has been to sketch a method for arguing that the tension should not be resolved. Whether it is persuasive, all things considered, remains to be seen.

Concluding remarks

I have raised a number of questions about the monarchy’s role in political affairs. The aim has not been to offer definitive answers to these questions, but rather to reflect on how we might develop arguments for the different answers that may be offered. These issues are not going away. There is heightened interest in light of the disclosure of the Prince of Wales’ advocacy correspondence, and the questions are likely to continue once he ascends to the throne. In an interview in *Vanity Fair*, the Prince of Wales has admitted that he sees the role of the monarch “[perhaps] in a different way than [his] predecessors saw it, because the situation has

¹⁵ The monarchy’s official website states: “By means of regular visits through every part of the United Kingdom, The Queen is able to act as a focus for national unity and identity. Through her engagements and walkabouts, The Queen is able to meet people from every walk of life”, <http://www.royal.gov.uk/MonarchUK/HowtheMonarchyworks/TheRoleoftheSovereign.aspx> [Accessed 27 April 2016]. Still, we may ask: Who does the monarch meet? And what kinds of concerns (if any) do members of the public bring to her attention? The daily Court Circular which records the official engagements of the Royal Family provides partial answers to these questions.

changed”.¹⁶ More thought is being given to the monarchy’s role in politics, including from the heir to the throne, and this essay seeks to join in that conversation.

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The Attorney General and the Charity Commission: one rule without reason?

☞ Attorney General; Charity Commission for England and Wales; Consent; References

In the October 2014 edition of *Public Law*, Alec Samuels argued for the abolition of the “undeniably and irredeemably anomalous” office of Attorney General.¹ Without opining on whether or not outright abolition is advisable or likely to be achieved, this article ventures to suggest that the Attorney General should at least be relieved of one of his functions. This is the act of granting (or refusing) consent to the Charity Commission (Commission) before that body can make a Reference to the (Charity) Tribunal,² which it is otherwise entitled to do where a question arises in connection with the exercise of any of its functions and involves either the operation of charity law in any respect or its application to a particular state of affairs.³ Not even making an appearance on the list of responsibilities set out on the Government’s website,⁴ it is a power which has attracted very little attention.

The procedure for making References was introduced in 2006 and, to date, only two References have been heard, each concerned with charitable status: one in the context of poverty⁵ and the other in the context of education.⁶ Both were submitted by the Attorney General, whose power to make References is not subject to the Commission’s consent.⁷ A third Reference, in respect of religion, was considered but not made.⁸

Whether the requirement for the Attorney General’s consent should be retained has been one of the issues considered by the Law Commission in its recent consultation on charity law reform.⁹ It is suggested here that the requirement should be abolished, as it risks impairing the Commission’s independence, damaging its ability to perform its role and inhibiting more generally the development of charity law.

¹⁶ B. Colacello, “The Prince and the Planet”, Vanity Fair, November 2010, <http://www.vanityfair.com/culture/2010/11/prince-charles-201011> [Accessed 27 April 2016].

¹ A. Samuels, “Abolish the Office of Attorney-General” [2014] P.L. 690, 690.

² Charities Act 2011 s.325(2). The Charity Tribunal (established by the Charities Act 2006) was abolished and its functions transferred to the First-tier Tribunal (General Regulatory Chamber): Transfer of Functions of the Charity Tribunal Order 2009 (SI 2009/1834). Both References (discussed below) were heard by the Upper Tribunal (Tax and Chancery).

³ Charities Act 2011 s.325(1).

⁴ Gov.uk, <https://www.gov.uk/government/ministers/attorney-general#responsibilities> [Accessed 27 April 2016].

⁵ *Attorney General v Charity Commission* [2012] UKUT 420 (TCC); [2012] W.T.L.R. 977.

⁶ *R. (on the application of Independent Schools Council) v Charity Commission for England and Wales* [2011] UKUT 421 (TCC); [2012] Ch. 214 (combining the Reference and judicial review proceedings brought by the ISC).

⁷ Charities Act 2011 s.326.

⁸ Poverty, education and religion comprised the three principal heads of charity in case law: *Special Commissioners of Income Tax v Pemsel* [1891] A.C. 531 HL at 583.

⁹ Law Commission, *Technical Issues in Charity Law* (March 2015), Consultation Paper No.220, para.16.93.