THE RELIGION OF THE QUEEN – TIME FOR CHANGE

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Queen Elizabeth II is 85 years old. The law in the UK prohibits her from being a Roman Catholic or being married to one. It also requires her to be in 'communion' with the Church of England – the legal rights and privileges of which she swore to uphold as part of her coronation oath. Her present style and title declare her to be 'Defender of the Faith' – likely a reference to the faith expressed by the Church of England (or, possibly, the protestant faith in general). On her accession to the throne in 1952, she was required to declare that she was a 'faithful protestant'. She also gave an oath to maintain the Presbyterian Church of Scotland. Prince Charles, the heir to the throne, is 63 years old. Should he be subject to the same restrictions, especially when he has declared he would prefer to be 'Defender of Faith' only and given his sympathy with the removal of the prohibition against Roman Catholics?

This article sets out the legal basis for these restrictions and their repeal – as well as the removal of the unequal right of females to succeed to the throne. Changes to the law will not only involve England. Pursuant to the Statute of Westminster 1931, the assent of the Australian Parliament is required as well as of 14 other Commonwealth countries which still have Elizabeth II as their sovereign. At a recent Commonwealth conference in Australia it was agreed to remove the prohibition on the sovereign being married to a Roman Catholic as well as the unequal right of females to succeed to the throne. However, this still leaves in place legislation prohibiting the sovereign from being a Roman Catholic – as well as the obligations to defend the Church of England and to maintain the Church of Scotland. This article asserts that these provisions are out of sync with modern times and that they should also be repealed.

Previous published articles have considered various pieces of legislation relating to the sovereign and the Crown which were enacted prior to 1800 and which are still extant. The tenor of these articles was that most of this antiquated legislation should be repealed[1] or modernised.[2] This article considers the religion of the sovereign – as well as gender in respect of succession. The purpose of all three articles is to assert that what is required is a Crown Act to consolidate all prior legislation that relates to the sovereign in a *personal* capacity. That is, an Act that deals with:

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1 See Graham McBain, 'Modernising the Monarchy – in Legal Terms: Part 1' (2010) 21 *King's Law Journal* 529. It considered the: *Statute Concerning Tallage 1297*, *Confirmation of the Charters 1297*, *Prerogativa Regis c. 1324*, *Crown Lands Act 1623*, *Petition of Right 1627* (in part), *Tenures Abolition Act 1660*, *Free and Voluntary Present to his Majesty 1661*, *Crown Lands Act 1702*. It argued that all these Acts should be repealed. It also considered the *Status of Children Born Abroad Act 1350-1* which it argued should be modernized.

2 See Graham McBain, 'Modernising the Monarchy – in Legal Terms: Part 2' (2011) 22 *King's Law Journal* 51. It considered the: *Petition of Right 1627* (in part), *Royal Mines Acts 1688 and 1693*, *Princess Sophia's Precedence Act 1711*, *Royal Marriages Act 1772*. It argued these Acts should be repealed. It also considered the *Demise of the Crown Act 1702*, *Succession to the Crown Act 1707*, *Demise of the Crown Act 1727*, *Representation of the People Act 1867*, s 51, *Sheriffs Act 1887*, s 3(3) and the *Demise of the Crown Act 1901* (they provide that the sovereign's demise shall not terminate various Crown offices, or legal proceedings brought by, or against, the Crown). It argued these should be modernised.

- Religion of the sovereign (or the lack of a need for);
- Style and Title;
- Succession (including gender);
- Regency;
- Consent to royal marriages (or the lack of a need for);
- Demise.

The form of such a Crown Act is proposed. It may be noted that, while there have been many old[3] and modern[4] texts on constitutional law, analysis of much of the subject matter covered in this article has not been detailed, probably, because there is so little case law. However, there have been a number of useful articles, to which reference is made.

I RELIGION OF THE SOVEREIGN

Matters relating to the *religion* of the sovereign are contained in a number of pieces of English and Scots legislation, *viz*.

- *Bill of Rights 1688*
- *Claim of Right 1689 (Scots)*
- *Coronation Oath Act 1688*
- *Act of Settlement 1700*
- *Union with Scotland Act 1706*
- *Union with England Act 1707 (Scots)*
- *Union with Ireland Act 1800*
- *Royal Titles Act 1953*[5]

These Acts, *in toto,* specify that the sovereign:

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3 See Sweet and Maxwell, *A Legal Bibliography of the British Commonwealth of Nations* (2nd ed, 1955) vol 1, for works pre-1900. Useful material after 1900 includes: LS Amery, *Thoughts on the Constitution* (2nd ed, 1953); WR Anson, *The Law and Custom of the Constitution* (4th ed, 1935); ES Creasy, *Rise and Progress of the English Constitution* (17th ed, 1907); AV Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed, 1948); AV Dicey and RS Rait, *Thoughts on the Scottish Union* (1920); RC Fitzgerald, *Some Aspects of the British Constitution* (1944); WI Jennings, *The British Constitution* (5th ed, 1968); WI Jennings, *The Law and the Constitution* (5th ed, 1959). For constitutional history see SB Chrimes, *English Constitutional History* (2nd ed, 1949); JEA Jolliffe, *Constitutional History of Medieval England* (2nd rep, 1948); FW Maitland, *Constitutional History of England* (1st ed, 1908); TE May, *Constitutional History of England* (1862 ed); CG Robertson, *Select Statutes Cases and Documents* (7th ed, 1935) 13-8; EW Ridges, *Constitutional Law of England* (5th ed, 1934); P Taswell-Langmead, *English Constitutional History* (11th ed, 1960); MA Thomson, *Constitutional History of England* (1938); B Wilkinson, *Constitutional History of Medieval England* (1958).

4 SA De Smith and R Brazier, *Constitutional and Administrative Law* (8th ed, 1998); AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th ed, 2006); O Hood Phillips and Jackson, *Constitutional and Administrative Law* (8th ed, 2001); E Barendt, *An Introduction to Constitutional Law* (1998); G Marshall, *Constitutional Theory* (1971); M Sunkin and S Payne (eds.), *The Nature of the Crown*: *A Legal and Political Analysis* (1999).

5 For the older Acts I have used the dating employed by Halsbury (the change from the Julian to the Gregorian calendar was in 1752). For the dating of Scots legislation, see Stair, *The Laws of Scotland* (1987 as updated) vol 7, [739].

- Cannot be (or become) a Roman Catholic and be (or remain) sovereign;
- Cannot marry a Roman Catholic and become (or remain) sovereign;[6]
- Must declare, on accession, himself (or herself) to be a '*faithful protestant'*;
- Must join '*in communion*' with the Church of England;
- Must give a coronation oath in which he (or she) promises to maintain the:
  - (i) laws of God;
  - (ii) the true profession of the gospel; and
  - (iii) the protestant reformed religion established by law.
- Also, to maintain and preserve:
  - (iv) the settlement of the Church of England and its doctrine, worship, discipline and government, by law established; and
  - (v) the legal rights and privileges of the bishops and clergy of the Church of England (and their churches);
- Must swear to maintain the Church of Scotland;
- Bears the title '*Defender of the Faith*'.

There is also the *Statute of Westminster 1931*, which requires the assent of various Commonwealth countries to any change to succession. All this legislation is now considered.

A *Bill of Rights 1688*

The *Bill of Rights 1688*[7] has the force of a statute and it can be amended (as can the *Act of Settlement 1700*) like any other Act.[8] In the form of a declaration, the *Bill of Rights 1688* recites the mis-deeds and abdication of James II (1685-8)[9] as well as the invitation by Parliament to William of Orange and his wife Mary (daughter of James II) to take the

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6 As to the applicability of these restrictions on the spouse of the sovereign, R Blackburn, *King and Country: Monarchy and the Future Charles III* (2006) 112: 'the only exclusionary provision is whether the monarch's spouse is a Roman Catholic. ... she or he does not have to profess her or his Protestant faith, she or he does not have to join in communion with the Anglican Church, and she or he does not have to swear to uphold the established churches'. Cf L Maer, *Royal Marriages – Constitutional Issues* House of Commons Library Note SN/PC/03417 (2 Dec 2008) 3-4, but see below n 41.

7 1 Will and Mar sess 2 c 2, entitled: 'An Act declaring the rights and liberties of the subject and settling the succession of the Crown'. (spelling modernized). See Halsbury, *Statutes of England* (4th ed) vol 10, 42 and Halsbury, *Laws of England* (4th ed) vol 8(2), [35] and [39]. There are many writings on the historical background to the *Bill of Rights 1688*: see, eg, G Clark, *The Later Stuarts 1660-1714* (1987 reprint) and G Lock, *The 1688 Bill of Rights 1688*, Political Studies, XXXVII (4), Dec 1989, 541. See also texts cited by SM Cretney, *Royal Marriages: Some Legal and Constitutional Issues* (2008) 124 *Law Quarterly Review* 281, fn 9. Also, L Maer and O Gay, *The Bill of Rights 1689*. House of Commons Library Note no SN/PC/0293. See also Robertson, above n 3, 129-30.

8 AV Dicey, *Introduction to the Study of the Law of the Constitution* (9th ed, 1948) 483: 'The *Bill of Rights 1688*, with which must be read its complement the Act of Settlement ... is technically of no greater effect than any other statute; in that its provisions are subject to repeal by an Act of any succeeding Parliament. Some of its provisions have been so repealed'. See also Halsbury Laws, above n 7, vol 8(2), [1].

9 There are two religious references in the recitation of James' mis-deeds: (a) that he endeavored to extirpate the '*protestant religion*'; and (b) that he caused '*several good subjects being protestants to be disarmed at the same time when papists were both armed and employed contrary to law'*. These mis-deeds are historical and could be deleted from the *Bill of Rights 1688*, without rendering this statute unintelligible.

throne – which they did. These matters are historical. The *Bill of Rights 1688* also declares the exercise of the royal prerogative to be, in certain instances, illegal.[10] More especially, the *Bill of Rights 1688*, s 1, provides in respect of the religion of the sovereign, that:

> all and every person and persons that is or are or shall be reconciled to or shall hold communion with the see or church of Rome or shall profess the popish religion or shall marry a papist shall be excluded and be for ever incapable to inherit possess or enjoy the crown and government of this realm and Ireland and the dominions thereunto belonging or any part of the same or to have use or exercise any right power authority or jurisdiction within the same [And [in] all and every such case or cases the people of these realms shall be and are hereby absolved of their allegiance][11]
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> and the said crown and government shall from time to time descend to and be enjoyed by such person or persons being protestants as should have inherited and enjoyed the same in case the said person or persons so reconciled holding communion or professing or marrying as aforesaid were naturally dead (spelling modernised and wording divided for ease of reference).[12]

Thus, the *Bill of Rights 1688* prevents a Roman Catholic – or a person married to the same – from being (or becoming) sovereign. The *Bill of Rights 1688* also requires the sovereign to make a declaration either:

> (a) on the first day of the meeting of the first Parliament after his accession; or
> (b) at his coronation (whichever first occurs).[13]

The declaration in the *Bill of Rights 1688* was one originally contained in the *Second Test Act 1678*[14] – a declaration which was required to be made by members of both houses of Parliament and the sworn servants of the sovereign.[15] The need for such a

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10 See below n 189.

11 This was annexed to the Act in a separate schedule.

12 The Bill contains a general proviso in art 2: '…no dispensation by *non obstante* of or to any statute or any part thereof shall be allowed but the same shall be held void and of no effect except a dispensation be allowed of in such statute'. (spelling modernized).

13 'And that every king and queen of this realm who at any time hereafter shall come to and succeed in the imperial crown of this kingdom shall on the first day of the meeting of the first Parliament next after his or her coming to the crown sitting in his or her throne in the House of Peers in the presence of the lords and commons therein assembled or at his or her coronation before such person or persons who shall administer the coronation oath to him or her at the time of his or her taking the said oath (whichever shall first happen) make subscribe and audibly repeat the declaration mentioned in the statute [*Act of Charles II* – below n 14]'. (spelling modernised). Provision is made where the sovereign is under 12 (now 18) at the time of their succession (not printed here). See Halsbury Statutes, see above n 7, vol 10, 132 and Halsbury Laws, see above n 7, vol 12(1), [20]. Victoria (1837-1901), Edward VII (1901-10), George V (1910-36) and Elizabeth II (1952-) made their declarations at the opening of Parliament; George VI (1936-52) at his coronation. See Halsbury Laws, above n 7, vol 8 (2), [39].

14 30 Ch II st 2 c 1 (rep). See also Robertson, above n 3, 86 and Taswell-Langmead, above n 3, 427-8.

15 The oath required to be taken by MPs and peers in the *Second Test Act 1678* was subsequently replaced by one laid down in the *Legalization of the Convention Parliament Act 1689*, s 4. The latter oath excluded reference to the adoration of the Virgin Mary or the transubstantiation being idolatrous. Instead, the oath provided for a denial of the pre-eminency of the pope within the realm and a denial that excommunicated sovereigns could, lawfully, be murdered.

declaration arose from the religious hysteria emanating from the Popish Plot of 1678.[16] This declaration was then required of the sovereign by the *Bill of Rights 1688* – at a time when there was more religious and political turmoil.[17] Why was such a declaration required? Halsbury conjectures that it was (and is) designed to make it clear that the sovereign was not secretly a Roman Catholic.[18] This supposition is likely correct – given suspicions over the religion of Charles II (1660-85) and James II (1685-8).[19] The form of the declaration in the *Bill of Rights 1688* was:

> I [the sovereign], do solemnly and sincerely, in the presence of God, profess, testify, and declare that I do believe that in the sacrament of the Lord's Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever; and 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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> And I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration and every part thereof in the plain and ordinary sense of the words read unto me, as they are commonly understood by English protestants, without any evasion, equivocation, or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the pope, or any other authority or person whatsoever, or without any hope of any such dispensation from any person or authority whatsoever, or without thinking that I am or can be acquitted before God or man, or absolved of this declaration or any part thereof, although the pope or any other person or persons or power whatsoever should dispense with or annul the same or declare that it was null and void from the beginning.[20]

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16 The Popish Plot was a plot that a notorious perjurer, Titus Oates, supposedly discovered. He alleged that various Roman Catholics planned to murder Charles II, fire London, and massacre its inhabitants. His testimony resulted in the deaths of some 22 people. See generally, Kenyon, *The Popish Plot* (2000).

17 In this article, it is not necessary – nor is there sufficient space – to analyse why anti-Catholicism was so prevalent in Parliament and among the general public in this era. Suffice to say that there was a deep public suspicion that the country was being undermined by Charles II (1660-85) and James II (1685-8) – the former having a secret, and the latter an open, Roman Catholic faith. This fear was closely connected to other public fears such as fear of: a move towards monarchical absolutism, the re-introduction of papal authority, an invasion of Britain by France, a loss of English 'identity' – and it was reflected in the persecution of prominent Roman catholics, especially for treason. See generally, Clark, above n 7. See also GS McBain, *Abolishing High Crimes and Misdemeanours as Well as the Criminal Processes of Impeachment and Attainder* (2011) 85 *Australian Law Journal* 810.

18 Halsbury Laws, see above n 7, vol 14, [354]: 'To make it clear that the sovereign is not personally and secretly a Roman Catholic, she is required to make, on accession to the Crown, a doctrinal declaration.'

19 Charles II, although head of the Church of England, was a secret Roman Catholic and James II an avowed one, a point made by L Maer, *The Act of Settlement and the Protestant Succession*. House of Commons Library Note SN/PC/683, 9. As a result, at the coronation of James II, although it was conducted by Protestant clergy, the Anglican communion was omitted. See DJ Keir, *Constitutional History of Modern Britain* (9th ed, 1969) 262 and Ratcliff, *The Coronation Service of Queen Elizabeth II* (1953) 14.

20 See also Halsbury Statutes, above n 7, vol 10, 46-7. This declaration was first made by Queen Anne in 1702. LG Wickham Legg, *English Coronation Records* (1901) p xxx and JR Planche, *Regal Records* (1838) 118-9. For an attempt to remove this declaration by inserting a clause into the *Promissory Oaths Act 1869* at the Bill stage, see Times, 22 May 1868 (Sir Colman O'Loghlen, The Coronation Oath). The Times is now online.

By the 20th century, however, this language was regarded as too offensive and Edward VII (1901-10) wanted it changed.[21] This did not occur until the coronation of George V (1910-36)[22] when the *Accession Declaration Act 1910*[23] inserted a simpler declaration into the *Bill of Rights 1688*; *viz*:

> I [the sovereign] do solemnly and sincerely in the presence of God profess, testify, and declare that I am a faithful Protestant, and that I will, according to the true intent of the enactments which secure the protestant succession to the throne of my realm, uphold and maintain the said enactments to the best of my powers according to law.[24]

This declaration was first made at the coronation of George V and, in its making, Herbert Asquith (Liberal Prime Minister) and Randall Davidson (Archbishop of Canterbury) were involved.[25] The first attempt – which was proposed by Asquith to Parliament on 28 June 1910 – referred to the sovereign declaring that he was a '*faithful member of the protestant reformed church by law established in England*'. This was rejected by the Archbishop Davidson (and others) for being uncertain in purport – although Davidson did not think it necessary that the declaration require the sovereign to be a member of the Church of England, as such.[26] The wording of the declaration seems to have come from non-conformists who were anxious that specific reference not be made to the Church of England.[27] What does the wording of the declaration mean?

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21 P Magnus, *King Edward the Seventh* (1967) 361-2 and R Strong, *Coronation* (2006) 429-30. A *Royal Declaration Bill 1902* was introduced but withdrawn because of objections (HC Deb 8 Aug 1901, vol 99 c 80). See also A Berridale Keith, *The King and the Imperial Crown* (1936) 367-8.

22 See Strong, above n 21, 430.

23 *Accession Declaration Act 1910* (10 Edw 7 and 1 Geo 5 c 29) entitled: '*An Act to alter the form of the Declaration required to be made by the sovereign on Accession*'. S 1 bears the headnote '*Alteration of form of accession declaration'*. It provides: 'The declaration to be made, subscribed, and audibly repeated by the sovereign under [s 1] of the *Bill of Rights 1688* and [s 2] of the *Act of Settlement* shall be that set out in the Schedule to this Act instead of that referred to in the said section'.

24 See also Halsbury Statutes, above n 7, vol 10, 47 and Halsbury Laws, above n 7, vol 8(2), [39].

25 See Strong, above n 21, 429-30. See also GKA Bell, *Randall Davidson* (1952) ch 36 and R Brazier, *Legislating about the Monarchy* [2007] *Cambridge Law Journal* 86, 94.

26 See Bell, above n 25, 616, cites a letter of Davidson to Asquith dated 27 July 1910: 'Doubtless some churchmen would attach great importance to the king's so declaring himself, but I think that the wiser and weightier men are satisfied with the terms used in the Act of Settlement'. This same issue had actually arisen with regard to the form of the coronation oath in 1688, with the opaque wording leaving open the possibility that the sovereign might be a protestant but not necessarily a member of the Church of England, see below n 58.

27 See Bell, above n 25, 616 (citing the letter Davidson, in n 25 above). At 617, he cites a letter of Asquith to Davidson dated 27 July 1910: 'I gather, from the course of the debate this evening [in the House of Commons] that this form of declaration is generally acknowleged in all quarters – by Anglicans, Scottish Presbyterians, and English Nonconformists – as the best solution of the problem'.

- The adjective '*faithful'* is unclear.[28] It might be satisfied if the sovereign simply believes in the protestant religion and its doctrines. Or it might impose an additional requirement that the sovereign be a practising protestant (attending services, taking communion *etc*). Asquith interpreted it to mean a protestant '*at heart*' (i.e. by conviction).[29] History suggests it does not mean that the sovereign must be morally upright.[30] Thus the word is not a legal term of art, and it would seem to add nothing to the context;
- The reference to '*protestant*' is also uncertain. Although they did not have to make such a declaration, George I (1714-27) and George II (1727-60) were German Lutherans and William III (1689-1702) a Dutch Calvinist – and not members of the Church of England – yet all three were taken to be '*in communion*' with the Church of England for the purposes of the *Settlement Act 1700* (see 1(c)).[31] Further, the discussions in relation to the 1910 form of declaration seem to have been designed to leave open the possibility that the sovereign might be a protestant, but not a member of the Church of England.[32] Today, the Church of England is in '*communion*' with various other protestant denominations and it is possible the sovereign might satisfy this wording, if a member of one of these;[33]

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28 The Oxford English Dictionary (OED) contains a number of meanings in respect of the word '*faithful*', among them: (1) 'Full of or characterized by faith; believing'; (2) 'Firm in fidelity or allegiance to a person to whom one is bound by any tie, constant, loyal, true'; (3) 'True to one's word or professional belief, abiding by a covenant or promise, steadfast;' (4) 'Of persons and their conduct: conscientious, thorough in the fulfillment of duty'. These imply not only believing, but also practicing.

29 Asquith, HC Deb 27 July 1910, vol 19, cc 2129-41: 'he is at heart and in faith what the law requires him to be', 'a protestant at heart' and 'a faithful protestant – that is to say a protestant at heart as he has to be a protestant at law'. He also indicated that the Government did not think that the amended declaration had a 'sacramental authority' (at 2135).

30 Cf V Bogdanor, *The Monarchy and the Constitution* (1995). Noting the position of the sovereign as head of the Church of England, he states, at 215: 'The Supreme Governorship is a constitutional position … and the personal behavior of the sovereign is irrelevant to it. In the past, indeed, some quite dissolute sovereigns have been Supreme Governors…'.

31 Ibid, 44.

32 The House of Commons debate of 27 July 1910. vol 19, cc 2129-249 and House of Lords debate of 1 August 1910, vol 6, cc 597-634.

33 For those churches in communion with the Church of England (as at May 2011), see Diocese in Europe, *Churches in Communiun with the Church of England*, <http://europe.anglican.org/ partners/partners_incommunion.htm> at 4th November 2011. Since 1995, the Church of England has been in communion with various Lutheran churches as a result of formal discussions between the four Anglican churches of Britain and Ireland and eight Nordic Baltic Lutheran churches commencing in 1989 (the churches of the Porvoo Agreement). See L Osterlin, *Churches of Northern Europe in Profile* (1995) and The Porvoo Communiun, <www.porvoochurches.org> at 4th November 2011. Although the Church of England offers Eucharistic hospitality to churches such as the Methodists, Baptists, Church of Scotland and United Reformed Church it is not (in accordance with the modern interpretation of the word 'communion') in communion with them. Cf Maer, above n 6, 5, who notes that other protestant denominations (such as Methodists, Congregationalists, Baptists and members of the Church of Scotland) can take Anglican Communion. See also Canons of the Church of England (5th ed, 1993). Brazier, above n 25, 89: 'Methodists, or Baptists, and all other non-anglicans (and indeed atheists), none of whom can succeed to, or retain, the throne'.

- The sovereign declares that he will '*uphold*' and '*maintain*'[34] the '*enactments which secure the protestant succession to the throne'*. The latter wording refers to the *Bill of Rights 1688* and the *Act of Settlement 1700*.[35]

In conclusion, the *Bill of Rights 1688* excludes a Roman Catholic (or one married to the same) from the throne. Further, on accession, the Bill requires the sovereign to declare that: (i) he is a 'faithful protestant'; and (ii) that he will uphold the *Bill of Rights 1688* and the *Act of Settlement 1700* (for the latter, see 1 (c)) – which Acts provide for protestant succession to the throne.

B *Coronation Oath Act 1688*[36]

The *Coronation Oath Act 1688* is entitled '*An Act for Establishing the Coronation Oath*'.[37] S 1 noted that there was doubt as to the form of the oath in the past[38] and s 2 provided for the oath to be administered at the coronation of William and Mary in 1688, by the archbishops of Canterbury or York (or either) or by any other bishop[39] appointed

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34 It is suggested that the words '*uphold*' and '*maintain*' are synonyms. Oxford English Dictionary, '*maintain*' (12a): 'To uphold, back up, stand by, support the cause of; to defend, protect, assist: to support or uphold in (an action)'.

35 This wording is not very satisfactory, since it imports the declaration into the *Bill of Rights 1688* which, being enacted before the *Act of Settlement 1700*, should not be cognizant of the latter.

36 There have been a number of texts on the coronation oath. Some are listed in Sweet and Maxwell, above n 3. In particular, reference may be made to JM Bak, *Coronations: Medieval and Early Modern Monarchic Ritual* (1992); TC Bank, *An Historical Account of the Ancient and Modern Forms, Pageantry and Ceremony, of the Coronations of the Kings of England* (1820); JJ Dillon, *An Essay on the History and Effect of the Coronation Oath* (1807); RS Hoyt, *The Coronation Oath of 1308* (1955) *Traditio, Studies in Ancient and Medieval History, Thought and Religion*, vol 11, 235-57; J Perkins, *The Coronation Book* (1911); HG Richardson, *The English Coronation Oath* (1949) *Speculum*, vol xxiv, 44-75; PE Schramm, *A History of the English Coronation* (1937) (its Appendix contains an excellent list of sources); T Silver, *The Coronation Service* (1831); Strong, above n 21 (text contains dates of coronations); A Taylor, *The Glory of Regality* (1820); WC Taylor, *Chapters on Coronations* (1838); R Thomson, *Faithful Account of the Processions and Ceremonies observed in the Coronation of the Kings and Queens of England* (printed for J Major, 1820); Wickham Legg, above n 20. For individual coronation oaths, see Appendix A.

37 1 Will and Mar c 6. See also Halsbury Statutes, above n 7, vol 10, 37 and Halsbury Laws, above n 7, vol 8(2), [28] and [39]. For Scots commentary, see Stair, above n 5, vol 7, [708].

38 S 1: '*Oath heretofore framed in doubtful words*'. It provides: 'Whereas by the law and ancient usage of this realm the kings and queens thereof have taken a solemn oath upon the Evangelists [i.e. the Bible] at their respective coronations to maintain the statutes laws and customs of the said realm and all the people and inhabitants thereof in their spiritual and civil rights and properties. But forasmuch as the oath itself on such occasion administered hath heretofore been framed in doubtful words and expressions with relation to ancient laws and constitutions at this time unknown to the end therefore that one uniform oath may be in all times to come taken by the kings and queens of this realm and to them respectively administered at all times of their and every of their coronation'. (spelling modernised)

39 For instances where the Archbishop of Canterbury did not officiate see Wikipedia, coronation of the British sovereign. Also, see Schramm, above n 36.

by the sovereign.[40] These sections are spent – being historical. S 3 bears the headnote '*Form of oath and administration thereof*'. It contains the oath given by William and Mary in 1688, which was:

> *Arch bishop or bishop,* Will you solemnly promise and swear to govern the people of this kingdom of England and the dominions thereto belonging according to the statutes of Parliament agreed on and the laws and customs of the same? *The King and Queen shall say* I solemnly promise so to do.
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> *Arch bishop or bishop,* Will you to your power cause law and justice in mercy to be executed in all your judgements? *King and Queen* I will.
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> *Arch bishop or bishop,* 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 preserve unto the bishops and clergy of this realm and to the churches committed to their charge all such rights and privileges as by law do or shall appertain unto them or any of them? *King and Queen* All this I promise to do.
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> *After this the King and Queen laying his and her hand upon the holy gospels, shall say, King and Queen* The things I have here before promised I will perform and keep so help me God. *Then the King and Queen shall kiss the book.* (spelling modernised and italics supplied)

The wording in s 3 was designed to deal with the situation of William and Mary who ruled as joint sovereigns. It is said to be unclear if the oath is required to be taken by the spouse of the sovereign – when the same is not a joint sovereign. However, in the case of Elizabeth II, the coronation oath was not taken by her spouse.[41]

This s 3 is effectively spent (being a matter of history) but for the fact that s 4 bears the headnote *'Oath to be administered to all future Kings and Queens*' and it provides for the oath to be administered by future sovereigns to be the same as that of William and

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[40] S 2: '*Oath hereafter mentioned to be administered by the archbishop of Canterbury etc*'. It provides: 'May it please your majesties that it be enacted and be it enacted by the king and queens most excellent majesties by and with the advice and consent of the lords spiritual and temporal and commons in this [present] Parliament assembled and by the authority of the same that the oath herein mentioned and hereafter expressed shall and may be administered to their most excellent majesties king William and queen Mary (whom God long preserve) at the time of their coronation in the presence of all persons that shall be then and there present at the solemnizing thereof by the archbishop of Canterbury or the archbishop of York or either of them or any other bishop of this realm whom the king's majesty shall thereunto appoint and who shall be hereby thereunto respectively authorised which oath followeth and shall be administered in this manner that is to say, The arch bishop or bishop shall say'. (spelling modernised).

[41] Cf Maer, above n 6, 3 (this Act 'seems' to require a queen consort to also give the oath). This does not take into account: (a) the fact that many spouses of monarchs in earlier times did not jointly take the oath. In particular, when they failed to attend the coronation – such as the wife of Charles I (who was a Roman Catholic) or the wife of George IV (who was prevented from attending); and (b) the wording at the coronation ceremony of Elizabeth II only refers to the Queen taking the oath ('Madam, is your Majesty willing to take the oath?' see Ratcliff, above n 19, 37) as does that of George VI (see below n 216). For the coronations of wives of the sovereign see, R Huish, *An Authentic History of the Coronation of His Majesty, King George the Fourth* (1821) and see Wickham Legg, above n 20, lvii-lix.

Mary.[42] How did the new form of coronation oath come about? The statutory form of oath contained in the *Coronation Oath Act 1688* was the outcome of a committee of 39 persons set up by Parliament on 25 February 1688 (nine tories, the remainder whigs).[43] The content of the coronation oath given by William and Mary in 1688 was threefold. Two of the oaths related to laws and customs (see above) and they are not dealt with further in this article.[44] The third related to religion and it comprised an assent by the sovereign to two separate questions asked by the archbishop (or bishop), *viz.*

> 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?
>
> Will you preserve unto the bishops and clergy of this realm and to the churches committed to their charge all such rights and privileges as by law do or shall appertain unto them or any of them?

The reference to the '*Protestant reformed religion established by law*' is not to be found in the oaths of sovereigns prior to 1688.[45] It was specifically added by the *Coronation Oath Act 1688* – the wording being proposed by Sir Thomas Clarges MP.[46] It may be noted that the words do not expressly refer to the Church of England (the only church then '*established by law'*) and this was probably deliberate. Schramm observes:

> These words had been the subject of a fairly long debate, as the Anglicans wanted to keep their position and the Presbyterians were indulging in hopes for the future. They were finally left unaltered, as it was decided that Parliament could in any case make any

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42 S 4: '*Oath to be administered to all future Kings and Queens*'. 'And ... the said oath shall be in like manner administered to every king or queen who shall succeed to the imperial Crown of this realm at their respective coronations by one of the archbishops or bishops of this realm of England for the time being to be thereunto appointed by such king or queen respectively and in the presence of all persons that shall be attending assisting or otherwise present at such their respective coronations any law statute or usage to the contrary notwithstanding'. (spelling modernised).

43 On 25 March 1688, this committee informed the House of Commons that they had sat several times but could not come to a conclusion. The House therefore resolved itself into a committee of the whole House and, as such, they agreed on the form of coronation oath. For their debates, A Grey, *Debates of the House of Commons From the Year 1667 to the Year 1694* (1769) vol 9, 190-98 and the *Parliamentary History of England* (1809) vol 5 (1688-1702) 199-211. They refer to House of Commons debates on 25 and 27-9 March 1688. See also Strong, above n 21, 284-5 and Robertson, above n 3, 116-20.

44 The first oath has been altered a number of times since 1688 to take account of the rise (and fall) of the British Empire. The wording of the second oath has remained unchanged. See Appendix A. Also, Halsbury Laws, above n 7, vol 8(2), [38] and [39] and vol 12(1), [20].

45 See Appendix A.

46 See Grey, above n 43, 190 (25 Feb 1688) quotes him as saying: 'I move for an addition to the oath, that to the utmost of his power he will maintain, etc the protestant religion, established by law'. The amended coronation oath was passed by the House of Commons, 188 to 149. An amendment was proposed on 27 Feb by Sir Henry Capel MP to refer to 'The protestant religion *professed by the Church of England*'. It was rejected. A proviso was proposed on 28 Feb by Pelham MP that 'no clause in this Act shall be understood so, to bind the Kings or Queens of this realm, as to prevent their giving their royal assent to any bill, which shall be at any time offered by the Lords and Commons assembled in Parliament, for the taking away or altering any form or ceremony in the established church [ie. the Church of England], so as the doctrines of the said church, a public liturgy, and the episcopal government of it, be preserved' was withdrawn. These amendments were intended to make more explicit reference to the Church of England, but they failed. For the biography of Sir Thomas Clarges MP (c. 1618-95), see The History of Parliament, *The History of the House of Commons 1660-90* (1983) vol 2.

> fresh laws affecting the church, laws which would be confirmed by the king, so that it was unnecessary to give any precision to these words in the coronation oath.[47]

As a result, this oath was not interpreted by Protestant writers[48] as being broken when protestant dissenters were given relief by the *Toleration Act 1689*.[49] The same occurred in relation to the *Roman Catholic Emancipation Act 1829*.[50] When union of England with Scotland happened in 1706, an additional question (and answer) was inserted in the third oath by virtue of the *Union with Scotland Act 1706*.[51] It was:

> And will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline and government thereof as by law established within the kingdoms of England and Ireland, the dominion of Wales and the town of Berwick upon Tweed and the Territories thereunto belonging, before the Union of the two kingdoms?

This was the position in 1706. However, by the time of the coronation of Elizabeth II in 1953, the Church of Ireland and the Church in Wales had long been dis-established (in 1871 and 1920, respectively), so, the words in her third coronation oath were reduced to:

> Will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established in England?[52]

This additional wording inserted by the *Union with Scotland Act 1706* clarified that the church the sovereign was required to swear to maintain (and protect) was the Church of England – and not any other protestant church.[53] The form of the coronation oath, over the centuries, is set out in detail in Appendix A to this article. The following may be noted by way of summary:

> Nature of Coronation Oath. From early times the coronation oath comprised three promissory clauses. These changed to a question and answer format in the reign of

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47 See Schramm, above n 36, 222. Also see Grey, above n 43 and the Parliamentary History, above n 43.

48 See, eg, CT Lane, *The Coronation Oath considered with reference to the Principles of the Revolution of 1688* (2nd ed, 1828) and J Reeves, *Considerations on the Coronation Oath* (1805).

49 1 Will and Mary stat 1 c 18 (rep). See also Robertson, above n 3, 123-4 and Clark, above n 7, 153 *et seq*.

50 The background to this is that, in 1801, when William Pitt (the Prime Minister) sought Roman Catholic emancipation, George III declared it would breach his coronation oath, to '*abolish all the distinctions of religion in Ireland*'. Schramm, above n 36, 222 and JS Watson, *The Reign of George III* (1960) 393-5. George III did this after consulting Kenyon CJ (as well as others). For an exchange of letters of Kenyon CJ in 1795, see *Letters from his late Majesty to the late Lord Kenyon, On the Coronation Oath: with his Lordship's answers, and letters of the Right Hon. William Pitt to his late Majesty, with his Majesty's answers* (2nd ed, 1827) and *A Letter on the Coronation Oath* (2nd ed, 1827). See also Strong, above n 21, 357-8; C Hibbert, *George III: A Personal History* (1999) 312-4, J Ehrman, *The Younger Pitt* (1996) 499 and J Brooke, *King George III* (1972) 367-9. See also Times, 16 May 1825 (The Coronation Oath) and 16 July 1868 (The Coronation Oath). As it was, in 1829, the Roman Catholic Emancipation Act 1829 was enacted – even though it was opposed by George IV. See Schramm, above n 36, 222-3. See also Robertson, above n 3, 317-27.

51 The method of doing this was rather convoluted, see 1(d).

52 See Appendix A. For the dis-establishment of the Irish and Welsh churches, see below n 70.

53 See also Halsbury Laws, above n 7, vol 8(2), [28] and [39].

Edward II (1307-27) – if not before.[54] The religious content was fairly anodyne. Bracton (c. 1240) records that the sovereign promised that: '*true peace shall be maintained for the church of God and all Christian people'*. This probably meant little more than that the sovereign would protect the rights of the (Roman Catholic) church and preserve the peace.[55] The wording of the coronation oath likely remained unchanged until Edward II (1307-27) when he gave a quadripartite oath and (it seems) assented to a separate petition by the bishops and clergy for him to defend their privileges.[56] From Edward II the format of the coronation oath seems to have changed little until James I (1603-25). His first oath – to observe the laws of St Edward – was amended so that it was qualified by the words, '*according to the laws of God, the true profession of the gospel established in this kingdom and the ancient customs of the realm*'. The reference to the '*true'* profession of the gospel '*established in this kingdom'* was an endorsement of the Church of England.[57]

In 1688, the coronation oath was substantially amended pursuant to the *Coronation Oath Act 1688*. The third oath was re-cast to refer to '*the true profession of the gospel and the protestant reformed religion established by law*'.[58]Also, the additional petition of the clergy and bishops (and answer) which had prevailed from the time of Edward II (i.e. 1307) was subsumed (in a shortened version) into the third oath, becoming, '*Will you preserve unto the bishops and clergy of this realm and to the churches committed to their charge all such rights and privileges as by law do or shall appertain unto them or any of them?*' This was a further endorsement of the Church of England – although the same was not specifically referred to;

- <u>*Amendments to the Coronation Oath*</u>. After 1688, various amendments have been made to the coronation oath. They have been:

    - In 1706, in the oath of George I (1714-27) additional wording was inserted pursuant to the *Union with Scotland Act 1706* (see 1(d) and Appendix A);[59]
    - In 1760, in the oath of George III (1760-1820), a reference in the third oath to '*this realm*' was changed to '*England*' (see Appendix A). This may be described as a clarification – there seems to have been no legislative basis for this change. There also seems to have developed what, today, would likely be described as a typo. In the third oath, '*churches committed to their charge*' became '*churches <u>there</u> committed to their charge'*. This was not repeated in the oath of George IV (1820-30) but it was in that of William IV (1830-7). By the oath of Edward VII (1901-10) '*there*' had become '*therein*' reverting back to '*there*' in the oaths of George VI (1936-52) and Elizabeth II (1952-).

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54 See Wickham Legg, above n 20, xxviii and Schramm, above n 36, 204.

55 See Schramm, above n 36, 180, 182 and 196. 'Christian people' is a reference to people, and does not contain a religious intent, as such. See Wickham Legg, above n 20, xxviii.

56 See Appendix A. Also, see Wickham Legg, above n 20, xxix and xxxi. Protection for the church and its rights was also covered in *Magna Carta* (1297) ch 1 (still extant): 'First, we have granted to God, and by this our present charter have confirmed, for us and our heirs for ever, that the church of England shall be free, and shall have all her whole rights and liberties inviolable'.

57 See Schramm, above n 36, 218, they were, 'words which struck both at the Romanists and at the Puritans'. However, it should be noted that the oath given by James I is not entirely clear, see Appendix A.

58 See Strong, above n 21, 286: 'Those last three words [i.e. *established by law*] signified a victory for the Tories, making a clear reference to the church of England, but not at the expense of alienating the dissenting communities'.

59 Noted in HL Deb 12 May 1902, vol 107, cc 1317-21 (Lord Stanmore). Also, 511 HC Deb col 2099-2100 (25 Feb 1953) (Winston Churchill). See also Times, 6 July 1868 (The Coronation Oath).

There is no basis for this word, which adds nothing to the context (see Appendix A);

- In 1820, the oath of George IV (1820-30) was amended to reflect the union with Ireland, effected by the *Union with Ireland Act 1800* (see 1(f) and Appendix A);[60]
- In 1902, the oath of Edward VII (1901-10) was amended to reflect the disestablishment of the Church of Ireland pursuant to the *Irish Church Act 1869*;[61]
- In 1937, amendment was made to the oath of George VI (1936-52) as a result of the *Statute of Westminster 1931* (see 1(g));[62]
- In 1953, amendment was made to the oath of Elizabeth II (1953-) to remove reference to the Empire of India pursuant to the *Indian Independence Act 1947*.[63]

Thus, 7 amendments have been made since 1706 to the coronation oath to date (two of a minor nature). Those of 1706 and 1902 seem to have a legislative basis – that of 1820 is unclear. Those of 1937 and 1953 were made by the authority of the Privy Council – after consultation with other self-governing countries of the Commonwealth.[64] It is arguable that all amendments can (should) *only* be made by legislation since they amend an Act of Parliament.[65] However, precedent has been established.[66] Any

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[60] In the oath, the words, '*the united church of England and Ireland*' were substituted for the words '*the church of England'*. No express provision was made for this in the *Union with Ireland Act 1800*. However, see comments of Lord Stanmore in HL Deb, 12 May 1902, vol 107 cc 1317-21 (implicit). Also, reference in the oath to '*the kingdoms of England, Ireland, the dominion of Wales, and town of Berwick on Tweed*' was replaced by a reference to '*England and Ireland*' since reference to Wales and Berwick on Tweed had been included in all English Acts by 20 Geo II c 42 s 3(1746) (repealed by the *Interpretation Act 1978*). Strictly, this amendment should have been made in the oath of George III (1760-1820).

[61] It seems this amendment was made by virtue of the *Irish Church Act 1869*, s 69. HL Deb 12 May 1902, vol 107, c 1320 (Lord Halsbury). Cf 511 HC Deb, col 2099-2100 (25 Feb 1953) (Winston Churchill) who appears not to have been aware of Lord Halsbury's statement when he stated, 'On one occasion only has the change had legislative sanction' referring to the *Union with Scotland Act 1706*. See 1(b).

[62] On 20 February 1937, an amended coronation oath was issued by the authority of the Privy Council. Changes included, in the first oath, reference to the '*Dominions*' and the omission of the words '*according to the statutes in Parliament agreed on'*. In the third oath, the promise to maintain the protestant reformed religion was qualified by the words, '*United Kingdom*'. See Schramm, above n 36, 273 and Ratcliff, above n 19, 28. Also, Times 20 Feb 1937, 12 (The Coronation Oath by Wickham Legg) and Times 5 March 1937, 10 (The Coronation Oath. Reasons for Revision by GM Trevelyan).

[63] For the Act, see below n 126. Also Times, 17 March 1953 and 511 HC Deb col 2099-2100 (25 Feb 1953) (Winston Churchill) (who claimed that the oath had been amended at least five times before). This is incorrect; there have been 7 amendments. See also Times, 26 Feb 1953, 8 (The Coronation Oath).

[64] Halsbury Laws, above n 7, vol 12 (1), [38]: says that the coronation oath was only amended on the *Irish Church Act 1869* and the *Act of Union with Scotland Act 1706*. This is incorrect.

[65] Schramm, above n 36, 273 (referring to the coronation oath of George VI, above n 62), 'The authority quoted for these changes was the Statute of Westminster, but it is not clear how that statute sanctions either the omission of reference to Parliament or the alteration of those parts of the oath which refer to the Church of England as by law established'. Blackburn, above n 6, 115 (referring to the coronation oath of Elizabeth II, above n 63) quotes E Fletcher MP, Hansard HC Deb, 23 Feb 1953, cols 2091-3: 'In view of the fact that the Coronation Oath is a parliamentary creation, and is intended as a limitation on the prerogative, is it not desirable, though it may be inconvenient, that any changes that are proposed this year should have legislative sanction ... It is a matter which affects the rights of Parliament, and not merely the rights of the Executive'. See also A Berridale Keith, *The King, the Constitution, the Empire and Foreign Affairs* (1939) 21-8.

amendment of the religious part of the oath should not require the assent of other Commonwealth countries – including those 15 which have the sovereign as their sovereign pursuant to the *Statute of Westminster 1931* (see 1(g)) since the oath only relates to the Church of England in the United Kingdom.[67]

- *Content of the Oath*. Today, the sovereign promises to maintain: (i) the laws of God; (ii) the true profession of the gospel; (iii) the protestant reformed religion established by law (i.e. the Church of England); (iv) the settlement of the Church of England and the doctrine, worship, discipline and government thereof as by law established; and (v) all the rights and privileges of the bishops and clergy of the Church of England (and their churches) as by law appertains to them. As to these: (i) and (ii) likely derive from the change made to the coronation oath of James I in 1603; (iii) derives from the change made to the coronation oath of William and Mary in 1688; (iv) is an addition required by the *Union with Scotland Act 1706* and (v) likely derives from the petition of the bishops and clergy made after the coronation oath of Edward II in 1307 which was cut down and inserted into the third coronation oath of William and Mary in 1688.
- *Meaning of the Oath*. (i) and (ii) (see dot point above), in effect, refer to the laws of God and the profession of the gospel as expounded by the Church of England.[68] Therefore, they also are covered by (iii). As to (iii)-(v), they refer to the Church of England and its rights, privileges and doctrine, as laid down in law. Thus, (i)-(v) is a patchwork of promises arising from historical changes and the gradual, overt, protestantisation of the oath in its religious aspects – particularly from the time of James I in 1603. However, the nature of all of (i)-(v) would seem to be clear. They comprise an oath to uphold the Church of England as the State (established) church – together with its legal rights, privileges and doctrines. This interpretation accords with the extra-judicial view of Kenyon CJ given to George III in 1795.[69] Thus, legislation emancipating dissenters (in 1689) and Roman Catholics (in 1829) was not interpreted as breaching this oath – nor was the dis-establishment of the Church of

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66 It is dubious whether extra-statutory changes can be said to be made by virtue of the royal prerogative SA de Smith, *The Royal Style and Titles* (1953) 2 *International and Comparative Quarterly*, 271: 'A statutory title is not alterable by prerogative'. This would also seem to apply to a statutory coronation oath.

67 In the amendment to the oath of George VI it was specifically provided that the oath to maintain the '*protestant reformed religion established by law*' was in the '*United Kingdom*'. See also Keith, above n 65, 25 and De Smith, n66, 267. Further, the rest of the oath relates only to the settlement of the '*Church of England*' and preserving the rights of the bishops and clergy of '*England*'. Thus, Elizabeth II is not swearing to maintain any other church apart from the Church of England – nor any protestant religion other than that in the UK (in fact, since the churches of Ireland and in Wales have been dis-established and the Church of Scotland is protected by a separate oath, see 1(d)) – then the reference to the 'United Kingdom' should, more appropriately be to '*England*'. See Keith, above n 65, 27. Also, Times 20 Feb 1937 (The Coronation Oath).

68 See above n 57.

69 He told George III (Letters, above n 50, 17-8): 'So long as the King's Supremacy and the main fabric of the Act of Uniformity, the doctrine, discipline, and government of the [Church of England], are preserved as the *national* church, and the provision for its ministers kept as an appropriate fund, it seems that any ease given to the sectarists [i.e. dissenters] would not militate against the coronation oath or the Act of Union'. (italics supplied).

> Ireland in 1871 and of the Church in Wales in 1920.[70] Further, it would seem possible for a Roman Catholic sovereign in modern times to give this oath. It may be noted that James II (1685-8), a Roman Catholic, gave (i) and (ii)).[71] However, for the sovereign today to give royal assent to the dis-establishment of the Church of England would likely breach this oath – since it seems it was clearly designed (by reason of the amendments made in 1688 and 1706) to require the sovereign *not* to accede to this. That said, for the legally binding nature of the coronation oath, see 7(d).

In conclusion, the *Coronation Oath Act 1688* (confirmed by the *Act of Settlement 1700* and the *Union with Scotland Act 1706*) requires the sovereign to give a coronation oath in which he (or she) promises to maintain the: (i) laws of God; (ii) true profession of the gospel; and (iii) protestant reformed religion established by law. Also, he (or she) promises to maintain and preserve: (iv) the settlement of the Church of England and its doctrine, worship, discipline and government, by law established; and (v) the legal rights and privileges of the bishops and clergy of the Church of England (and their churches).

Thus, in effect, the coronation oath (vis-a-vis its religious content) means that the sovereign promises to uphold the established status the Church of England as a State church – and its legal rights and privileges.

C *Act of Settlement 1700*

The *Act of Settlement 1700*[72] was enacted in light of uncertainty as to who would succeed William III (1689-1702). Mary, his Queen, had died without issue, in 1694. The son of the next heir to the throne – Anne of Denmark – had died in July 1700[73] and it seemed likely that William III (aged 50 in 1700, and not in good health) would die without an heir. The preamble to the *Act of Settlement 1700* referred to the *Bill of Rights 1688* and its prohibition relating to Roman Catholics.[74] The *Act of Settlement*, s 1, then specified that the crown – failing any issue to William III or Anne – would pass to

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70 The Church of Ireland was dis-established by the *Irish Church Act 1869* and the Church in Wales by the *Welsh Church Act 1914*. See generally, Ridges, above n 3, 424-9. For a petition that the sovereign had breached her coronation oath by giving the royal assent to laws that legalized abortion, liberalized censorship, divorce and gambling; and the reply of the Home Office, see I Bradley, *God Save the Queen: The Spiritual Dimension of Monarchy* (2002) 169.

71 Though this is not (presently) possible because of the prohibition on a Roman Catholic being sovereign contained in the *Bill of Rights 1688* and the *Act of Settlement 1700*.

72 12 and 13 Will 3 c 2, entitled: 'An Act for the further limitation of the Crown and better securing the rights and liberties of the subject'. See also Halsbury Statutes, above n 7, vol 10, 50 and Halsbury Laws, above n 7, vol 8 (2), [36], [38]-[39]. Also, Robertson, above n 3, 151-7.

73 This child was known as Prince William, Duke of Gloucester (died of smallpox on 30 July, 1700).

74 *viz*: it was thereby further enacted [i.e. in the *Bill of Rights 1688*] that all and every person and persons that then were or afterwards should be reconciled to or shall hold communion with the see or church of Rome or should profess the popish religion or marry a papist should be excluded and are by that Act made for ever incapable to inherit possess or enjoy the crown and government of this realm and Ireland and the Dominions thereunto belonging or any part of the same or to have use or exercise any regal power authority or jurisdiction within the same and in all and every such case and cases the people of these realms shall be and are thereby absolved of their allegiance and the said crown and government shall from time to time descend to and be enjoyed by such person or persons being protestants as should have inherited and enjoyed the same in case the said person or persons so reconciled and holding communion professing or marrying as aforesaid were naturally dead'.

Princess Sophia (granddaughter of James I) and then to the '*heirs of her body being Protestants*'. Most of the wording in the preamble to the Act and s 1 is now only of historical interest – since, in fact, the crown passed to an heir of Sophia (George I). However, the *Act of Settlement*, s 2 bears the headnote, '*The persons inheritable by this Act, holding communion with the church of Rome, incapacitated as by the former Act [i.e. The Bill of Rights 1688], to take the oath at their coronation, according to Stat 1 W & M c 6'[i.e. The Coronation Oath Act 1688]'*. It states:

> Provided always and it is hereby enacted that all and every person and persons who shall or may take or inherit the said crown by virtue of the limitation of this present Act and is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall profess the popish religion or shall marry a papist shall be subject to such incapacities as in such case or cases are by the said recited Act [i.e. the *Bill of Rights 1688*] provided enacted and established.
>
> And that every king and queen of this realm who shall come to and succeed in the imperial crown of this kingdom by virtue of this Act shall have the coronation oath administered to him her or them at their respective coronations according to the [*Coronation Oath Act 1688*] and shall make subscribe and repeat the declaration in [the *Bill of Rights 1688*] in the manner and form thereby prescribed. (spelling modernized and wording divided for ease of reference).

Thus the *Act of Settlement 1700*, s 2 confirms the religious restrictions laid down in the *Bill of Rights 1688* and it requires the sovereign to take the oath in accordance with the *Coronation Oath Act 1688*. The *Act of Settlement 1700*, s 3, bears the headnote '*Further Provisions for securing the religion, laws, and liberties of these realms*' and it provides:

> And whereas it is requisite and necessary that some further provision be made for securing our religion laws and liberties from and after the death of His Majesty [i.e. William III] and the Princess Ann of Denmark and in default of issue of the body of the said princess and of his majesty respectively.
>
> Be it enacted by the King's most excellent Majesty by and with the advice and consent of the Lords spiritual and temporal and commons in Parliament assembled and by the authority of the same That *whosoever shall hereafter come to the possession of this Crown shall join in communion with the Church of England as by law established.* (spelling modernised, italics supplied and wording divided for ease of reference).

This requirement that the sovereign '*join in communion with the Church of England*' is uncertain. What does it mean? Given the date of this Act (1700), it was likely intended to make it clear that the sovereign *must* be a member of the Church of England.[75] This is confirmed (to an extent) by the addition of a specific reference to the Church of England being inserted, pursuant to the *Union with Scotland Act 1706*, into the coronation oath (see 1(d)). That said, today, a looser interpretation of the words '*in communion*' would (likely) be permitted and – since, the Church of England is in

[75] This was the opinion of Asquith, HC Deb 27, July 1910, vol 19, c 2132. 'Join in communion', as everybody acquainted with the English language of that period will know … means have fellowship or membership with the particular religious body to which reference is made. No doubt it was in that sense that those words were used in the Act of 1701, and they have always been so interpreted'. Such an interpretation is unsurprising since the sovereign was (and is) the supreme governor of the Church of England (see 1(h)). Blackburn, above n 6, 114, 'This means that the King must not only profess the Protestant faith (as required by the *Bill of Rights 1688*), but he must actively participate and join in Anglican communion and worship'.

'*communion*' with other protestant denominations – it might be sufficient if the sovereign is a member of one of the same.[76] Construing old statutes – such as the *Act of Settlement 1700* – in the light of modern circumstances is not an unacceptable means of interpretation – as can be seen, even in the more strict case of construing old criminal statutes.[77]

In conclusion, the *Act of Settlement 1700*: (a) confirms the line of succession (and the restrictions against Roman Catholics) contained in the *Bill of Rights 1688*; (b) confirms the obligation imposed on the sovereign to take the coronation oath according to the *Coronation Oath Act 1688*; and (c) requires the sovereign to 'join *in communion*' with the Church of England – likely meaning that he (or she) must be a member of the same – although this may be less strictly interpreted in modern times.

D *Union with Scotland Act 1706*

The union between England and Scotland was effected by Articles of Union signed on 22 July 1706 by English and Scots commissioners appointed by Queen Anne. The union was then ratified by enactments of each Parliament[78] before those Parliaments were replaced by a Parliament of Great Britain. The *Union with Scotland Act 1706*,[79] in art II, confirms that succession to the sovereignty of the United Kingdom of Great Britain and the dominions thereto, belongs to Queen Anne (1702-14) and, in default of issue, to Princess Sophia and the '*heirs of her body being protestants'* in accordance with the *Act of Settlement 1700*.[80] This material is now historical – save for reference to the '*heirs*'. Art II also provides that:

> all papists and persons marrying papists shall be excluded from and for ever incapable to inherit possess or enjoy the imperial crown of Great Britain and the Dominions thereunto belonging or any part thereof and in every such case the crown and government shall from time to time descend to and be enjoyed by such person being a protestant as should

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[76] See above n 33. R Brazier, *Skipping a Generation in the Line of Succession* [2000] *Public Law* 569, fn 10: 'It is equally improbable that a reigning sovereign would cease to be in communion with the [Church of England], but if that were to happen, there would be a demise of the crown'.

[77] *R (Rushbridger) v AG* [2004] 1 AC 357, 362 (per Lord Steyn): 'Counsel for the [Attorney General] accepted that the [Treason Felony Act 1848] must be construed as an always speaking statute in a modern democracy'. *Joyce v DPP* [1946] AC 347, 366, (per Lord Jowitt LC): 'It is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language'.

[78] I.e. the *Union with Scotland Act 1706* (passed on 6 March 1707) and the *Union with England Act 1707* (passed on 16 January 1707). The Act of Union came into force on 1 May 1707 and the meeting of the first (British) Parliament was on 23 October 1707. There are a number of general works on the background to the union including: AV Dicey and RS Rait, above n 3; PWJ Riley, *The Union of England and Scotland* (1978) and C Whatley, *The Scots and the Union* (2006). Also, Clark, above n 7, 287 *et seq*. For the dates of various events, see Dicey and Rait, above n 3, Appendix B.

[79] 6 Anne c 11 entitled: 'An Act for the Union of the two kingdoms of England and Scotland'. See also Halsbury Statutes, above n 7, vol 10, 56 and Halsbury Laws, above n 7, vol 8 (2), [36]. Also, Robertson, above n 3, 162-4.

[80] 'That the succession to the sovereignty of the United Kingdom of Great Britain and of the dominions thereto belonging after her most sacred majesty and in default of issue of her majesty be remain and continue to the most excellent Princess Sophia Electoress and Dutchess dowager of Hanover and the heirs of her body being protestants upon whom the crown of England is settled by an Act of Parliament [the *Act of Settlement 1700*]'. See also Halsbury Laws, above n 7, vol 8(2), [53].

> have inherited and enjoyed the same in case such papist or person marrying a papist was naturally dead according to the provision for the descent of the crown made by another Act of Parliament in England [the *Bill of Rights 1688*].

Thus this Act confirms the *Bill of Rights 1688* and the *Act of Settlement 1700* in respect of succession – including the religious restrictions on the sovereign. There is more. The *Union with Scotland Act 1706*, art XXV (3) refers to an earlier piece of legislation – the *Act of Security for the Church of England 1706* (the '*Church of England Act*').[81] This Act is the source for the additional wording inserted into the coronation oath referred to in 1(b)[82] but this is achieved in a convoluted fashion – since the entirety of the *Church of England Act* is referred to – and recited in full – in the *Union with Scotland Act 1706*, art XXV s 3. It, *inter alia*, states:

> And be it further enacted by the authority aforesaid that after the demise of her Majesty [Queen Anne] (whom God long preserve) the sovereign next succeeding to her Majesty in the royal government of the kingdom of Great Britain and so for ever hereafter every King and Queen succeeding and coming to the royal government of the kingdom of Great Britain at his or her coronation shall in the presence of all persons who shall be attending assisting or otherwise then and there present take and subscribe an *oath to maintain and preserve inviolably the said settlement of the [Church of England] and the doctrine worship discipline and government thereof as by law established within the kingdoms of England and Ireland the dominion of Wales and town of Berwick upon Tweed and the territories thereunto belonging.* (italics supplied)

The *Union with Scotland Act 1706*, art XXV s 5, then confirms that the *Church of England Act* is a '*fundamental*' and '*essential*' condition of the union.[83] The effect of all this is that the additional wording inserted in the coronation oath is also a '*fundamental*' and '*essential*' condition of the union. Can this wording be altered – or repealed – therefore? One would assert that the answer is '*yes*' since other fundamental (immutable) terms of the *Acts of Union 1706* and *1707* (for the latter see (e) below) have been altered

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[81] 6 Anne c 8. This Act, also called an Act for the Security of the Church of England, was passed on 13 February 1707. See also Halsbury Laws, above n 7, vol 14, [348]. To safeguard the Church of England as the established (State) church, the *Church of England Act*, art I, provides that the *Act of Uniformity 1662* and 'all and singular other Acts of Parliament now in force for the establishment and preservation of the [Church of England] and the doctrine worship discipline and government thereof shall remain and be in full force for ever'. Despite the latter wording, the *Act of Uniformity 1662*, and the other Acts referred to, have been often amended or repealed. For example, the *Act of Uniformity 1662* now only has ss 10 and 15 extant.

[82] The *Church of England Act*, art II, states: 'And after the demise of her Majesty [Queen Anne] (whom God long preserve) the sovereign next succeeding to her Majesty in the royal government of the kingdom of Great Britain and so for ever hereafter every King and Queen succeeding and coming to the royal government of the kingdom of Great Britain at his or her coronation shall in the presence of all persons who shall be attending assisting or otherwise then and there present take and subscribe an oath to maintain and preserve inviolably the said settlement of the [Church of England] and the doctrine worship discipline and government thereof as by law established within the kingdoms of England and Ireland the dominion of Wales and town of Berwick upon Tweed and the territories thereunto belonging'. See also Halsbury Laws, above n 7, vol 8(2), [39], fn 6. Strangely, this Act is not in Halsbury Statutes, but it is in the Statute Law Database maintained by the Office of Public Sector Information, available at <www.statutelaw.gov.uk>.

[83] 'be and shall forever be held and adjudged to be and observed as fundamental and essential conditions of the said union'. This Act, along with the *Articles of Union and the Protestant Religion and Presbyterian Church Act 1707* (see above n 86), was also 'ordained to be and continue in all times coming the complete and entire union of the two kingdoms of England and Scotland'.

– as have many other Acts which have declared themselves to have immutable terms.[84] This, Dicey, among others, has observed.[85] Finally, the *Union with Scotland Act 1706*, art XXV s 2, refers to certain Scots legislation – the *Protestant Religion and Presbyterian Church Act 1707* ('*Church of Scotland Act*') which was designed to protect the status of the Church of Scotland.[86] It provides that, after the death of Queen Anne (1702-14), the next sovereign:

> shall in all time coming at his or her accession to the crown swear and subscribe that they shall inviolably maintain and preserve the aforesaid settlement of the true protestant religion with the government worship discipline right and privileges of this church as above established by the laws of this kingdom in prosecution of the Claim of Right.[87]

As with the *Church of England Act*, the *Union with Scotland Act 1706*, art XXV (2) then refers to – and recites in full – the *Church of Scotland Act* which, in art XXV (5), it also confirms is a '*fundamental*' and '*essential*' condition of the union. This will include the oath in respect of the Church of Scotland (see above). However, unlike the addition to the coronation oath in respect of the Church of England, the oath given by the sovereign in respect of the Church of Scotland, is not included in the coronation oath. Instead, it is given by the sovereign at the first meeting of the privy councillors following her accession.[88]

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84 Trying to make Acts immutable has a long tradition. For early attempts in English law to making legislation immutable, see HWR Wade, *Constitutional Fundamentals* (1980) 32-4. Also, Jolliffe, above n 3, 444. An attempt to make the status of the united Church of England and Ireland immutable was made by the *Union with Ireland Act 1800*, art V, providing that: 'the doctrine, worship, discipline and government of the said united church, shall be and shall remain in force for ever, as the same are now by law established for the Church of England; and that the continuance and preservation of the said united church, as the established church of England and Ireland, shall be deemed and taken to be an essential and fundamental part of the union'. However, this wording was of no avail when that church was dis-established in 1871. See Dicey, above n 3, 66 and *Ex p Canon Selwyn* (1872) 36 JP 54 (application for a mandamus to the Lord President of the Privy Council commanding him to present a petition to the sovereign requesting her to obtain a judicial decision as to the validity of her assent to the *Irish Church Act 1869*, it being inconsistent with her coronation oath). For the process of dis-establishment of the Irish church, see Ridges, above n 3, 424-5.

85 Dicey, above n 3, 65-66 referring to the *Act of Union with Scotland 1706*, art 25 in part repealed by the *Universities (Scotland) Act 1853*. Also, 68-70 and 145. See also Halsbury Laws, above n 7, vol 8(2), [53], [54] and [235] and Stair, above n 5, vol 7, [739]; Munro, *Studies in Constitutional Law* (1987) ch 4; Upton, *Marriage Vows of the Elephant: the Constitution of 1707* (1989) *Law Quarterly Review* 79, 93 and TB Smith, *The Union of 1707 as Fundamental Law* [1957] *Public Law* 99, 112. For a reference to the table of repeals *vis-a vis* the *Acts of Union 1706* and *1707* see F Cranmer, *Church State Relations in the United Kingdom: A Westminster View* (2006) *Ecclesiastical Law Journal* 6 (29), 119 fn 40.

86 1707 c 6. Also called the *Act for the Security of the Church of Scotland*, this Act was passed on 12 November 1706. See also Statute Law Database, above n 81. For the concerns of the Church of Scotland in relation to the union and its desire to ensure that this Act became a fundamental part of the *Union with Scotland Act 1707*, see J Stephen, *Scottish Presbyterians and the Act of Union 1707* (2007); Dicey and Rait, above n 3, 247 and RK Murray, *The Constitutional Position of the Church of Scotland* [1958] *Public Law* 105. Also CR Munro, *Does Scotland have an Established Church?* (1997) *Ecclesiastical Law Journal* 4 (20), 639.

87 For the *Claim of Right 1689*, see 1(e).

88 Elizabeth II gave the oath in respect of the Church of Scotland at a meeting of the privy council held immediately after her accession. Halsbury Laws, above n 7, vol 8 (2), [39]. See London Gazette Extraordinary, 8 Feb 1952, 859 and London Gazette, 12 Feb 1952, 861 (now online <www.london-gazette.co.uk>). See also L Maer and O Gay, *The Coronation Oath.* House of Commons Library, Standard Note no SN/PC/00435.

In conclusion, the *Union with England Act 1706*: (a) confirms the *Bill of Rights 1688* and the *Act of Settlement 1700* in respect of succession – including the religious restrictions on the sovereign; (b) inserts an additional oath in respect of the Church of England into the *Coronation Oath Act 1688* and; (c) requires the sovereign to take an oath in respect of the Church of Scotland – although this is not inserted into the coronation oath.

E *Union with England Act 1707*

This Act[89] (the Scots counterpart to the English *Union with Scotland Act 1706*), in art II, provides for succession to the monarchy of the United Kingdom of Great Britain and the dominions to belong to Queen Anne and, on default of issue, to Sophia and the '*heirs of her body being protestants*', according to the *Act of Settlement 1700*. This is historic, save for the reference to '*heirs*'. Art II continues:

> And that all papists and persons marrying papists shall be excluded from and for ever incapable to inherit possess or enjoy the imperial crown of Great Britain and the Dominions thereunto belonging or any part thereof. And in every such case the crown and government shall from time to time descend to and be enjoyed by such person being a protestant as should have inherited and enjoyed the same in case such papists or person marrying a papist was naturally dead according to the [*Bill of Rights 1688*].

Thus this Scots legislation confirms the terms of the *Bill of Rights 1688* and the *Act of Settlement 1700*. Like its English counterpart (see (d)), it also refers to – and recites in art XXV – the *Church of Scotland Act* – including the oath in respect of the Church of Scotland required of the sovereign.[90] The *Union with Scotland Act 1707*, in art XXV, also states that the *Church of Scotland Act* is a '*fundamental*' and '*essential*' condition of the union. Thus, the oath in respect of the Church of Scotland is also a fundamental and essential condition of the union but – despite being declared to be immutable – it is asserted that it can be changed, as with other general legislation.[91] The *Union with England Act 1707* (in its preamble) also refers to other Scots legislation – the *Claim of Right 1689*, which is still extant.[92] Similar to its English counterpart, the *Claim of Right 1689* lists the various misdeeds of James VII of Scotland (James II of England)[93] and that he has forfeited the Crown.[94] This material is historic. However, the Claim also declares:

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89 1707, c 7.

90 The wording in this respect is the same as in the Union with England Act 1706, see 1(d).

91 See above n 84 and 85.

92 *Claim of Right 1689* (c 28) (validated by the *Parliament of 1689 Act 1703* (c 3)). Halsbury, above n 7, vol 8(2), [52]: 'In April 1689, the Scottish Estates (i.e. Parliament) adopted the Claim of Right, which sets out the conditions on which the Scottish crown was offered to William and Mary, who by then were already king and queen of England'.

93 A number of these mis-deeds make reference to Roman Catholics, see Statute Law Database, above n 82.

94 *viz*: 'being a professed papist did assume the regal power and acted as king without ever taking the oath required by law and has by the advice of evil and wicked counsellors invaded the fundamental constitution of the kingdom and altered it from a limited monarchy to an arbitrary despotic power and has exercised the same to the subversion of the protestant religion and the violation of the laws and liberties of the kingdom inverting all the ends of government whereby he hath forfeited the right to the crown and the throne is become vacant'. (spelling modernised)

> That by the law of this kingdom no papist can be king or queen of this realm nor bear any office whatsoever therein nor can any protestant successor exercise the regal power until he or she swear the coronation oath.[95] (spelling modernised)

Finally, the Claim of Right declares that William of Orange and Mary are the king and queen of Scotland and, after their decease, Anne of Denmark and her heirs (which failing, to William and his heirs). This also is historic, since title, in fact, passed to George I (son of the Electress Sophia) pursuant to the *Act of Settlement 1700*.

In conclusion, the *Union with England Act 1707*: (a) confirms the *Bill of Rights 1688* and the *Act of Settlement 1700* in respect of succession – including the restrictions on the religion of the sovereign; (b) imposes an obligation on the sovereign to give an oath in respect of the Church of Scotland and; (c) refers to the *Claim of Right 1689*, which provides that no Roman Catholic can be sovereign and that the sovereign must swear the coronation oath.

F *Union with Ireland Act 1800*

The *Union with Ireland Act 1800*,[96] art II, bears the headnote '*That the succession to the crown shall continue limited and settled as at present*' and it provides:

> That it be the second article of union, that the succession to the imperial crown of the said [UK], and of the dominions thereunto belonging, shall continue limited and settled in the same manner as the succession to the imperial crown of the said kingdoms of Great Britain and Ireland and now stands limited and settled, according to the existing laws and to the terms of union between England and Scotland.

There is no provision in this Act (which now only applies to Northern Ireland) on the coronation oath.[97]

In conclusion, the *Union with Ireland Act 1800* confirms the *Bill of Rights 1688*, the *Act of Settlement 1700* and the *Union with Scotland Act 1706* in respect of succession – including the religious restrictions on the sovereign.

G *Statute of Westminster 1931*

The *Statute of Westminster 1931*[98] contains a preamble which states:

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95 There are a number of other declarations relating to Roman Catholics in the *Claim of Right 1689*, see Statute Law Database, above n 82.

96 39 and 40 Geo 3 c 67 entitled: 'An Act for the Union of Great Britain and Ireland'. See also Halsbury Statutes, above n 7, vol 31, 820 and Halsbury Laws, above n 7, vol 8(2), [67] *et seq*, in particular [84]. Also, Robertson, above n 3, 283-92.

97 It may be noted that the *Union with Ireland Act 1800*, art V, refers to the Church of Scotland: 'That it be the fifth article of Union that ... the doctrine, worship, discipline and government of the [Church of Scotland] shall remain and be preserved as the same are now established by law and by the Acts for the union of the two kingdoms of England and Scotland'. This article would not be affected by any change to the religion of the sovereign.

98 22 and 23 Geo 5 c 4 entitled: 'An Act to give effect to certain resolutions passed by the Imperial Conferences held in the years 1926 and 1930'. This refers to imperial conferences held at Westminster in 1926 and 1930 which concurred in making the declarations and resolutions set forth in the Reports of the same. For the reports see Cmd 2768 and 3717. See also KC Wheare, *The Statute of Westminster and Dominion Status* (4th ed, 1949) 82, 149-52 and ch 12; RP Mahaffy, *The Statute of Westminster 1931* (1932) and RTE Latham, *The Law and the Commonwealth* (1937).

> And whereas it is meet and proper to set out by way of preamble to the Act that, inasmuch as the crown is the symbol of free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that *any alteration in the law touching the Succession to the Throne or the Royal Style of Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the [UK]*.[99] (italics supplied)

Although it has been suggested that this preamble has a moral (rather than a legal) basis *vis-a-vis* consultation on succession[100] – since the preamble refers to a convention and not to a matter of strict law[101] – is best to conclude that it is legally binding by reference to the *Declaration of Abdication Act 1936*,[102] in which assent was sought from the Commonwealth countries for the abdication of Edward VIII (1936).[103] Obtaining this assent did not seem to have been problematic.[104] Today, the assent of *what* Commonwealth countries would be required in respect of any change to succession – including the removal of religious restrictions on the sovereign?

- It is arguable that assent is only required of those 15 Commonwealth countries who still have the sovereign as their monarch *and* who were parties to the agreement on which the *Statute of Westminster 1931* was

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[99] Halsbury Statutes, above n 7, vol 7(2), 339. See also Halsbury Laws, above n 7, vol 12 (1), [9] and vol 8(2), [37].

[100] Blackburn, above n 6, 126: 'In British law, the nature of this obligation is moral or one of honour only, because the need for these assents is stipulated in the preamble rather than the actual text of the 1931 statute. But nonetheless, this obligation is a powerful political convention. Indeed, in international terms across those Commonwealth countries affected, it is equivalent to a treaty. Absence of consultation by the UK government before it brought forward legislation to reform the succession laws would be regarded as high handed and arrogant, and it would cause serious offence in Australia, Canada and the other Commonwealth states where the Queen now reigns'.

[101] Wheare, above n 98, 149-51 (not enacted in the body of the Act). Stair, above n 5, vol 7, [703]: 'As a matter of domestic law this requirement could not fetter the right of Parliament to act without the consent of the Dominions'.

[102] *His Majesty's Declaration of Abdication Act 1936* (1 Edw 8 and 1 Geo 6 c 3) entitled: 'An Act to effect His Majesty's declaration of abdication; and for purposes connected therewith'. The preamble states: 'Whereas his majesty by his royal message of [10th December 1936] has been pleased to declare that he is irrevocably determined to renounce the throne for himself and his descendants, and has for that purpose executed the instrument of abdication set out in the schedule to the Act, and has signified his desire that effect thereto should be given immediately: And whereas, following upon the communication to his dominions of his majesty's said declaration and desire, the Dominion of Canada pursuant to the provisions of [s 4] of the *Statute of Westminster 1931* has requested and consented to the enactment of this Act, and the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa have assented thereto'. See also Wheare, above n 98, ch 12, Blackburn, above n 6, 127-8 and Brazier, above n 25, 93.

[103] Bogdanor, above n 30, 45: 'The provisions of this [the Declaration of Abdication] Act were required, by convention, first laid down in 1930 and confirmed in the preamble to the *Statute of Westminster 1931*, to be given the consent of the other members of the Commonwealth. Since today the sovereign is also the sovereign of fifteen other Commonwealth countries, there must be a common rule of succession, and it would be unconstitutional, although not illegal, for the British government unilaterally to alter the rule of succession'. See also A Berriedale Keith, *The Constitution of England from Queen Victoria to George VI* (1940), vol 1, 29-34.

[104] See Amery, above n 3, 135.

based – now being Canada, Australia and New Zealand.[105] However, in practice, it would seem appropriate that all those Commonwealth countries which still have the sovereign as their sovereign[106] assent to any changes to succession – including the removal of religious restrictions on the sovereign;[107]

- In the past, Commonwealth assents have been sought pursuant to the *Statute of Westminster 1931* on three occasions: (a) in 1936, on the abdication of Edward VIII; (b) in 1947, on the removal of the title 'Emperor of India' from George VI's title; (c) in 1953, on the adoption of separate titles by Elizabeth II for separate countries of which she was sovereign.[108]

Further, the *Statute of Westminster 1931*, s 4 bears the headnote '*Parliament of the United Kingdom not to legislate for Dominions except by consent*'. It provides:

> No Act of Parliament of the [UK] passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is specifically declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

The effect of this is that a United Kingdom Act amending succession – to apply to any Dominion – must declare in the Act that that Dominion has '*requested and consented*' to it. Brazier notes:

> The complexity of the effects of the preamble between the various realms means that there is no uniform rule which requires either local primary legislation to express the necessary consent, or a simple parliamentary resolution. Thus, for example, effect was given in the Dominions to their consents to the Abdication Act 1936 by local legislation in some of them (as in Canada and South Africa), or by Parliamentary resolution in others (as in Australia and New Zealand).[109]

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[105] See Stair, above n 5, vol 7, [703], fn 5. The assent of the Republic of Ireland is not required to a change in style or title. *Ireland Act 1949*, s 3(3). South Africa became a republic in 1981 and its assent is not required. Newfoundland surrendered her status as a dominion in 1933. Cf Q Edwards, *The Canon Law of the Church of England: Its Implications for Unity* (1988) *Ecclesiastical Law Journal* 1(3), 18, 22 (argues that the *Statute of Westminster 1931* would not apply to other Commonwealth countries, save for Australia, Canada and NZ).

[106] I.e. Antigua and Barbuda, Australia, Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, NZ, Papua New Guinea, St Christopher and Nevis, St Lucia, S Vincent and the Grenadines, Solomon Islands, Tuvalu.

[107] Halsbury, above n 7, vol 8(2), [37]: 'Any alteration by Parliament in the law touching the succession to the throne would, except perhaps in the case of Canada and Australia, be ineffective to alter the succession to the throne in respect of, and in accordance with the law of, any other independent member of the Commonwealth which was within her Majesty's dominions at the time of such alteration, unless the alteration were effected by legislation expressly reciting the request and consent of the member concerned. Constitutional convention therefore requires that the assent of the Parliament of each member of the Commonwealth within her Majesty's dominions be obtained in respect of any such alteration [concerning succession to the throne] in the law'. See also Halsbury, above n 7, vol 6, [813]-[816]; Maer, above n 19, 13-6 and *O'Donohue v Canada* [2003] OTC 623 and (2003) 109 CRR.

[108] Noted by Brazier, above n 76, 572. For the *Royal Titles Act 1953*, see 2.

[109] Brazier, above n 25, 101. The situation depends on whether the Commonwealth country in question has enacted the equivalent of the *Statute of Westminster 1931*, s 4 in its domestic legislation. See also Wheare, above n 98, 152 (who summarises it) and ch 12.

Given this complexity, it would seem advisable – in the case of any UK Act dealing with any change in succession, including the removal of religious restrictions on the sovereign – that the UK Act make it clear (in the Act) that all 15 Commonwealth countries have '*requested and consented*' to the same.

In conclusion, the *Statute of Westminster 1931* requires various Commonwealth countries to assent to changes to succession – which includes changes affecting the religious restrictions on the sovereign. Further, the UK Act should make it clear that those Commonwealth countries have requested, and consented, to such changes.

H *Other Legislation – Sovereign as Head of Church of England*

The sovereign is '*supreme governor*' of the Church of England. This was contained in an oath required to be given by the *Act of Supremacy 1558*[110] (repealed). However, s 8 of this same Act bears the headnote '*All spiritual jurisdiction united to the Crown'*. It provides:

> And ... that such jurisdictions privileges superiorities and pre-eminences [spiritual] and ecclesiastical, as by any spiritual or ecclesiastical power or authority hath heretofore been or may lawfully be exercised or used for the visitation of the ecclesiastical state and [persons], and for the reformation order and correction of the same and of all manner of errors heresies schisms abuses offences contempts and enormities, shall for ever by authority of this [present Parliament] be united and annexed to the imperial crown of this realm.[111] (spelling modernised)

Thus it retains the concept of the sovereign as supreme governor. Further, the declaration of the sovereign which prefaces the Church of England's Thirty Nine Articles of Religion describes the sovereign as '*being by God's ordinance, according to our just title, Defender of the Faith and ... Supreme Governor of the Church of England*'.[112] Among other things, the sovereign

- formally appoints archbishops and bishops;[113]
- summons (and dissolves) the General Synod of the Church of England; and
- gives assent to new ecclesiastical measures, to enable them to take effect.[114]

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[110] 1 Eliz c 1: 'An Act restoring the Crown the ancient jurisdiction over the statute ecclesiastical and [spiritual] and abolishing the foreign power repugnant to the same'. (spelling modernized). See also Halsbury Statutes, above n 7, vol 14, 46 and Halsbury Laws, above n 7, vol 14, [346]. Cf *Supremacy of the Crown Act 1534* (26 Hen 8 c 1) (rep) which used an older form, 'only supreme head in earth of the Church of England'.

[111] See also Halsbury Laws, above n 7, vol 14, [352]; Bogdanor, above n 30, ch 9 and Stair, above n 5, vol 7, [709].

[112] The 39 Articles are no longer recognized by statute (*Clerical Subsciption Act 1865*, ss 1,4, 5 (rep)). The Revised Canons Ecclesiastical, Canon A2 declares that the 39 Articles are agreeable to the word of God and may be assented to with a good conscience by all the members of the Church of England. Canon A7 records that the Queen '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'. However, the canons of the Church of England (which are regulations made by the General Synod of the Church of England) also do not have statutory force. See Halsbury's Laws, above n 7, vol 14, [352] and Q Edwards, above n 105.

[113] *Appointment of Bishops Act 1533* (25 Hen 8 c 20). See also Halsbury Statutes, above n 7, vol 14, 23. However, the sovereign does this on the advice of the Prime Minister who, himself, acts on the advice of the Standing Commission on Diocesan Vacancies.

In conclusion, if the religious restrictions on the sovereign previously discussed were removed – although this would not necessarily lead to the dis-establishment of the Church of England[115] – there could arise the possibility, in the future, of the supreme governor of the Church of England being of another protestant faith, or a Roman Catholic, agnostic, atheist *etc*. Of course, this may not occur for a long time, as Brazier notes:

> too much has been made of that argument, at least if we concentrate on the monarch's position as Supreme Governor of the [Church of England]. The monarch is, by statute, Supreme Governor by virtue of being monarch: there is no other test.[116]

That said, if the present religious restrictions on the sovereign were removed it would seem sensible to make provision for the sovereign to be able to resign as head of the Church of England – if incompatible with his or her religious beliefs[117] – as well as for the General Synod to be able to secure the same.[118] If the Church of England is dis-established, the rationale for any religious restrictions on the sovereign goes in any case.[119] It may be noted that the sovereign's position in the case of the Church of Scotland is quite different. He or she is an ordinary member only, with a right to attend their General Assembly – but not to take part in its deliberations.[120] Therefore, if the sovereign (or the Church of Scotland) decided, in the future, to end this role, it would change little.

In conclusion, if the present religious restrictions on the sovereign not being (or marrying) a Roman Catholic – and on being a '*faithful protestant*' and '*in communion* with the Church of England' – are removed, this will affect the issue of succession. As

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[114] *The Church of England Assembly (Powers) Act 1919* provides for the General Synod of the church to legislate by way of measures, which measures are given royal assent in the same fashion as Parliamentary bills. See Halsbury Statutes, above n 7, vol 14, 7 and 297 and Halsbury Laws, above n 7, vol 14, [350] and [355]. Also, Blackburn, above n 6, 131 and Stair, above n 5, vol 7, [709]. See also Submission of the Clergy Act 1533 (25 Hen 8 c 19, still extant) and Halsbury Statutes, above n 7, vol 14, 21.

[115] Cf Blackburn, above n 6, 128: 'These two issues – reform of the Act of Settlement and disestablishment of the [Church of England] are – in truth, two sides of the same coin. Reform of the Act of Settlement and its related statutes would set in train an inevitable momentum towards disestablishment; and disestablishing the [Church of England] would automatically remove the rationale for the religious provisions binding succession to the Crown'.

[116] Brazier, above n 25, 90.

[117] Since the sovereign can abdicate, it is possible for him to resign his position as head of the Church of England. Further, the current role of the sovereign is really only a ceremonial one. Halsbury, above n 7, vol 8(2), [4]: 'The monarch … is the titular head of the [Church of England]'. Blackburn, above n 6, 129, 'largely ceremonial role'.

[118] At present, the Synod accepts the sovereign on sufferance. There is little doubt that, if they adopted a measure appointing the Archbishop of Canterbury (say) as the head of the Church of England, this would be accepted by the sovereign – albeit some statutory amendment would be necessary.

[119] See above n 115. One would agree with Blackburn. For a useful review of Church-State relations, see Cranmer, above n 85.

[120] Halsbury, above n 7, vol 8(2) [54]: 'The Queen has responsibilities in relation to the [Church of Scotland], but these are of less significance than her role as Supreme Governor of the [Church of England]'. The Lord High Commissioner (or Queen's Commissioner) is appointed by the Queen as her representative at the General Assembly (which Assembly has power to pass resolutions that can take effect without the royal assent). See generally, F Lyall, *Of Presbyters and Kings* (1980) and the *Office of the Lord High Commissioner* (1957). Also, Stair, above n 5, vol 7, [709].

such, it will require the amendment of the following Acts: *Bill of Rights 1688, Claim of Right 1689, Coronation Oath Act 1688, Act of Settlement 1700, Union with Scotland Act 1706, Union with England Act 1707* and the *Union with Ireland Act 1800*. Such a change would also require the assent of 15 Commonwealth countries pursuant to the *Statute of Westminster 1931*, with the same having requested and consented to it. It will also affect the *Royal Titles Act 1953*, which is now considered.

II STYLE AND TITLE OF THE SOVEREIGN

The style and title[121] of the sovereign has changed over the centuries. More recently, it has reflected the rise, and fall, of empire. In respect of changes to the sovereign's style and title, James I (1603-25) changed his pursuant to a royal proclamation issued under the *royal prerogative*.[122] However, when Victoria (1837-1901) adopted the title of '*Empress of India*' in 1876, legislation provided for the issue of a *royal proclamation*.[123] The same happened in the case of a change to the style and title of Edward VII (1901-10),[124] George V (1910-36)[125] and George VI (1936-52).[126] The present title of the sovereign in the UK is:

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[121] Legally, there seems to be no distinction between '*style*' and '*title*' (the former being an older expression) and the Act itself simply refers to title. Lord President Lord Cooper in a Scots decision, *McCormick v Lord Advocate* 1953 SC 396, 410-1, did not think that 'Elizabeth II' was part of the style or title of the sovereign for the purposes of the *Royal Titles Act 1953*.

[122] Proclamation of James I of 15 November 1604: 'by the force of our royal prerogative, we assume to ourselves the style and title of King of Great Britain, France, and Ireland, Defender of the Faith. … discharging and discontinuing the several names of England and Scotland, to be expressed in our titles'. Quoted in Dicey and Rait, above n 3, 121.

[123] *Royal Titles Act 1876* (39 and 40 Vict c 10) (rep).This Act referred to the Union with Ireland Act 1800 (art 2 of which provides: 'that the royal stile and titles appertaining to the imperial crown of the said [UK] and its dependencies … shall be such as his Majesty, by his royal proclamation under the great seal of the [UK], shall be pleased to appoint') and then stated, in s 1: 'It shall be lawful for her most gracious majesty … by her royal proclamation under the great seal of the [UK], to make such addition to the style and titles at present appertaining to the imperial crown of the [UK] and its dependencies as to her majesty may seem fit'.

[124] *Royal Titles Act 1901* (1 Edw 7 c 15) and SR and O 1904, I, 'Arms, Ensigns etc', 12.

[125] *Royal and Parliamentary Titles Act 1927* (17 and 18 Geo 5 c 4) and SR and O 1927, no 422. See also Wheare, above n 98, 35 and 125 and Ridges, above n 3, 118. George V's title was: 'George V, by the grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India'. It was changed by *Royal and Parliamentary Titles Act 1927*, s 1 and a royal proclamation issued on 12 April 1927 (the latter is contained in Keith, *Speeches and Documents of the British Dominions*, 171-2) to 'George V, by the grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India'. Wheare, above n 98, 125 notes: 'the legal term 'Great Britain', and the geographical term 'Ireland' replace the legal expression 'the United Kingdom of Great Britain and Ireland' and reference to the political partition of Ireland is avoided'.

[126] *Indian Independence Act 1947*, s 7(2) provided: 'The assent of the Parliament of the [UK] is hereby given to the omission from the Royal Style and Titles of the words '*Indiae Imperator*' and the words '*Emperor of India*' and to the issue by his Majesty of that purpose of his Royal Proclamation under the Great Seal of the Realm'. For the royal proclamation, see London Gazette of 22 June 1948. See also Halsbury Statutes, above n 7, vol 7(2), 349 and Brazier, above n 25, 101. The assent of the Parliaments of Canada, Australia, NZ and South Africa was given by separate Acts. De Smith, above n 66, 266.

> Elizabeth II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth, *Defender of the Faith.*[127] (italics supplied)

The title '*Defensor Fidei'* was, it seems,[128] conferred by pope Leo X (1513-21) on Henry VIII (1509-47) as a reward for the latter's work against Martin Luther – entitled *A Defence of the Seven Sacraments* (*Assertio Septem Sacramentorum)* – which work was completed in May 1520 and presented to the pope in October of that year.[129] This title was confirmed by pope Clement VII (1523-34) but withdrawn when Henry was excommunicated by Pope Paul III (1534-49). However, an Act of Parliament of 1543-4 (now repealed) confirmed this title.[130] The title is anomalous, in that it applied when Henry was a Roman Catholic; yet was utilised when he became head of the Church of England. It has been used by succeeding sovereigns. This title obviously has a religious connotation since the '*faith*' being defended is that of the Church of England. In 1953, Amery noted its incongruity when applied to Commonwealth countries[131] and only two of those who have Elizabeth as their sovereign now have this title.[132] If the religious restrictions on the sovereign previously discussed are dropped, the title '*Defender of the Faith*' ought also to go. The *Royal Titles Act 1953*[133] is pertinent in respect of this. The preamble to this Act notes that the Commonwealth agreed, in 1952, that each of the sovereignties in the Commonwealth should be free to adopt its own title in a form which was suitable to its local circumstances.[134] S 1 of the Act bears the headnote '*Power to alter the style and titles of the Crown*'. It provides:

> The assent of the Parliament of the [UK] is hereby given to the adoption by her Majesty, for use in relation to the [UK] and all other the territories for whose foreign relations Her Government in the [UK] is responsible, of such style and titles as her Majesty may think fit having regard to the said agreement, in lieu of the style and titles at present appertaining to the Crown, and to issue by Her for that purpose of Her Royal Proclamation under the Great Seal of the Realm.[135]

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127 The present title was announced by Royal Proclamation dated 28 May 1953. See Halsbury Laws, above n 7, vol 12(1), [23]; Cmd 8748 and De Smith, above n 66, 267. For Elizabeth II's title at accession, above n 137.

128 See also E Coke*, Institutes of the Laws of England* (W Clarke and Sons, London, last ed, 1824), vol 1, 7b. Cf The petition of the clergy and bishops to Edward II (1307-27) to 'defend' their rights and privileges. See Appendix A.

129 JD Mackie, *The Earlier Tudors 1485-1558* (1987 rep) 311. Lord Herbert, *Life and Reign of Henry VIII* (1741 ed) 95 (transcript of bull of Leo X).

130 35 Hen 8 c 3 (King's Style) (rep) 'Defender of the Faith'. Cf Brazier, above n 25, 103: 'The ability of the monarch to use that title, stems from an Act of Supremacy of 1559'.

131 Amery, above n 3, 167: 'Defender of the Faith' applicable by a stretch to all Christian member nations, could hardly apply to the new Hindu, Moslem, and Buddhist members'. See also De Smith, above n 66, 267.

132 Canada and New Zealand.

133 1 and 2 Eliz 2 c 9 entitled: '*An Act to provide for the alteration of the Royal Style and Titles*'. See also Halsbury Statutes, above n 7, vol 10, 162.

134 'Whereas it is expedient that the style and titles at present appertaining to the Crown should be altered so as to reflect more closely the existing constitutional relations of the members of the Commonwealth to one another and their recognition of the Crown as the symbol of their free association and of the sovereign as head of the Commonwealth. And whereas it was agreed between representatives of her Majesty's governments in the United Kingdom, Canada, Australia, New Zealand, the Union of South Africa, Pakistan, Ceylon assembled in London in the month of December [1952], that there is need for an alteration thereof which, whilst permitting of the use in relation to each of those countries of a form suiting its particular circumstances, would retain a substantial element common to all'.

135 See generally, De Smith, above n 66.

Thus the title '*Defender of the Faith*' – which is not contained in UK legislation – can be removed by royal proclamation in the UK.[136] This would not require the assent of other Commonwealth countries pursuant to the *Statute of Westminster 1931*[137] (although this has been disputed).[138] It could also be removed (separately, if desired) by royal proclamation in those Commonwealth countries which also still have that title (Canada and NZ) – without reference to other Commonwealth countries.[139]

In conclusion, if the religious restrictions on the sovereign are removed, reference to '*Defender of the Faith*' from the title of the sovereign should also be removed. This can be achieved by way of royal proclamation.

III REGENCY

The religious restrictions currently imposed on the sovereign also affect any regent. The *Regency Act 1937*[140] provides for a regency: (a) while the sovereign is under 18 on his (her) accession or; (b) in the event of the incapacity of the sovereign through illness. The Act also makes provision for the delegation of royal functions to counsellors. S 1 of

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136 The Union with Ireland Act 1800, art 2, also makes provision for the royal style and titles to be amended by proclamation, see above n 123.

137 On 6 Feb 1952, Elizabeth II was acknowledged in the UK as 'Queen of this Realm, and of all her other realms and territories, Head of the Commonwealth, Defender of the Faith'. This omitted reference to Ireland, substituted 'realms and territories' for 'British dominions beyond the seas' and introduced the words 'Head of the Commonwealth'. De Smith n 66, 269: 'A suggestion that the introduction of a new form of title by the [UK] violated the convention set out in the preamble to the Statute of Westminster cannot be taken seriously; the convention required action by the several parliaments only where a change was made in the *law* relating to the royal titles…'.

138 Brazier, above n 25, 103 fn 80: 'It is arguable that the Queen's successor could proclaim such style and titles as he thought fit under the *Royal Titles Act 1953*. But that statute was passed following a Commonwealth Prime Minister's Conference specific agreement that the Queen should be able to use different titles in her various realms, thus reflecting the divisibility of the crown. Would a provision with that background be unambiguously wide enough to permit alteration of the title of Defender of the Faith, itself confirmed by another specific statute?' Cf R Brazier, *A British Republic* [2002] CLJ 351 and HC Deb vol 341 col WA57 (13 Dec 1999, Tony Blair, PM) re succession.

139 OH Phillips and P Jackson, above n 4, 801-2 (no longer requires the assent of any other members). Bogdanor, above n 30, 269: 'consent was no longer needed to changes in the local element of the title…today there is merely notification of changes after the event'. De Smith and Brazier, above n 4, 119, and above n 8: 'The adoption of a separate royal title for a newly independent Commonwealth country of which her majesty remains Queen has not recently been accompanied by the assent of the Parliaments of other independent Commonwealth countries. To this extent the Convention recited in 1931 has partly lapsed…'.

140 1 Edw 8 and 1 Geo 6 c 16. This Act was passed as a consequence of the incapacity of George V in 1928 and 1936. See Halsbury Statutes, above n 7, vol 10, 146 and Halsbury Laws, above n 7, vol 12(1), [12]-[13]. Also, Blackburn, above n 6, 163-7; R Brazier, *Constitutional Practice* (2nd ed, 1994) 194-5; R Brazier, *Royal Incapacity and Constitutional Continuity* [2005] *Cambridge Law Journal* 352 and Sunkin and Payne, above n 4, 344-9. For prior history, Anson, above n 3, 76-81 and Ridges, above n 3, 119-20. For Scotland, see Stair, above n 5, [705].

the Act bears the headnote, '*Regency while the sovereign is under eighteen*'[141] and s 2 bears the headnote '*Regency during total incapacity of the sovereign'*.[142] S 3 bears the headnote '*The Regent*' and it deals with the religion of the regent. It provides:

> (1) If a regency becomes necessary under this Act, the regent shall be that person who, excluding any persons disqualified under this section, is next in the line of succession to the Crown.
>
> (2) A person shall be disqualified from becoming or being regent, if he is not a British subject[143] of full age and domiciled in some part of the [UK], or is a person who would, under [s 2] of the *Act of Settlement 1700*, be incapable of inheriting, possessing, and enjoying the crown; and [s 3] of the *Act of Settlement* shall apply in the case of a regent as it applies in the case of a sovereign.[144]

Thus the religious restrictions imposed on the sovereign are replicated with regard to the regent, who must also join *'in communion'* with the Church of England (see 1(c)). S 4 of the Act bears the headnote '*Oaths to be taken by, and limitations of power of, Regent*'. It provides:

> (1) The regent shall, before he acts in or enters upon his office, take and subscribe before the Privy Council the oaths set out in the Schedule to this

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141 It provides that: '(1) If the sovereign is, at his accession, under the age of [18] years, then, until he attains that age, the royal functions shall be performed in the name and on behalf of the sovereign by a regent; (2) For the purpose of any enactment requiring any oath or declaration to be taken, made or subscribed, by the sovereign on or after his accession, the date on which the sovereign attains the age of [18] shall be deemed to be the date of his accession'. The Act, s 8(2), provides: 'In this Act, save as otherwise expressly provided, the expression "royal functions" includes all powers and authorities belonging to the Crown, whether prerogative or statutory, together with the receiving of any homage required to be done to his Majesty'.

142 It provides: '(1) If the following persons or any three or more of them, that is to say, the wife or husband of the sovereign, the lord chancellor, the speaker of the house of commons, the lord chief justice of England, and the master of the rolls, declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the sovereign is by reason of infirmity of mind or body incapable for the time being of performing the royal functions or that they are satisfied by evidence that the sovereign is for some definite cause not available for the performance of those functions, then, until it is declared in like manner that his majesty has so far recovered his health as to warrant his resumption of the royal functions or has become available for the performance thereof, as the case may be, those functions shall be performed in the name of and on behalf of the sovereign by a regent. (2) A declaration under this section shall be made to the Privy Council and communicated to the governments of his majesty's dominions'.

143 Why this should be a requirement is uncertain, since there is no such requirement on the sovereign, as noted by Brazier, above n 140, 367

144 S 3 continues: '(3) If any person who would at the commencement of a regency have become regent but for the fact that he was not then of full age becomes of full age during the regency, he shall, if he is not otherwise disqualified under this section, thereupon become regent instead of the person who has theretofore been regent. (4) If the regent dies or becomes disqualified under this section, that person shall become regent in his stead who would have become regent if the events necessitating the regency had occurred immediately after the death or disqualification; (5) Section [2] of this Act shall apply in relation to a regent, with the substitution for references to the sovereign of references to the regent, and for the words "those functions shall be performed in the name and behalf of the sovereign by a regent" of the words 'that person shall be regent who would have become regent if the regent had died'.

> Act, and the Privy Council are empowered and required to administer those oaths and to enter them in the Council Books.
>
> (2) The regent shall not have the power to assent to any Bill for changing the order of succession to the Crown or for repealing or altering an Act of the fifth year of the reign of Queen Anne made in Scotland entitled 'An Act for securing the Protestant religion and Presbyterian Church Government.[145]

The Schedule to the Act sets out the Oaths to be taken by the Regent. As to the third oath,[146] it provides:

> I swear that I will inviolably maintain and preserve in England and in Scotland the Settlement of the true Protestant religion as established by law in England and as established in Scotland by the laws made in Scotland in prosecution of the Claim of Right, and particularly, by an Act intituled 'An Act for Securing the Protestant religion and Presbyterian Church Government' and by the Acts passed in the Parliament of both Kingdoms for Union of the two Kingdoms, together with the Government, Worship, Discipline, Rights, and Privileges of the Church of Scotland. So help me God.[147]

S 5 of the Act bears the headnote '*Guardianship etc, of sovereign during regency*'[148] and s 6 bears the headnote '*Power to Delegate Royal Functions to*

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[145] For this Act, see above n 86.

[146] The first two oaths are: '1. I swear that I will be faithful and bear true allegiance to [here insert name of the sovereign] his heirs and successors according to law. So help me God'. 2. 'I swear that I will truly and faithfully execute the office of regent, and that I will govern according to law, and will, in all things, to the utmost of my power and ability, consult and maintain the safety, honour, and dignity of [here insert the name of the sovereign] and the welfare of the people. So help me God'.

[147] For the first Act, see above n 81. For the *Protestant Religion and Presbyterian Church Act 1707*, see above n 86. For the *Claim of Right 1689*, see above n 91.

[148] It provides, 'During a regency, unless Parliament otherwise determines – (a) if the sovereign is under the age of [18] years, and unmarried, his mother, if she is living, shall have the guardianship of his person; (b) if the sovereign, being married, is under the age of [18] years or has been declared under this Act to be incapable for the time being of performing the royal functions, the wife or husband of the sovereign, if of full age, shall have the guardianship of the person of the sovereign; (c) the regent shall, save in the cases aforesaid, have the guardianship of the person of the sovereign; and the property which in accordance with the terms of any trust affecting it is to be administered by some other person, shall be administered by the regent'.

Counsellors of State'.[149] It should also be noted that the *Regency Act 1953*[150] provides for Prince Philip to act as regent in certain circumstances – and it refers to his not being regent if he fails to satisfy the religious restrictions contained in the *Regency Act 1937* s 3(2) (see above). This Act is of little relevance today since it is very unlikely to be invoked – the Prince being 90 and there being children (and grandchildren) of the Queen and the Prince over the age of 18.[151] One other Act makes provision on the religion of the regent. The *Roman Catholic Relief Act 1829*,[152] s 12 bears the headnote '*This Act not to enable Roman Catholics to hold certain offices*'. It provides:

> nothing herein contained shall extend or be construed to extend to enable any person or persons professing the Roman Catholic religion to hold or exercise the office of ... regent of the [UK], under whatever name, shape or title such office may be constituted

The assent of certain Commonwealth countries to changes in matters affecting regency pursuant to the *Statute of Westminster 1931*, is not required.[153]

In conclusion, a person cannot be regent if he or she fails to satisfy the religious restrictions laid down in the *Act of Settlement 1700* and the *Roman Catholic Relief Act 1829*. Such a person must also join '*in communion*' with the Church of England, as well as give an oath in respect of the Church of England and the Church of Scotland.

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[149] It provides: '(1) In the event of illness not amounting to such infirmity of mind or body as is mentioned in [s 2] of this Act, or of absence or intended absence from the [UK], the sovereign may, in order to prevent delay or difficulty in the dispatch of public business, by letters patent under the great seal, delegate, for the period of that illness or absence, to counsellors of state such of the royal function as may be specified in the letters patent, and may in like manner revoke or vary any such delegation: Provided that no power to dissolve Parliament otherwise than on the express instructions of the sovereign (which may be conveyed by telegraph), or to grant any rank, title, or dignity of the peerage may be delegated; (2) Subject as hereinafter provided, the counsellors of state shall be the wife or husband of the sovereign (if the sovereign is married), and the next four persons who, excluding any persons disqualified under this section, are next in the line of succession to the Crown, or if the number of such persons next in the line of succession is less than four, then all such persons: provided that if it appears to the sovereign that any person who, in accordance with the foregoing provisions of this subsection, would be required to be included among the counsellors of state to whom royal functions are to be delegated, is absent from the [UK] or intends to be so absent during the whole or any part of the period of such delegation, the letters patent may make provision for excepting that person from among the number of counsellors of state during the period of such absence. (2A) Any person disqualified under this Act from being regent shall be disqualified from being counsellor of state. (3) Any functions delegated under this section shall be exercised jointly by the counsellors of state, or by such number of them as may be specified in the letters patent, and subject to such conditions, if any, as may be therein prescribed. (5) The provisions of this section shall apply in relation to a regent with the substitution for references to the sovereign of references to a regent, so however, that in relation to a regent subsection (2) of this section shall have effect as if after the word "next", where that word first occurs therein, there were inserted the words "after the regent". (6) Any delegation under this section shall cease on the demise of the Crown or on any occurrence of any events necessitating a regency or a change of regent'. Brazier, above n 140, 385 suggests certain improvements, although a couple are likely to be contentious.

[150] 2 and 3 Eliz 2 c 1.

[151] One would suggest the *Regency Act 1953* is spent – save for s 2. It states 'The heir apparent or heir presumptive to the Throne shall be deemed for all the purposes of the *Regency Act 1937* to be of full age if he or she has attained the age of [18] years'. See also Brazier, above n 140, 360. The *Regency Act 1943* is also spent.

[152] 10 Geo 4 c 7, entitled 'An Act for the relief of his Majesty's Roman Catholic subjects'. See also Halsbury Statutes, above n 7, vol 14, 70.

[153] See Wheare, above n 98, 175 and Bogdanor, above n 30, 49.

IV SUCCESSION TO THE CROWN – GENDER

As well as removing the religious restrictions on the sovereign, the unequal position as to male and female succession to the Crown should be considered. At common law, succession to the Crown is governed by feudal rules of hereditary descent formerly applicable to land – with two exceptions.[154] This still applies, although Parliament can change the rules of succession (as was done in 1688).[155] Succession to the crown depends on primogeniture: the eldest child succeeding, with male before female heirs.[156] Halsbury notes:

> The statutory limitation under the *Act of Settlement* (1700 or 1701) to the heirs of the body of Princess Sophia means that the common rules of inheritance, which recognise the right of primogeniture, as applicable to entailed interests in real property before 1926 continue to apply.[157]

Today, this restriction on the basis of gender goes against prevailing *mores* on sex equality as well as contemporary legislation to that effect. Also, possibly, the European Convention on Human Rights (ECHR), which is part of English law by virtue of the Human Rights Act 1998.[158] Many private members bills have been brought to change this gender limitation on succession.[159] The wording usually adopted is:

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[154] These are that: (a) in the case of females, title devolves on the eldest daughter alone and her issue (and not to the daughters equally as co-parcenors); and (b) doctrines relating to the exclusion of the half blood from inheritance do not apply. See Halsbury Laws, above n 7, vol 8 (2), [34] and W Blackstone, *Commentaries on the Laws of England* (1st ed, 1765-9, rep 1979) vol 1, 187. For the history of succession in Scotland, see Stair, above n 5, vol 7, [703]. The determination of who are heirs for the purposes of the succession to the Crown is according to English law, *Union with England Act 1707*, art II.

[155] Halsbury, above n 7, vol 12(1), [8] and vol 8 (2) [34] and [35]. [35] states: 'the Crown descends now according to the statutory limitations, but retaining its hereditary and descendible qualities as at common law, subject to the statutory provisions'. (i.e. under the *Act of Settlement 1700*). Blackstone n154, vol 1, 184: 'the crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself: but that right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown shall continue hereditary'. See generally, ibid, ch 3. It used to be high treason (6 Ann c 7, 1708, rep) to maintain by writing (or printing) that Parliament could not determine succession to the Crown. See Blackstone, ibid, 210.

[156] Ibid, vol 12(1), [10]. Also, vol 8(2), [34]. For the general history of primogeniture in the case of land see HJ Stephen, *New Commentaries on the Laws of England* (1841) vol 1, 371 *et seq*.

[157] Halsbury, Laws, above n 7, vol 12(1), [10] and vol 8(2), [34]. Also, Bradley and Ewing, above n 4, 243.

[158] Blackburn, above n 6, 157-63 which discusses ECHR, art 14. Also, Protocol 1, art 1 and Protocol 12.

[159] Listed in L Maer, *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill*, Research Paper 09/24 (17 March 2009). Also, Dept of Information Services, Parliamentary Information List SN/PC/04663, *Attempts to Amend Crown Succession since 1979*. It appears Queen Elizabeth II has no objection to such a change. 586 HL Deb 916 (27 Feb 1998).

> In determining the line of succession to the Crown and to all the rights, privileges and dignities belonging thereto no account shall be taken of gender, notwithstanding any custom or rule of law to the contrary.[160]

At a conference of Commonwealth heads of government meeting (CHOGM) in Perth, Australia in October 2011, the UK – as well as the heads of the 15 Commonwealth countries required to assent to changes to succession pursuant to the *Statute of Westminster 1931* (see 1 (g)) – agreed that this gender restriction should be removed as well as the restriction on the sovereign marrying a Roman Catholic.

In conclusion, in modern times, succession to the Crown should not be affected by gender. Male and female heirs should have an equal right to succession.

V MODERNISING THE LAW

Few would likely deny that the:

- Religious restrictions imposed on the sovereign are contrary to the general freedom of individuals in the UK to embrace such religion as they may choose;[161] and
- A limitation on gender, *vis-a-vis* succession, is contrary to prevailing *mores,* and legislation, on sexual equality.[162]

There have been various attempts to change the law on these matters. The reason, in part, why these have failed (it is asserted) is that legislative proposals have been piecemeal. In 2008, Jack Straw LC, in answer to a Parliamentary question stated:

> Legislation that would need to be reviewed includes the *Bill of Rights 1688*, the *Coronation Oath Act 1688*, the *Union with Scotland Act 1707*, the *Union with England Act 1707*, the *Princess Sophia Precedence Act 1711*, the *Royal Marriages Act 1772*, the *Union with Ireland Act 1800*, the *Accession Declaration Act 1910*, and the *Regency Act*

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[160] This wording was from the Succession to the Crown Bill (1997-8) of Lord Archer. It was adopted by Lord Dubs and Anne Taylor MP in their Succession to the Crown Bill (2004-5) and by Dr Ewan Harris in his Succession to the Crown (Prevention of Discrimination) Bill (2008-9). These three Bills are listed in Maer, above n 159 and discussed in Blackburn, above n 6, 151-4. See also L Maer, *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill.* Research Paper 09/24 (17 March 2009).

[161] See Blackburn, above n 6, 116: 'There is now widespread support for the proposition that the ancient prohibition on Roman Catholics, or persons marrying a Roman Catholic, becoming royal head of state should be abolished. This view has emerged as part of the wider historical context in which Roman Catholicism is no longer viewed as a threat to the political security of the state, as it was at the time three centuries ago when the Bill of Rights and the Act of Settlement were passed'. See also P Cumper, *The Protection of Religious Rights under section 13 of the Human Rights Act 1998* [2000] *Public Law* 254.

[162] Cretney, above n 7, 220: 'These provisions relating to the monarch's religion are impossible to reconcile with 21st century attitudes to discrimination based on ethnicity, gender, class or religion'.

> *1937*. Any change in legislation would among other things require the consent of member nations of the Commonwealth.[163]

As well as the legislation mentioned by Jack Straw, regard needs to be had to the *Act of Settlement 1700*, *Roman Catholic Emancipation Act 1829*, *Royal Titles Act 1953* and the *Regency Act 1953*. Would a repeal of all this material be complex? Blackburn states:

> this complication would hardly bother the government's legislative draftsman. ... As a constitutional measure, the Constitutional Reform Act 2005, transforming the office of the Lord Chancellor and the position of the Law Lords, was far more complex. The annual Finance Acts, dealing with the inter-woven minutiae of mind-boggling taxation details, are arguably much worse in terms of detail of comprehension.[164]

It is asserted that the simplest way to modernise matters discussed in this article is a Crown Act, one which consolidates all the legislation relating to the sovereign in a personal capacity, into one Act. If a new Crown Act were to be formulated, how might it be drafted?

A *The Sovereign*

One of the problems with the antiquated legislation dealing with the sovereign is that succession derives from the descendents of '*Princess Sophia'* and the '*heirs of her body*'. This formula means little to anyone today – lawyers included. Elizabeth II has been on the throne since 1952 and it seems that no one in the UK (with, possibly, a miniscule exception) deny that she is sovereign. Halsbury states, '*The present sovereign is Elizabeth II*'.[165] Thus a Crown Act should commence with this, obviating the need to refer back to previous sovereigns or those who were once in the line of succession – such as William III, Queen Anne, Princess Sophia *etc.* This would also help correct an irregularity, noted by Halsbury.[166]

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[163] See Maer, above n 6, 12 citing HC Deb 31 (March 2008) c 554W. *Princess Sophia's Precedence Act 1711* deals with precedence in the House of Lords (it was enacted to give the Duke of Cambridge, the future, George II, precedence in the House of Lords) not succession, and it is spent. The *Royal Marriages Act 1771* voids a royal marriage if undertaken without the approval of the sovereign. However, it does not affect the right of succession to the throne. For a discussion of these Acts, see fn 2. Thus, any change to the religion of the sovereign does not require change to (or repeal of) these two Acts.

[164] See Blackburn, above n 6, 126. Also, Brazier, above n 25, 100: 'Too much can, however, be made of this difficulty'.

[165] See Halsbury, above n 7, vol 12(1), [5].

[166] Ibid, vol 8(2), [35]: 'although the right of the two Houses of Parliament to vary and limit the descent of the crown, in cases of mis-government amounting to a breach of the original contract between the crown and the people, cannot be said to be admitted as a definite constitutional principle, due weight must be attributed to fact that the tenure of the crown since 1688 has depended primarily upon the action taken by the Lords and Commons convened in an improper manner'. Improper, because the Parliament assembled to invite William of Orange and Mary to take the throne, was not summoned by the issue of writs to Members of Parliament by the sovereign (James II having fled).

B *Style and Title*

The right of Elizabeth II to call herself '*Elizabeth II*' has been upheld.[167] It would also seem best to incorporate the terms of the *Royal Titles Act 1953* in any new Crown Act. If the present religious restrictions on the sovereign are dropped, the title '*Defender of the Faith*' should also be discarded.[168] This title is anomalous anyway – being originally awarded to Henry VIII for defending the Roman Catholic faith. Further, its meaning is unclear – unless it simply comprises (another) confirmation that the sovereign will protect the legal status of the Church of England as the established church[169] – something which the accession declaration, and the English coronation oath, also do.

C *Succession*

Any new Crown Act should clarify that succession to the crown should not be affected by gender. Thus, succession will pass to the eldest son, or daughter, of the sovereign. Failing a child – the Crown Act should list the line of succession (in an Appendix). In the past, vast lists have been drawn up,[170] which have proved quite unnecessary. Further, there ought to be a situation where – failing the first (say, 10) in the line of succession – Parliament should consider the issue anew, since it is unlikely the general public would want a complete unknown as sovereign in the case where the immediate royal family is wiped out. The Crown Act should also make it clear that succession is unaffected where a child of the sovereign is born abroad; this is presently contained in the *Status of Children Born Abroad Act 1350-1*.[171]

D *Religion*

Today, freedom of religion is upheld as a general principle. The sovereign should be free to choose his or her own religion and not be forced to adopt one – which may be contrary to his or her private inclinations. In respect of the current restrictions:

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[167] The use of the designation '*Elizabeth II'* was challenged in the Court of Session in Scotland – *McCormick v Lord Advocate* (1953) SC 396, 1953 SLT 255 – on the basis that it was historically inaccurate (there never having been an Elizabeth I in Scotland). The action was dismissed as incompetent; it had not been shown that the Scots courts had jurisdiction to determine whether the governmental act of proclaiming Elizabeth the 'II' was, or was not, in conformity to the Treaty of Union. Per Lord President Lord Cooper at 412: 'it is of little avail to ask whether the Parliament of Great Britain can 'do' this thing or that, without going on to inquire who can stop them if they do'. See also Stair, above n 5, [703], above n 6 and De Smith, above n 66, 270-1. Also, TB Smith, *MCormick and Anor v Lord Advocate July 30, 1953* (1953) 69 *Law Quarterly Review*, 512. O Hood Phillips and Jackson, above n 4, 802, above n 84: 'all overseas countries described her as Elizabeth II, although she was the first Elizabeth to reign over them as distinct kingdoms'. It may also be noted that she is referred to as Elizabeth II around the world. See also J Comyns, *Digest of the Laws of England* (1822) vol 7, 297: 'The style of the king is not parcel of his name'.

[168] For a proposed change to 'Defender of Faith' by Prince Charles, see Bradley, above n 70, 169-71.

[169] If 'Defender of the Faith' is dropped from the royal style, it should also be removed from the preface to the Church of England's 39 Articles. This would not require legislation, since the 39 Articles do not have legislative force, above n 112.

[170] For the first forty see <www.royal-gov.uk/output/page5655.asp>.

[171] See above n 1.

- No Roman Catholics: It seems that most politicians – and the general public – accept that the current prohibition on the sovereign being a Roman Catholic should be repealed.[172] This should also apply to any regent. This would require the amendment of a number of Acts;[173]
- Faithful Protestant: The obligation in the *Bill of Rights 1688* that the sovereign declare himself to be a '*faithful protestant*' is uncertain. The word '*faithful*' does not have a moral connotation and it may not require the sovereign to be a member of the Church of England.[174] Anyway, this declaration is only valid at the time it is given, and it does not impose any legal obligation on the sovereign.[175] The need for a declaration was likely only retained because it was in substitution of an anti-Roman Catholic oath. The sovereign must also declare that he (or she) will uphold and maintain '*protestant succession to the throne*' according to the *Bill of Rights 1688* and the *Act of Settlement 1700*. However, the sovereign cannot be held to this – since Parliament can pass legislation changing the religion of the sovereign in any case. In short, this declaration is of little worth and it should be dropped anyway.[176] If the prohibition on a Roman Catholic being sovereign is removed, it should go also;
- Join in Communion with the Church of England: This is required by the *Act of Settlement 1700*. However, its meaning is uncertain. Today, it probably requires the sovereign to be a protestant – but not necessarily to be a member of the Church of England.[177] It is impossible to enforce, in practice, given its vagueness. If the prohibition on a Roman Catholic being sovereign is removed, it, necessarily, should go;
- Coronation Oath: Despite the vague wording of the oath, its purport seems clear: the sovereign promises to maintain the Church of England as a State church. However, as Bogdanor has pointed out, this oath has, in practice, no real effect.[178] It did not prevent the dis-establishment of the Church of England in Ireland or in Wales; nor Roman Catholic emancipation in

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[172] For the removal of dis-abilities on Roman Catholics and dissenters over the centuries, Ridges, above n 3, 432-6.

[173] *viz. Bill of Rights 1688*, *Settlement Act 1700*, *Act of Union with Scotland 1706*, *Act of Union with Ireland 1800*. Also, *Claim of Right 1689* and *Act of Union with England 1707*. In respect of the regent, it would require amendment to the *Regency Act 1937* and the *Roman Catholic Emancipation Act 1829*.

[174] See above n 28-30.

[175] The declaration is 'I am a faithful protestant'. See above n 24. If the sovereign *later* became say, an atheist, this would not breach the declaration. Further, 'faithful' and 'protestant' are not legal terms of art, such that the sovereign could be prosecuted for breaching them.

[176] In 1910, Asquith PM, House of Common debates 27 July 1910, vol 19, c 2134, thought the 'logical and natural course would be to abolish the declaration altogether, for I believe it to be of no value as a safeguard to the protestant succession'. Other MPs felt the same. It was not done in 1910, however, since Asquith thought that such a proposal would meet an even more hostile reception, given the anti-Roman Catholic sentiments of the time.

[177] See above n 75-6.

[178] See Bogdanor, above n 30, 221: 'The disestablishment of these churches [Church of Ireland and Church of Wales] shows that the sovereign's oath, made upon accession, to preserve the Church has no legal effect, and, parliament being sovereign, could not be brought into play to prevent disestablishment. The same would be true of the disestablishment of the Church of England…'. At 229: 'the sovereign's oath could not be brought into play to prevent the disestablishment of the Church of England'. TB Macaulay, *The History of England* (1855) vol 3, 115-6, asserted that it was universally accepted in 1688 by the political parties that the oath was never intended to bind the sovereign in his legislative, but only in his executive, capacity.

1829.[179] Further, the sovereign does not have the power to uphold such an oath. Parliament can pass legislation to disestablish the Church of England. Even if the royal assent were withheld, it may provoke a constitutional crisis, but it would not prevent enactment. The rights of the Church of England are protected by legislation anyway.[180] It seems that the general public would likely accept a change to this oath – regardless of whether the Church of England is dis-established or not.[181] If the prohibition on a Roman Catholic being sovereign is removed, this necessarily should go;

- Church of Scotland Oath: This oath is to protect the status of the Church of Scotland.[182] It would not be affected – as such – if the religious restrictions currently imposed on the sovereign, were removed. However, like the coronation oath in respect of the Church of England, the sovereign does not have the power to uphold this oath, if Parliament passed legislation to remove the status of the Church of Scotland. If the prohibition on a Roman Catholic being sovereign is removed, it also should go.
- Defender of the Faith: See 5(b).

In short, if the prohibition on a Roman Catholic being sovereign (or marrying one) were removed, it would seem appropriate to remove all the above as well. This would not, in itself, mean that the sovereign would, *ipso facto*, cease to be head of the Church of England – nor result in its dis-establishment. However, it could give rise to the possibility that the head of the Church of England might be a Roman Catholic, buddhist, baptist, atheist *etc*. Although this may not happen for a long time, it seems appropriate that a Crown Act make it clear that a sovereign can resign as head of the Church of England – or that the Church of England can require the same. What legislative changes would be needed to achieve all the above?

- The *Bill of Rights 1688* would be amended to remove references to: (a) the crown passing to William and Mary (this is historic); (b) the

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[179] See I Leigh, *By Law Established? The Crown, Constitutional Reform and the Church of England* [2004] *Public Law* 269, 271. Lord Stanmore in HL Deb 12 May 1902, vol 107, cc 1317-21: 'it only shows how useless, and worse than useless, such an oath with regard to the maintenance of a particular institution is, because the only way in which we can read such an oath nowadays is that it is subject to what may be done by parliament subsequently to the oath being taken'. Also, 'The disestablishment of the Church of Ireland was not retarded for a single hour by the fact that her majesty had sworn to maintain the established church in Ireland … What advantage therefore is gained by the retention of the oath I cannot see'. See also R Blackburn, *The Royal Assent to Legislation and a Monarch's Fundamental Human Rights* [2003] *Public Law* 205.

[180] Magna Carta, above n 56, ch 29. The providing of legal rights in royal charters and, then, in legislation superseded the purpose of the coronation oath. Anson, above n 3, 14: 'The importance of the *charter* in the history of the royal prerogative consists in the definitiveness and permanence which it gave to the promiser of the coronation oath' (italics supplied).

[181] Spafford et al, 'Working Party on "Disestablishment" Report' (2002) *Ecclesiastical Law Journal* 6 (30) 266: 'there is probably considerable public support for a change in the coronation oath whether the church remains established or not'. Also, 'The monarch's position and the coronation ceremony would clearly be changed in any disestablished church, although there is no reason why the monarch could not be offered an honorary figurehead position'.

[182] 'Maintain and preserve the aforesaid settlement of the true protestant religion with the government worship discipline right and privileges of this church as above established by the laws of this kingdom in prosecution of the Claim of Right'. For the Claim of Right, see 1(e) and above n 94.

prohibition on the sovereign being a Roman Catholic, or married to one; (b) the sovereign being required to make a declaration;[183]

- The *Coronation Oath Act 1688* would be repealed (ss 1-3 are spent anyway). The new Crown Act would contain the form and administration of the coronation oath – the third oath being wholly omitted. Historically, this would make the coronation oath more consonant to what it was, pre-1307 (see last part of Appendix A, for a proposed oath);
- The *Act of Settlement 1700* would be amended to remove references to: (a) the *Bill of Rights 1688*; (b) the crown passing to Sophia and her descendants; (c) the *Coronation Oath Act 1688*; (b) the sovereign joining 'in communion' with the Church of England;[184]
- The *Union with Scotland Act 1706* would be amended to remove references to: (a) the crown passing to Sophia and her descendants pursuant to the *Act of Settlement 1700*; (b) the *Bill of Rights 1688* and the prohibition on Roman Catholics; (c) the giving of oaths to the Church of England and the Church of Scotland;
- The *Union with England Act 1707* be amended in the same fashion as the *Union with Scotland Act 1706* (see above);
- The *Claim of Right 1689* would be amended to exclude the prohibition on a Roman Catholic being sovereign;[185]
- The *Union with Ireland Act 1800* would be amended to remove references to succession in the *Bill of Rights 1688*, the *Act of Settlement 1700* and the *Union with Scotland Act 1706*;
- The *Accession Declaration Act 1910*, *Regency Acts 1943* and *1953* and the *Roman Catholic Emancipation Act 1829* s 12 (so far as it relates to the regent) would be repealed;
- The *Royal Titles Act 1953* and the *Regency Act 1937* (as well as various acts relating to the demise of the sovereign) would be consolidated in a new Crown Act.

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[183] The *Bill of Rights 1688* would then only contain its Preamble, and art 1 up to the reference to the words 'And that for the redress of all grievances and for the amending strengthening and preserving of the laws Parliaments ought to be held frequently'). Also, art 2, see above n 12.

[184] The *Act of Settlement 1700* would then only contain the following (its Preamble and ss 1 and 2 being repealed, s 3 being amended): 'Be it enacted by the kings most excellent majesty by and with the advice and consent of the lords spiritual and temporal and commons in Parliament and by the authority of the same. That in case the crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of England this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the crown of England without the consent of Parliament. … [N]o person born out of the kingdoms of England Scotland or Ireland or the dominions thereunto belonging (although he be … made a denizen (except such as [are] born of English parents) shall be capable to be of the privy council or a member of either House of Parliament or to enjoy any office or place of trust either civil or military or to have any grant of lands tenements or hereditaments from the crown to himself or to any other or others in trust for him. That no pardon under the great seal of England be pleadable to an impeachment by commons in Parliament'. Also, s 4.

[185] See 1(e) and above n 94.

VI CONCLUSION

Blackburn has remarked that:

> there is a great deal of fossilised legal verbiage and statements of outmoded royal etiquette still stamped on our common law and statute book, ripe for repeal or modernisation. The ancient law relating to who should be the monarch is itself out of date with current civic mores.[186]

One would agree. To date, attempts to change the law in the areas discussed in this article have failed, in part, because (one would assert) they were piecemeal. As noted in 4, at a conference of Commonwealth leaders in Australia in October 2011, the UK – as well as the heads of the 15 Commonwealth countries required to assent to changes to succession pursuant to the *Statute of Westminster 1931* (see 1 (g)) – agreed that the restriction on gender in respect of succession should be removed together with the restriction on the sovereign marrying a Roman Catholic. This is to be welcomed, but it does not go far enough. The restriction on the sovereign being (or becoming) a Roman Catholic is equally anomalous and should be repealed.

That said, with these two amendments requiring legislation, the opportunity should be taken to place all legislation relating to the sovereign in a *personal capacity* in one Crown Act. If so, what older legislation concerning the Crown would remain? Besides material relating to the civil list[187] and the Crown Estate,[188] there is legislation which restricts Crown prerogatives. It is contained in the *Bill of Rights 1688*[189] and the *Act of Settlement 1700*.[190] All this material should be modernised and placed in a separate Constitution Act (or Bill of Rights). However, analysis of this must be considered in a separate article.

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186 R Blackburn and R Plant, *Constitutional Reform* (1999) 143.

187 Halsbury's Statutes, above n 7, vol 10. The civil list is the Government funding of the sovereign.

188 Ibid. The Crown Estate – in the form of the royal demesne – was passed to the State by George III in 1760 in return for an increased sum from the civil list.

189 The *Bill of Rights 1688* contains the following limitations on the crown prerogative: (a) The power of the crown to suspend laws (or their execution) without the consent of Parliament is illegal; (b) The power of the crown to dispense with laws (or their execution) is illegal; (c) The levying of money for, or to the use of, the crown by the crown without grant of Parliament for longer time or in other manner than the same is or shall be granted by Parliament is illegal; (d) It is the right of subjects to petition the sovereign and all commitments and prosecutions for such petitioning are illegal; (e) The raising, or keeping, of a standing army in the kingdom in peace time is illegal unless with the consent of Parliament; (f) Subjects which are protestants may have arms for their defence suitable to their condition and as allowed by law; (g) The election of members of Parliament ought to be free; (h) That freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament; (i) That excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishments inflicted; (j) That jurors ought to be duly impanelled and returned; (k) That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void; (k) For the redress of all grievances and for the amending, strengthening and preserving of the laws, Parliaments ought to be frequently held. Another provision – which refers to a commission for electing the Court of Commissioners for Ecclesiastical Causes (and all other courts and commissions of like nature) – is obsolete.

190 See above n 184.

APPENDIX A – HISTORY OF THE CORONATION OATH

Note: Spelling has been modernised and letters of the alphabet inserted, to help identify the historical progress of the component parts of the coronation oath. Excluded are the answers of the sovereign ('I will keep it' etc) and the introductory 'Sire'.[191]

I PRIOR TO THE *CORONATION OATH ACT 1688*

1. Bracton (writing c. 1240): refers to a coronation oath the sovereign must give; he must promise: (a) In the first place, that to the utmost of his power he will employ his might to secure and will enjoin that true peace shall be maintained for the church of God and all Christian people throughout his reign; (b) Secondly, that he will forbid rapacity to his subjects of all degrees; (c) Thirdly, that he will cause all judgments to be given with equity and mercy, so that he himself be shown the mercy of a clement and merciful God, in order that by his justice all men may enjoy unbroken peace.[192] This tri-partite oath dates back, at least, to the 10th century[193] with little alteration.[194] The coronation oaths uttered by sovereigns from c. 1240 up to Edward II (1307-27) are uncertain. However, they likely follow Bracton's format with (possibly) an additional promise prohibiting the alienation of the rights of the crown.[195]

2. Edward II (1307-27): (a) Will you grant and keep and by your oath confirm to the people of England the laws and customs given to them by the previous just and god-fearing kings, your ancestors, and especially the laws, customs, and liberties granted to the clergy and the people by the glorious king, the sainted Edward, your predecessor? (b) Will you in all your judgments, so far as in you lies, preserve to God and Holy Church, and to the people and clergy, entire peace and concord before God? (c) Will you, so far as in you lies, cause justice to be rendered rightly, impartially, and wisely, in compassion and in truth? (d) Do you grant to be held and observed the just laws and customs that the community of your realm shall determine, and will you, so far as in you lies, defend and

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[191] See generally, Lambeth Palace Library Research Guide, *Sources for the Coronation* (undated).

[192] Bracton, (trans by S Thorne), *On the Law and Customs of England* c 1240 (1968-76) vol 2, 304. Bracton is now online at <hlsl5.law.harvard.edu/bracton/>.

[193] This is similar to the oath of King Edgar (959-975) given in 973. Ratcliff, above n 19, 24: 'These three things I promise in Christ's name to the Christian people subject to me: First, that the church of God and the whole Christian people shall have true peace at all time by our judgment; Second, that I will forbid extortion and all kinds of wrong doing to all orders of men; Third, that I will enjoin equity and mercy in all judgments, that God, who is kind and merciful, may vouchsafe his mercy to me and to you'. For the latin, see Wickham Legg, above n 20, 15.

[194] Richardson, above n 36, 44-5: 'the three promises, the *tria precepta*, are found in substantially the same, though slightly varying, language in all the early forms of the English coronation office back to the tenth century'. See also Taylor, above n 36, 330, Schramm, above n 36, ch 7; Strong, above n 21, chs 1 and 2; Hoyt, above n 36, and Wickham Legg, above n 20, *passim.* For the Anselm ordo of the 12th c, see Hoyt, above n 36, 245f. For the asserted coronation oath of Henry I (1100-35) see Taswell-Langmead, above n 3, 480

[195] Richardson, above n 36, 74, thought the fourth promise may have also been given by Henry III (1216-72) and Edward I (1272-1307). See also Taylor, above n 36, 330-1; Schramm, above n 36, ch 7 and Appendix; Wilkinson, above n 3, 75-9 and Strong, above n 21, 42-4, 65. Cf that of Richard I (1189-99), Strong, above n 21, 65, 91-2, Wickham Legg, above n 20, 52 and Wilkinson, above n 3, 75 (Richard I appears to have also promised to abolish bad laws).

strengthen them to the honour of God?[196] Edward II also seems to have acceded to the petition of the bishops and clergy (e) Domine rex a vobis perdonari petimus ut unicuique de nobis et ecclesiis nobis commissis canonicum privilegium ac debitam legem atque iustitiam conservetis, et defensionem exhibeatis, sicut rex in suo regno debet unicuique episcopo, abbatibus et ecclesiis sibi commissis.[197] His quadripartite oath was likely followed by subsequent sovereigns.[198]

3. Henry VII (1485-1509):[199] (a) Will you grant and keep to the people of England the laws and customs to them as old rightful and devout kings granted, and the same ratify, and confirm by your oath? And especially laws customs and liberties granted to the clergy, and people by your predecessors, and glorious king St Edward? (b) You shall keep after your strength and power to the church of God to the clergy and the people holy peace and godly concord? (c) You shall make to be done after your strength and power rightful justice in all your dooms and judgments and discretion with mercy and truth? (c) Do you grant the rightful laws and customs to be holden and promise you after your strength and power such laws as to the worship of God shall be chosen by your people by you to be strengthened and defended? Also, (e) We ask of you to be perfectly given and granted unto us, that you shall keep to us, and each of us the privileges of the law canon and of holy church and due laws and rightfulness and us and them defend as a devout and Christian king ought to do. And likewise to do and grant throughout all your realm to every bishop and to all the churches to them committed. [Ans] With good will and devout soul I promise and perfectly grant, that to you and every of you and all the churches to you committed, I shall keep the privileges of the law canon and of the holy church, and due law and rightfulness. And I shall in as much as I may by reason and right, by God's grace defend you, and every of you throughout my realm, and all the churches to you committed. The oath of Henry VIII (1509-47) likely followed this;[200]

4. Edward VI (1547-53):[201] (a) Will you grant to keep to the people of England and others your realms and dominions, the laws and liberties of this realm, and other your

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196 Thus, Bracton's (a) becomes Edward's (b). Bracton's (b) disappears. Bracton's (c) is Edward's (c). Edward's (a) makes reference to the laws of St Edward and the new (d) binds him to observe the future laws made by the community of the realm. For the anglo-norman and latin versions, see Statutes of the Realm (Royal Commission, 1713) vol 1, 168. See also Hoyt, above n 36, 237; Strong, above n 21, 92 (and sources cited) and *Calendar of the Close Rolls, Edward II* (1307-13, London, 1892) vol 1, 53. Richardson, above n 36, 75: 'The second preceptum [i.e. forbid rapacity] became superfluous in view of two new promises, the first and the fourth'. See also Taylor, above n 36, 409; Ratcliff, above n 19, 25 and Taswell-Langmead, above n 3, 486-7. Also, B Wilkinson, *The Coronation Oath of Edward II* in JG Edwards *et al* (eds), *Historical Essays in Honour of James Tait* (1933).

197 Wickham Legg, above n 20, xxxi: 'Our Lord and King, we beseech you to pardon and to grant and to preserve unto us and the churches committed to our charge all canonical privileges, and due law and justice, and to protect and defend us, as every good king in his kingdom ought to be protector and defender of the bishops and churches under their government'. However, it may be this petition was not inserted until Edward III (1327-77) or later, for which see Wilkinson, above n 3, 97-8.

198 Hoyt, above n 36, App cites sources. Also, Wickham Legg, above n 20, *passim.* For that of Richard II (1377-99) see Prynne, *The Signal Loyalty etc* (printed by TC and LP, 1660) 246 and Taylor, above n 36, 106. For that of Edward IV (1461-83) see Blackstone, above n 154, vol 1, 229 (trans Dillon, above n 36, 36-7) and Taylor, above n 36, 411.

199 See Wickham Legg, above n 20, 230-1; Schramm, above n 36, 236; Taylor, above n 36, 334-5 and Hoyt, above n 36, 210-3.

200 Wickham Legg, above n 20, 220 and Taylor, above n 36, 334-5. Cf Strong, above n 21, 186 and Ratcliff, above n 19, 26-7 (on Henry VIII's proposed amendments).

201 Acts of the Privy Council, NS, vol 2 (1547-50) (1890) 29-33. Also, Lane, above n 48, 49; Taylor, above n 36, 339 and Schramm, above n 36, 217. The request as to the securing the rights of the church (i.e. (e)) was deleted and reference to the laws of St Edward disappeared from (a). See also Schramm, above n 36, 217 and Strong, above n 21, 200.

realms and dominions? (b) You shall keep to your strength and power, to the church of God, and to all the people, holy peace and concord? (c) You shall make to be done, after your strength and power, equal and rightful justice in all your dooms and judgments, with mercy and truth? (d) Do you grant to make no new laws, but such as shall be to the honour and glory of God, and to the good of the commonwealth, and that the same shall be made by the consent of your people, as has been accustomed? The oaths of Mary (1553-58) and Elizabeth (1558-1603) are uncertain.[202]

5. James I (1603-25): (a) Will you grant and keep, and by your oath confirm to the people of England, the laws and customs to them granted by the kings of England your lawful and religious predecessors, and namely, the laws customs and franchises granted to the clergy, and to the people ['*and to the people' omitted in oath of Charles I*] by the glorious king St Edward your predecessor [or] according to the laws of God, the true profession of the gospel established in this kingdom, [*and agreeable to the prerogative of the king thereof –said to have been inserted in the oath of Charles I by Archbishop Laud*], and the ancient customs of the [this] realm]? (b) Will you keep peace and godly agreement entirely, according to your power, both to God, the holy church, the clergy, and people? (c) Will you, to your power, cause law, justice, and discretion in mercy and truth to be executed in all your judgments? (d) Will you grant to hold and keep, the laws and rightful customs, which the commonality of this your kingdom have: and to [*will you*] defend and uphold them to the honour of God, so much as in you lie [*lieth*]? Also, (e) Our Lord and King, we beseech you to pardon and grant, and [*to*] preserve [*and to grant*] unto [*to*] us and to your [*the*] churches committed to our charge, all canonical privileges, and due law and justice; and that you would protect and defend us, as every good king in his kingdom, ought to be [*a*] protector and defender of the bishops, and [*the*] churches under their [*his*] government. [Ans]. With a willing and devout heart, I grant my pardon; and promise [*I promise and grant my part and*] and that I will preserve and maintain to you and the churches committed to your charge, all canonical privileges, and due law and justice; and that I will be your protector and defender to my power, by the assistance of God, as every good king in his kingdom, in [*by*] right ought to protect and defend the bishops and churches under their [*his*] government.[203] The oath of Charles I (1625-49) was likely the same as that of James I, save for the changes made in [ ] and as noted. It was alleged Archbishop Laud made the unauthorised amendments.[204]

7. Charles II (1660-85): was (a) Will you grant and keep, and by your oath confirm to the people of England, the laws and customs to them granted by the kings of England your lawful and religious predecessors, and namely, the laws customs and franchises granted to the clergy, by the glorious king St Edward your predecessor according to the laws of God, the true profession of the gospel established in this kingdom and agreeable [*agreeing*] to the prerogative of the kings thereof, and the ancient customs of the realm? (b) Will you keep peace and godly agreement [*entirely*], according to your power, both to

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[202] Cf D Hoak, *The Coronation of Edward VI, Mary I and Elizabeth I and the Transformation of the Tudor Monarchy*, ch 5 in Westminster Abbey Reformed 1540-1640 (2003) 114-51. Also, Strong, above n 21, 205-12 and Planche, above n 20, 17 (Mary) and 42 (Elizabeth).

[203] Schramm, above n 36, 218. Cf Wickham Legg, *The Coronation Order of King James I* (1902) 13-6. Also, Strong, above n 21, 335-8. It is unclear exactly what the coronation oath given by James I was, ibid, Wickham Legg, above n 20, xcvii-cii.

[204] Collection of State Tracts of the Reign of William III (1705) vol 1, 445. Cf Wickham Legg, above n 20, 251-2. Laud was accused of altering Charles I's oath from that of James I by: (i) omitting the reference 'to the people' in (a); (ii) adding the words 'agreeable to the king's prerogative' in (a) and (iii) omitting the words 'which the people have chosen or shall choose'. The last was in clause (d) of Edward VI's oath but omitted in that of James I (Schramm, above n 36, 217). Thus, Laud was, doubtless, correct in denying he knew anything about it. See in particular Taylor, above n 36, 335-40. Also, Wickham Legg, above n 20, xcvii-cii; Strong, above n 21, 239-40 and Ratcliff, above n 19, 27-8.

God [*'to God' excluded in oath of James II*], the holy church, the clergy, and the people? (c) Will you, to your power, cause law, justice, and discretion to mercy and truth to be executed to your judgments [*in all your judgments*]? (d) Will you grant to hold and keep, the laws and [*'laws and' excluded in oath of James II*] rightful customs which the commonality of this your kingdom have? And will you defend and uphold them to the honour of God, so much as in you lieth? Also, (e) Our Lord and King, we beseech you to pardon [*us*] and to grant and to preserve unto us, and to ['*to*' *excluded in oath of James II*] the churches committed to your [*our*] charge, all canonical privileges, and due law and justice; and to protect [*that you will protect*] and defend us, as every good king in his kingdom ought to be protector and defender of the bishops, and the ['*the' excluded in oath of James I*] churches under their government. [Ans]. With a willing and devout heart, I promise and grant you my pardon; and that I will preserve and maintain to you, and the churches committed to your charge, all canonical privileges, and due law and justice; and that I will be your protector and defender to my power, by the assistance of God, as every good king in his kingdom, ought in right to protect and defend the bishops and churches under their government.[205] The oath of James II (1685-8) was the same but for the changes placed in brackets.[206]

II AFTER THE *CORONATION OATH ACT 1688*

8. William III and Mary (1689-1702): The oath was recast pursuant to the *Coronation Oath Act 1688* (see 1(b)). It comprised three promises: (a) Will you solemnly promise and swear to govern the people of this kingdom of England and the dominions thereto belonging according to the statutes of Parliament agreed on and the laws and customs of the same? (b) Will you to your power cause law and justice in mercy to be executed in all your judgements? (c) 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 preserve unto the bishops and clergy of this realm and to the churches committed to their charge all such rights and privileges as by law do or shall appertain unto them or any of them? *Since (b) has not changed to date, it is not repeated below*. The oath of Anne (1702-14) was the same as that of William and Mary.[207]

9. George I (1714-27): His oath was altered, to deal with the union with Scotland. (a) Will you solemnly promise and swear to govern the people of this kingdom of <u>*Great Britain*</u> and the dominions thereto belonging according to the statutes of Parliament agreed on and the laws and customs of the same? Also, a sentence was inserted into (c), as required by the Act of Union of England 1706: (c) And will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship and discipline government thereof as by law established within the kingdoms of England and Ireland, the dominion of Wales and town of Berwick upon Tweed, and territories

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[205] E Walker, *A Circumstantial Account of the preparations for the Coronation of his Majesty King Charles the Second* (1820). Also, WC Costin and JS Watson, *The Law and Working of the Constitution* (1961) 58-9 and Robertson, above n 3, 118-20.

[206] F Sandford, *History of the Coronation of James II and Queen Mary* (1687) 88; Wickham Legg, above n 20, 296-7 and Taylor, above n 36, 329-30.

[207] *The Form of Proceeding to the Royal Coronation of ... Queen Anne, the [23rd April 1702]*. Also, Planche, above n 20, 120.

thereunto belonging, before the union of two kingdoms?[208] The oath of George II (1727-60) was the same as that of George I.[209]

10. George III (1760-1820): (a) Will you solemnly promise and swear to govern the people of this kingdom of Great Britain, and the dominions thereto belonging, according to the statutes in Parliament agreed on, and the respective laws and customs of the same? (b) ... (c) 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 preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established, within the kingdoms of England, Ireland, the dominion of Wales, and town of Berwick upon Tweed, and the territories thereunto belonging, before the union of the two kingdoms? 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?[210]

11. George IV (1820-30): His oath was altered to deal with the *Union with Ireland Act 1800*. (a) Will you promise and swear to govern the people of this *United Kingdom of Great Britain and Ireland*, and the dominions thereto belonging, according to the statutes in Parliament agreed on, and the respective laws and customs of the same? (b) ... (c) 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 preserve inviolably the settlement of the *united Church of England and Ireland*, and the doctrine, worship, discipline, and government thereof, as by law established within *England and Ireland*, and the territories thereunto belonging? And will you preserve unto the bishops and clergy of *England and Ireland*, and to the *united* church committed to their charge, all such rights and privileges, as by law do, or shall appertain to them, or any of them?[211] The oaths of William IV (1830-7)[212] and Victoria (1837-1901)[213] were the same as that of George IV.

12. Edward VII (1901-10):[214] Altered to deal with the dis-establishment of the Church of Ireland. (c) 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 preserve inviolably the settlement of the *Church of England*, and the doctrine, worship, discipline, and government thereof, as by law established in *England*? And will you preserve unto the bishops and clergy of *England* and to the *church therein* committed to their charge, all such rights and privileges, as by law do, or shall appertain to them, or any of them? The oath of George V (1910-36)[215] was the same as that of Edward VII.

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[208] *The Form of Proceeding to the Royal Coronation of ... King George [I], on [20th October 1714]* Also, Strong, above n 21, 359.

[209] *Form and Order of... the Coronation of ... King George II and Queen Caroline* (1727).

[210] R Thomson, *A Faithful Account of the Processions and Ceremonies Observed in the Coronation of the Kings and Queens of England exemplified in that of their late most sacred majesties King George the Third and Queen Charlotte* (1820) 55. Also, *The Form and Order… in the Coronation of ... King George III and Queen Charlotte* (1761).

[211] R Huish, *An Authentic History of the Coronation of His Majesty, King George the Fourth* (1821) 225.

[212] *The Form and Order of ... the Coronation of ... King William IV and Queen Adelaide* (1831).

[213] *The Form and Order of ... the Coronation of ... Queen Victoria* (1838) 26-8.

[214] *The Form and Order of ... the Coronation of ... King Edward VII and Queen Alexandra* (1902) 39-40.

[215] *The Form and Order of ... the Coronation of ... George V and Queen Mary* (1911) 34. Also, Schramm, n 36, 225.

13. George VI (1936-52):[216] (a) Will you solemnly promise and swear to govern the peoples of *Great Britain, Ireland, Canada, Australia, New Zealand and the Union of South Africa, of your possessions and other territories to any of them belonging or pertaining, and of your Empire of India,* according to their respective laws and customs? (b) ... (c) Will you to the utmost of your power maintain the laws of God and the true profession of the gospel? Will you to the utmost of your power maintain *in the United Kingdom* the protestant reformed religion established by law? And will you maintain and preserve inviolably the settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as 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?

17. Elizabeth (1952-)[217] (a): Will you solemnly promise and swear to govern the peoples of the *United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand the Union of South Africa, Pakistan and Ceylon, and of your possessions and the other territories to any of them belonging or pertaining*, according to their respective laws and customs? (b) ... (c) (same as George VI).

III SUGGESTED NEW OATH

(a)Will you solemnly promise and swear to govern the peoples of the United Kingdom of Great Britain and Northern Ireland, Canada, Australia, New Zealand and of your possessions and the other territories to any of them belonging or pertaining, according to their respective laws and customs?

(b) Will you to your power cause law and justice, in mercy, to be executed in all your judgments?

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[216] *The Form and Order of ... the Coronation of ... King George VI and Queen Elizabeth* (1937) 4-6. Also, Strong, above n 21, 442.

[217] Ratcliff, above n 19 and Strong, above n 21, 487.

APPENDIX B: CROWN ACT

1. The Sovereign and Succession

(1) The sovereign is Elizabeth II and the heirs of her body.[218]

(2) Succession to the Crown shall pass to the eldest child of the sovereign, regardless of gender. In the absence of a child, succession shall pass according to the line of succession set out in Schedule 1.

(3) The right of succession of a child of the sovereign to the Crown (whether born before, or after, the sovereign becomes sovereign) shall not be affected by the fact that such child was born outside the United Kingdom.[219]

2. Style and Title

(1) The style and title of the sovereign is: Elizabeth II, by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other Realms and Territories Queen, Head of the Commonwealth.[220]

(2) The assent of the Parliament of the United Kingdom is hereby given to the adoption by her Majesty, for use in relation to the United Kingdom and all other the territories for whose foreign relations Her Government in the United Kingdom is responsible, of such style and titles as her Majesty may think fit from time to time, and to issue by Her for that purpose of Her Royal Proclamation under the great seal of the realm.[221]

3. Coronation Oath

(1) At the coronation of the sovereign, in the presence of all persons present, at the solemnizing thereof by the archbishop of Canterbury (or the archbishop of York or either of them or any other bishop of this realm whom the sovereign shall appoint), the oath to be administered shall be that set out in Schedule 2.[222]

4. Religion

(1) The religion of the sovereign is a private matter for the sovereign.[223]

5. Royal Marriages

(2) No consent of the sovereign, as sovereign, is required in respect of any marriage.[224]

6. Regency

[Sections 1-4 of the *Regency Act 1937*, as amended, would be set out]

7. Demise

(1) The demise of the sovereign shall not result in the:

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[218] The phase 'and the heirs of her body' can be found in the *Bill of Rights 1688* and the *Act of Settlement 1700*.

[219] This encapsulates the *Status of Children Born Abroad Act 1350-1*. See above n 1.

[220] This is taken from the *Royal Titles Act 1953* (omitting reference to 'Defender of the Faith').

[221] This is taken from the *Royal Titles Act 1953*.

[222] This will comprise the current oath of Elizabeth, with the third oath in relation to the Church of England removed, see Appendix A, part III.

[223] Strictly, such a statement is not required. However, if express provision is not made there will likely be conjecture in the future as to what religious status (or not) the sovereign is required to have.

[224] This covers the repeal of the *Royal Marriages Act 1772*. See above n 2.

(a) dissolution of Parliament. However, Parliament shall meet immediately, if prorogued or adjourned at the time;[225]
(b) termination of any Crown office or appointment, whether in the United Kingdom or elsewhere;
(c) termination of any office or appointment relating to principality of Wales, duchy of Cornwall or county palatine of Chester;
(d) termination of any membership of the privy council;[226]
(e) termination of any claims or legal proceedings by, or against, the Crown.[227]

8. Scotland and Northern Ireland
(1) This Act shall apply to Scotland and to Northern Ireland.

9. Effect of Act and Repeals
(1) The enactments set out in Schedule 3(a) are repealed.[228]
(2) Sections 1(2) and 4 and the repeal of the enactments set out in Schedule 3(b)[229] shall take effect when they have received the assent[230] of the Commonwealth countries set out in Schedule 4, which countries have requested and consented to the same.[231]

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225 *Modernising the Succession to the Crown Act 1707*, ss 4 and 5 and the *Representation of the People Act 1867*, s 51. The *Representation of the People Act 1985*, s 20 would be unaffected.

226 The Times, 9 Feb 1952. See also Cretney, above n 7, 218.

227 *Modernising the Demise of the Crown Act 1702*, s 4 and the *Crown Proceedings Act 1947*, s 32.

228 *viz*. The *Status of Children Born Abroad Act 1350-1*; *Coronation Oath Act 1688*, *Demise of the Crown Act 1702*, *Succession to the Crown Act 1707*, *Princess Sophia's Precedence Act 1711*, *Demise of the Crown Act 1727*, *Representation of the People Act 1867*, s 51, *Royal Marriages Act 1772*, *Sheriffs Act 1887*, s 3(3), *Demise of the Crown Act 1901*, *Accession Declaration Act 1910*, *Regency Act 1937*, *Regency Act 1943*, *Regency Act 1953*, *Royal Titles Act 1953*.

229 *viz. Bill of Rights 1688* (art 1, see n 183), *Claim of Right 1689* (n 95), *Act of Settlement 1700* (preamble and ss 1 and 2, see above n 184), *Union with Scotland Act 1706* (art 2. Also, arts 25 (2) and (3) relating to the coronation oath and the oath to the Church of Scotland), *Union with England Act 1707* (art II and art 25 (relating to the oath in respect of the Church of Scotland), *Union with Ireland Act 1800* (art 2)).

230 Assent can be given after the Crown Act is enacted and it does not have to be recited or declared in the Act. See Wheare, above n 98, 283.

231 Being 15 Commonwealth countries, see above n 106. For 'requested and consent', see the *Statute of Westminster 1931*, s 4 and 1(g).