# The Act of Settlement and the Protestant Succession

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This note sets out the legal background to the rules surrounding the succession, including the *Bill of Rights 1688,* the *Act of Settlement 1700* and the *Act of Union 1706.* In summary, the monarch must join in communion with the Church of England, must declare him or herself to be a Protestant, and must swear to maintain the established churches in England and Scotland and take the coronation oath. If he or she wishes to retain the title to the throne he cannot marry a Roman Catholic. And, by the same token, marriage to a Catholic automatically excludes anyone from the line of succession. In addition, the Crown passes to male heirs ahead of female heirs, according to common law.

The note considers the historical background and context for the limitations on religious beliefs of the monarch and their spouse before looking at how the legislative restrictions could be removed and the complexities of doing so. Lastly, it sets out the views of the Government on the matter. These were given most recently in a parliamentary answer by the Prime Minister in November 2009, in which he said that the Act of Settlement was "outdated" and that he would consult all members of the Commonwealth on the matter "in due course".

The Research Paper 09/24 *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill* looks at some of these issues in more detail, in relation to the introduction of Dr Evan Harris's Private Members' Bill in the 2008-09 Session.

Also of interest may be the Standard Notes:

- SN/PC/3417, *Royal Marriages – Constitutional Issues*
- SN/PC/293, *Bill of Rights 1688*
- SN/PC/435, *The Coronation Oath*
- SN/PC/4663, *PIL: Attempts to Amend Crown Succession since 1979*

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# 1 The Legal Background

The monarch is head of the Church of England. There are various legal provisions which mean that the monarch cannot be a Roman Catholic, must join in communion with the Church of England and must swear to maintain the established churches of England and Scotland. In addition, statute law requires that the monarch may not retain their throne if they marry a Catholic, and that any heir that marries a Catholic is removed from the line of succession. These legal provisions are contained in the *Bill of Rights 1688*, the *Act of Settlement 1700* and the *Act of Unions*, all reinforced by the provisions of the *Coronation Oath Act 1680* and the *Accession Declaration Act 1910*.[1]

There have been some recent examples where individuals have been removed from the line of succession because they have married a Catholic. The Earl of St Andrews and HRH Prince Michael of Kent both lost their right of succession through marriage to Roman Catholics.[2] Any children of these marriages would remain in the succession provided that they are in communion with the Church of England.

The Duke of Kent, however, has retained his place in the line of succession despite his wife converting to Catholicism in 1994 as she was not a Catholic when he married her in 1961.[3] The couple's youngest son, Lord Nicholas Windsor, has converted to Catholicism and therefore cannot inherit the throne.

In 2008 it was announced that Peter Phillips would marry his partner, Autumn Kelly. It emerged that she had been baptised as a Catholic. Ms Kelly was accepted into the Church of England before the marriage took place and Peter Phillips retains his place in the line of succession.[4]

In addition, the Crown passes to male heirs ahead of female heirs, according to common law requirements.[5]

## 1.1 Bill of Rights 1688

Until the *Bill of Rights 1688* there was nothing on the statute book to prevent the monarch from being a Roman Catholic.[6] Shortly after his accession in 1685 James II prorogued Parliament and, although it was not dissolved until July 1687, it never met again. Thus at his departure there was no Parliament, and the Convention Parliament summoned by William of Orange before his accession was inevitably irregularly convened. The House of Commons resolved in January 1688:

> That King James II having endeavoured to subvert the constitution of the kingdom by breaking the original contract between the King and people and by the advice of

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1 In England before 1752, 1 January was celebrated as the New Year festival, but 25 March was the start of the civil or legal year. The *Calendar (New Style) Act 1750* introduced the Gregorian Calendar in place of the Julian Calendar and moved the start of the civil year to 1 January. Therefore the years given in dates for Acts preceding 1752 are often recorded differently – depending on whether the old or new style calendar is used. In this note, the dates used in *Halsbury's Laws of England* have been used.

2 The Earl of St Andrews married Sylvana Tomaselli in January 1988. Prince Michael of Kent married Baroness Marie-Christine von Reibnitz in 1978.

3 The British Monarchy's website, *The Duchess of Kent – Public Role,* at: http://www.royal.gov.uk/ThecurrentRoyalFamily/TheDuchessofKent/Publicrole.aspx (last viewed 16 March 2009).

4 'Fiancée secures royal succession by abandoning her Catholic faith', *The Times,* 1 May 2008

5 More information about the gender restrictions on the succession are set out in Library Research Paper 09/24, *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill 2008-09*

6 All references in this note to 'Catholics' are to Roman Catholics.

> Jesuits and other wicked persons having violated the fundamental laws; and having withdrawn himself out of this kingdom; has abdicated the government; and that the throne is thereby vacant. [7]

On 12 February 1688 a declaration was drawn up affirming the rights and liberties of the people and conferring the crown upon William and Mary, then Mary's children, and, failing any heirs, Princess Anne and her heirs; and failing also that, William's heirs. Once the declaration had been accepted by William and Mary, it was published as a proclamation. The declaration was subsequently enacted with some additions in the form of the *Bill of Rights 1688*, and the Acts of the Convention Parliament were subsequently ratified and confirmed by the *Crown and Parliament Recognition Act 1689* which also acknowledged the King and Queen. In this way, the Bill of Rights was confirmed by a Parliament summoned in a constitutional manner and thereby acquired the force of a legal statute and appears as such on the statute book.[8]

The portion of the *Bill of Rights* affecting the right of succession reads as follows:

> And whereas it hath beene found by experience that it is inconsistent with the safety and welfaire of this protestant kingdome to be governed by a popish prince or by any King or Queene marrying a papist the said lords spirituall and temporall and commons doe further pray that it may be enacted that all and every person and persons that is are or shall be reconciled to or shall hold communion with the see or church of Rome or shall professe the popish religion or shall marry a papist shall be excluded and be for ever uncapeable to inherit possesse or enjoy the crowne and government of this realme and Ireland and the dominions thereunto belonging or any part of the same or to have use or exercise any regall power authoritie or jurisdiction within the same [And in all and every such case or cases the people of these realmes shall be and are hereby absolved of their allegiance.[9]] and the said crowne 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 soe reconciled holding communion or professing or marrying as aforesaid were naturally dead [And that every King and Queene of this realme who at any time hereafter shall come to and succeede in the imperiall crowne of this kingdome shall on the first day of the meeting of the first Parlyament next after his or her comeing to the crowne sitting in his or her throne in the House of Peeres 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 takeing the said oath (which shall first happen) make subscribe and audibly repeate the declaration mentioned in the Statute made in the thirtyeth yeare of the raigne of King Charles the Second entituled An Act for the more effectuall preserveing the Kings person and government by disableing papists from sitting in either House of Parlyament But if it shall happen that such King or Queene upon his or her succession to the crowne of this realme shall be under the age of twelve yeares then every such King or Queene shall make subscribe and audibly repeate the said declaration at his or her coronation or the first day of the meeting of the first Parlyament as aforesaid which shall first happen after such King or Queene shall have attained the said age of twelve year] All which their Majestyes are contented and pleased shall be declared enacted and established by authoritie of this present Parliament and shall stand remaine and be the law of this realme for ever And the same are by their said Majesties by and with the advice and consent of the lords spirituall and temporall and commons in Parlyament

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7 Commons Journal 28 Jan 1688

8 For further details see Library Note SN/PC/00293, *Bill of Rights 1688*

9 Annexed to the original Act in a separate schedule

> assembled and by the authoritie of the same declared enacted and established accordingly

As well as preventing the monarch from being or marrying a Catholic, the *Bill of Rights* requires that the sovereign must declare, at the first day of the meeting of the first parliament after his or her accession, or at the coronation, whichever occurs first, that he or she is a faithful Protestant.[10] The *Accession Declaration Act 1910* specified a new form of the declaration to be "made, subscribed and audibly repeated" by the monarch under the *Bill of Rights* and the *Act of Settlement* in preparation of the coronation of George V.[11]

### 1.2 Coronation Oath Act 1688

The *Bill of Rights* required the monarch to be in communion with the Church of England. The only restriction on the monarch's wife would seem to be that she must not be a Catholic. The *Coronation Oath Act 1688,* however, appears to require both the King and Queen to swear during their coronation ceremony that they will, to the utmost of their power:

> maintaine the Laws of God the true profession of the Gospell and the Protestant reformed religion established by law [...] and [...] 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.[12]

Section 4 of the Act appears to detract from this requirement:

> **4. Oath to be administered to all future Kings and Queens**
>
> And ... the said oath shall be in like manner administred to every King or Queene who shall succeede to the imperiall crowne of this realme at their respective coronations by one of the archbishops or bishops of this realme of England for the time being to be thereunto appointed by such King or Queene 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.

The 1688 Act included the Queen, since William and Mary ruled as joint monarchs. This joint monarchy was unprecedented in English history and came about as part of unique circumstances. Mary was the daughter of James II and her husband was Dutch. As part of the negotiations leading to the Glorious Revolution, William was approached for his opinion.

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[10] The declaration was as follows:

> I A: B doe solemnely and sincerely in the presence of God professe testifie and declare that I do believe that in the sacrament of the Lords 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 die Virgin Mary or any other saint, and the sacrifice of the masses as they are now used in the Church of Rome are superstitious and idolatrous, and I doe solenmely in the presence of God professe testifie and declare that I doe make this declaration and every part thereof in the plaine and ordinary sense of the words read unto me as they are commonly understood by English Protestants without any evasion, equivocation or mentall 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 1 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 annull the same, or declare that it was null and void from the beginning.

[11] This was done in preparation for the coronation of George V. The declaration now reads:

> I [monarch's name] 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.

[12] *Coronation Oath Act 1688* (1 Will & Mar chap 6), s 3

According to the *Oxford History of England* William made clear to those who sought to bring him to power that he would not be regent or accept a subordinate position to his wife. The history notes "Both William and Mary formally accepted the offer of the throne made to them jointly, and with it the Declaration of Rights".[13] Since the reign of William and Mary, there have not been other joint monarchs on the throne.

If it is the case that the monarch's spouse must also swear to maintain the established religion, there might be women of some Protestant denominations and non-Christian religions who would not wish to do so. However, the coronation oath was not administered to Prince Philip, who is the consort of the current monarch. Only Elizabeth II took the oath. In contrast, the Queen's parents, George VI and Queen Elizabeth both took the coronation oath.[14] It would not seem necessary to amend the *Coronation Oath Act* to change the law relating to Catholic consorts.

It is also worth noting that the oath has in the past been changed without statutory authority. It was changed to alter the territorial rehearsal as necessary. And more recently Elizabeth II swore to govern the peoples of her realms and territories according to their respective laws and customs and to maintain the established Protestant religion in the United Kingdom.[15]

### 1.3 Act of Settlement 1700

The *Act of Settlement* was deemed necessary to secure the Protestant succession following the death without heirs of Mary, the death of the then heir, Princess Anne's only surviving child, and the likelihood of William's death without heirs. The Stuarts still had claims to the throne and "it being absolutely necessary for the safety, peace and quiet of this realm to obviate all doubts and contentions in the same by reason of any pretended titles to the crown",[16] the *Act of Settlement* was passed, devolving the Protestant succession after Queen Anne (assuming no heir) on Princess Sophia the Electress of Hanover and her heirs, who are Protestants.

Section 2 of this Act reiterated the exclusion of Catholics or persons married to Catholics and the requirement for the Coronation oath:

> **2. The persons inheritable by this Act, holding communion with the church of Rome, incapacitated as by the former Act, to take the oath at their coronation, according to Stat 1 W & M c 6**
>
> 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 vertue 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 provided enacted and established. And that every King and Queen of this realm who shall come to and succeed in the imperiall crown of this kingdom by vertue of this Act shall have the coronation oath administered to him her or them at their respective coronations according to the Act of Parliament made in the first year of the reign of his Majesty and the said late Queen Mary intituled An Act for establishing the coronation oath and shall make subscribe and repeat the declaration in the Act first above recited mentioned or referred to in the manner and form thereby prescribed.

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13 Sir George Clark, *The Later Stuarts 1660-1714,* Second Edition, p145
14 See Halsbury's Laws of England Vol 12(1) The Crown, para 20
15 For further details see Library Note SN/PC/00435, *The Coronation Oath*
16 *Act of Settlement 1700* (12 & 13 Will 3 chap 2), in long title

It must be noted, however, that while between them the two enactments of 1688 establish an exclusion of Catholics and an obligation to uphold the established Protestant religion, the Church of England, technically they do not require the monarch to be a member of the Church of England. This was remedied in section 3 of the *Act of Settlement* which requires active participation in the Church of England by the monarch:

> 3**. Further provisions for securing the religion, laws, and liberties of these realms**
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> 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 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 Kings most excellent Majesty by and with the advice and consent of the lords spirituall and temporall and commons in Parliament assembled and by the authority of the same
>
> That whosoever shall hereafter come to the possession of this crown shall joyn in communion with the Church of England as by law established

At first the effect of this was to exclude all members of other churches. However, members of certain other Protestant churches may not now be debarred. Since 1972, by the Church of England's *Admission to Holy Communion Measure*[17], and the [Church of England] Canon (B15A) that followed it, "baptised persons who are communicant members of other churches which subscribe to the doctrine of the Holy Trinity, and who are in good standing in their own Church" shall without further process be admitted to Holy Communion in C of E churches.

This means, for instance, that a Methodist, Congregationalist, Church of Scotland, or Baptist member can take Anglican communion, though a Unitarian (who would reject the concept of the Trinity) and Quakers (who do not subscribe to the concept of the Lord's Supper) could not. Hence in the strict sense of the wording of the Act of Settlement, members of most Protestant churches would *not* now be excluded. Members of Protestant denominations outside the Church of England do not generally object as a matter of faith to the established status of the Church of England and could thus subscribe to the requirements of the *Coronation Oath Act 1688*. Such a person could therefore "join in communion", as the words of the statute decree.

A Catholic would probably still be affected by this section, additionally to the specific disabilities quoted in s 2, since he or she could not remain "in good standing" in the Roman Catholic Church by taking communion from an Anglican minister.[18]

### 1.4 The Acts of Union

The Acts of Union which formed the United Kingdom reinforced the religious requirements placed on the holder of the Crown. Ireland had been in personal union with England since 1541, when the Irish Parliament passed the Crown of Ireland Act 1542, proclaiming King Henry VIII of England to be King of Ireland. Both Ireland and England had been in personal union with Scotland since the death of Queen Elizabeth I and the succession to the throne of James I of England (James VI of Scotland) in 1603. The Acts of Union with Scotland, and then the Union with Ireland, included provisions to ensure the common line of succession to the Crown across the nations.

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[17] GSM no.2, 1972. The canon is reprinted in *Canons of the Church of England,* 5th ed 1993 (loose leaf publication)

[18] With certain minor exceptions, [RC] Canon 844; *Code of Canon Law*, 1997 ed.

The position of the established Protestant Presbyterian Church was safeguarded in the Acts of Union between England and Scotland. Article II of the Acts confirmed the provisions of the *Act of Settlement* and reiterated provisions relating to the Succession. They state:

> That the Succession to the Monarchy 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 made in England in the Twelfth year of the reign of His late Majesty King William the Third intituled an Act for the further Limitation of the Crown and better securing the rights and Liberites of the Subject 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 Papist or person marrying a Papist was naturally dead according to the Provision for the descent of the Crown of England made by another Act of Parliament in England in the first year of the reign of Their late Majesties King William and Queen Mary intituled an Act declaring the Rights and Liberites of the Subject and settling the Succession of the Crown.[19]

The second article of the *Union with Ireland Act 1800* stated that:

> **That the succession to the crown shall continue limited and settled as at present**
>
> That it be the Second Article of Union, that the succession to the imperial crown of the said United Kingdom, 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 now stands limited and settled, according to the existing laws and to the terms of union between England and Scotland.[20]

This would need amendment should the *Act of Settlement 1700* be amended or abolished.

## 2 Historical Background

Until 1688 there was nothing on the statute book to prevent the monarch from being a Catholic. Indeed James II, an avowed Catholic, was in the curious position of also being supreme governor of the Church of England, a position bestowed by statute. The statutes discussed in this note may now sound restrictive but at the time seemed entirely reasonable and had widespread support. Their wording is a reflection of the genuine fears of the time, e.g. the *Bill of Rights 1688* contains the following text:

> And whereas it has been found by experience that it is *inconsistent with the safety and welfare of the protestant kingdom* to be governed by a popish prince or by any King or Queene marrying a papist…

And the *Act of Settlement 1700* speaks of:

> the succession of the crown in the protestant line for the happiness of the nation and the security of our religion.

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19 *Union with Scotland Act 1706,* and, *Union with England Act 1707*

20 *Union with Ireland Act 1800,* article second

What this illustrates is the discrimination practised against Catholics because, in people's minds, they represented a threat to both the security of the nation and its religion. Some might argue that the Catholic subjects of England did not in fact represent a real threat and were entirely loyal to the state. But there were reasons for believing the contrary which, considering the political climate, were understandable. At the end of the seventeenth century, the religious settlement of Elizabeth I was not much more than a hundred years old, and that century had seen grave unrest. In Elizabeth's reign the religious settlement of Henry VIII was restored after its complete overturn (and brutal punishment of Protestants) in the reign of Mary I. Soon after Elizabeth's succession was complete, and the religious direction of her reign established, the Pope excommunicated Elizabeth, incited her subjects to rebellion and absolved them from their oaths of fidelity and allegiance, in the papal bull of 1570. This meant that English Catholics were in effect forced to choose between their country and their religion:

> The dual obedience and tacit compromise of conscience, on which the vast majority of Catholics in England had hitherto acted, was for ever destroyed, and in its place the duty of unqualified allegiance to the Church of Rome was restored. [21]

The bull of 1570 provoked Parliament to bring in repressive legislation against Catholics and the reaction intensified following an alleged 'invasion' of England by Jesuit missionaries sent by the Pope in 1580, and a succession of plots against the monarch, culminating in the Gunpowder Plot of 1605.

Religious and political conflict dominated the seventeenth century, with civil war, the execution of Charles I, and exile of his heir, the Commonwealth and the Puritan revolution, and eventually in 1660, the restoration of the monarchy with Charles II. It is not altogether surprising that amid such turmoil, 'dangerous' sections of the population such as Catholics (but also others) should attract unwelcome attention and suffer persecution. There was already considerable repressive legislation on the statute book by the end of Elizabeth's reign, and to it James I added more. However, as J.P. Kenyon remarked:

> it was only rarely that any of this legislation was enthusiastically or efficiently enforced and except during a brief period immediately after the Gunpowder Plot in 1605, the Crown was unco-operative. [22]

However, the Commons became steadily more concerned about the alleged threat posed by the Catholics, during the course of the century particularly as the religious beliefs of the Stuart monarchs became more ambiguous. The Long Parliament devised, and introduced in 1643 a more detailed and specific oath of allegiance, the model for the Test Acts of 1673 and 1678.[23]

Both Charles II, apparently secretly an adherent of the Catholic faith, and particularly James II, who was an avowed Catholic, attempted to prevent extant anti-Catholic legislation from being used, but both were eventually overruled by Parliament. In 1673 Charles II assented to the first Test Act, which applied to all office holders. It required of them an anti-Catholic declaration, but also that they must henceforth take the oaths of allegiance and supremacy in open court, and produce written evidence of having taken the Anglican Communion. Many Catholics were forced to resign (including the future James II, then Duke of York) and others to appoint deputies to carry on the business of their offices. However, despite the urgings of

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[21] J.C. Black, *The reign of Elizabeth I*, 2nd ed., 1959, p168
[22] J.P. Kenyon, *The Stuart Constitution,* 1966
[23] *Ibid,* p450

higher authority, the execution of the old penal laws remained lax and inefficient. Then in 1678 came the scare over the Popish Plot, which resulted in the second *Test Act* of that year. This included the declaration laid down in the 1673 Act abjuring transubstantiation, worship of the Virgin Mary and the celebration of mass: clearly unacceptable to any Catholic. The reign of James II brought these issues to the fore. He fled in the "Glorious Revolution" of 1688. [24]

A mass of penal legislation against Catholics (and others, but less severely) remained on the statute book in the eighteenth century, but its enforcement was lax. It was not until 1828-29 that the main body of penal laws was removed. The few disabilities remaining after the *Roman Catholic Emancipation Act 1829* have gradually been cleared up in the process of statute law revision. Almost no restrictions now remain other than the succession to the throne.

# 3 Altering the Succession to the Crown: Main issues

## 3.1 Discrimination

The Fabian Society's 2003 Commission on the Future of the Monarchy argued that it is difficult to align the current restrictions on religion and gender in relation to the succession with general concerns to end discrimination and promote equality:

> The current rules of succession raise a fundamental question for a modern democracy. In the context of increasing cultural diversity, and an expectation of civil and social equality, can institutionalised gender and religious discrimination any longer be acceptable? We believe it cannot, for symbolic and practical reasons, and reform is long overdue.[25]

The Scottish National Party have, in recent years, made a number of calls for the discriminatory provisions of the *Act of Settlement* to be repealed. On 28 June 2006 SNP leader Alex Salmond asked the then Prime Minister, Tony Blair:

> **Mr. Alex Salmond (Banff and Buchan) (SNP):** Will the Prime Minister set out a clear timetable for the removal from the statute book of the Act of Settlement, which introduces clear discrimination against millions of our fellow citizens? Would a Government set on a course of repeal not be demonstrating leadership, authority and direction?
>
> **The Prime Minister:** No, I am afraid that I cannot give the hon. Gentleman that assurance…[26]

Matters relating to the Crown are reserved matters under the terms of the *Scotland Act 1998* and the Scottish Parliament has no power to legislate in this area. However, the Scottish Parliament debated a motion on the *Act of Settlement* in December 1999[27] and resolved as follows: [28]

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[24] See House of Commons Factsheet G4 *The Glorious Revolution* for more detail at http://www.parliament.uk/documents/upload/G04.pdf

[25] Fabian Society Commission, *The Future of the Monarchy,* 2003, p48

[26] HC Deb 28 June 2006 c259

[27] Scottish Parliament Official Report, 16 December 1999, c1633-80: http://www.scottish.parliament.uk/official_report/session99-00/or031602.htm#Col1633

[28] *Ibid*, c1754

> Resolved,
>
> That the Parliament believes that the discrimination contained in the Act of Settlement has no place in our modern society, expresses its wish that those discriminatory aspects of the Act be repealed, and affirms its view that Scottish society must not disbar participation in any aspect of our national life on the grounds of religion, recognises that amendment or repeal raises complex constitutional issues, and that this is a matter reserved to UK Parliament

For further details on the views of the Scottish churches etc. on this issue, see *Scottish Parliament Information Centre Research Paper 99/17 - The Act of Settlement*.[29]

The Government has repeatedly stated its opposition to discrimination in this context. During the debate on Lord Dubs' Bill in 2005, the then Lord Chancellor, Lord Falconer, stated that although the *Act of Settlement* and other associated Acts that exclude Roman Catholics from the succession could be seen as 'discriminatory', he remained opposed to what would be a complex and controversial procedure to change them:

> To bring about changes to the law would be a complex and controversial undertaking, raising major constitutional issues which would involve the amendment or repeal of a number of pieces of related legislation. 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 Princess Sophia's Precedence Act 1711—I hope no one will intervene on that one—the Royal Marriages Act 1772, the Union with Ireland Act 1800, the Accession Declaration Act 1910, and the Regency Act 1937. I recognise that my noble friend's Bill deals with obvious aspects of the Union with Scotland Act and, indeed, the parallel Union with England Act of the pre-Union Scottish Parliament, but it has not addressed any of the issues raised by the other Acts to which I have referred.
>
> (…)
>
> I should make it clear that this Government stand firmly against discrimination in all its forms, including discrimination against Catholics, and will continue to do so. The Government would never support discrimination against Catholics, or indeed any others, on the grounds of religion. The terms of the Act are discriminatory, but we should be clear that for all practical purposes, its effects are limited.[30]

However, more recently, in March 2009, Jack Straw, the Secretary of State for Justice and Lord Chancellor, said that:

> The Prime Minister has made it clear that we take the issue seriously, and we accept that at the heart of the measures that we are considering, there is discrimination, which should have no place in a modern society.[31]

### 3.2 Complexity

To remove legislative restrictions against Roman Catholics in relation to succession to the throne, the statutes mentioned in section 1 of this note would have to be amended. If the position of the established church were affected, many others would be included too. In 2008 the effect of the repeal of the Act of Settlement on other Acts of Parliament was raised in a written Parliamentary question to Jack Straw:

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29 http://www.scottish.parliament.uk/whats_happening/research/pdf_res_papers/rp99-17.pdf
30 HL Deb 14 January 2005 cc510-511
31 HC Deb 27 March 2009 c620

> **Mr. Ingram:** To ask the Secretary of State for Justice which other Acts of Parliament would need to be amended if the Act of Settlement 1700 were amended to end the prohibitions on Roman Catholics within that Act.
>
> **Mr. Straw:** 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's Precedence Act 1711, the Royal Marriages Act 1772, the Union with Ireland Act 1800, the Accession Declaration Act 1910, and the Regency Act 1937. Any change in legislation would among other things require the consent of member nations of the Commonwealth.[32]

It is clear that drafting any piece of legislation to change the situation would not be straightforward. Dealing with amendments to the legislation concerning the union of Scotland and England could open up extremely complex constitutional issues, quite apart from the problems inherent in trying to disentangle matters of religion and politics, being, as they are, at the heart of core aspects of the British constitution. However, the complexity argument has been challenged by Robert Blackburn, Professor of Constitutional Law at University College London, who has written that:

> …this complication would hardly bother the government's legislative draftsmen, known as 'parliamentary counsel'. As a constitutional measure, the Constitutional Reform Act 2005, transforming the office of Lord Chancellor and 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 and comprehension.[33]

More fundamental, he argues, is the relationship between the protestant succession and the establishment of the Church of England:

> There is no doubt that at the crux of the whole debate about reforming the Act of Settlement is whether the country, and the political elite of the country, wishes to maintain the established Church of England. 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.[34]

### 3.3 Assent of the Commonwealth

The *Statute of Westminster 1931* appears to require the United Kingdom to obtain the assent of all the Parliaments in the Commonwealth before altering the law of succession,[35] although the precise nature of this requirement is subject to some disagreement.

The preamble to the *Statute of Westminster* states:

> 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

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32 HC Deb 31 March 2008 c554W

33 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p126

34 *Ibid,* p128

35 Sixteen countries, including the UK, retain the British Monarch as their head of state. The other fifteen are: Antigua and Barbuda, Australia, The Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, Mauritius, New Zealand, Papua New Guinea, Saint Christopher and Nevis, Saint Vincent and the Grenadines, The Soloman Islands, and Tuvalu.

> 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 and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.[36]

However, Professor Blackburn has argued that as these words are included in the preamble to the Act, rather than the Act itself, they have no legal basis, but a strong moral one:

> 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 reigns.[37]

In his book *Monarchy and the Constitution* Professor Vernon Bogdanor refers to the abdication crisis in 1936 where consent was sought from the nations in the Commonwealth for the *Declaration of Abdication Act 1936*. This Act gave statutory effect to the Instrument of Abdication which Edward VIII had signed. It also provided that the Duke of York (who was next in line to the throne) should succeed, barred any possible future claim to the throne by Edward VIII or his descendents, and declared that the *Royal Marriages Act 1772* should not apply to Edward VIII or his descendents. Professor Bogdanor states that:

> 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.[38]

Therefore, he explains, it remains "a convention that any alteration in [the rules of succession] must be agreed between all of the members of the Commonwealth which recognise the Queen as their head of state".

In 1952 the Commonwealth prime ministers had agreed that each of the monarchies in the Commonwealth should be free to adopt its own title in a form suitable to its own local circumstances.[39] Although the title of the monarch might be varied from country to country, the person to whom the titles apply must be the same person across the Commonwealth.[40]

Professor Bogdanor explains that:

> When George, Elector of Hanover, became George I in 1714, he ruled over two kingdoms with different rules of succession – for Hanover prohibited the succession of a female to the throne. Accordingly, when Victoria became queen in 1837, the link with Hanover was broken, and Victoria's uncle, the Duke of Cumberland, became the Elector of Hanover. Clearly, it would not be in accordance with the relationship

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36 *Statute of Westminster 1931*
37 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p126
38 Vernon Bogdanor, *The Monarchy and the Constitution,* 1995, p45
39 *The Royal Titles Act 1953*
40 Vernon Bogdanor, *The Monarchy and the Constitution,* 1995, p269

> between the monarchies of the Commonwealth that there should be any differences in the rules of succession.[41]

The matter has been tested in the Canadian courts, by way of an action in the Superior Court of Ontario by a private individual, who was aggrieved by the attitude taken by the Act of Settlement and allied constitutional statutes to Roman Catholics. This case, *O'Donohue v. Canada,* was decided in June 2003.[42] The judge, Mr Justice Roleau, decided the case was non-justiciable. He dismissed the application. Some of the *obiter dicta* of the judge are however instructive.

> The office of the Queen is such a fundamental part of our constitutional structure that amendments to the Constitution in respect of that office require the unanimous consent of the federal and provincial governments (see s. 41(a) of the Constitution Act, 1982).[43]

He continued:

> Applying that reasoning to the present case, it is clear that Canada's structure as a constitutional monarchy and the principle of sharing the British monarch are fundamental to our constitutional framework. In light of the preamble's clear statement that we are to share the Crown with the United Kingdom, it is axiomatic that the rules of succession for the monarchy must be shared and be in symmetry with those of the United Kingdom and other Commonwealth countries. One cannot accept the monarch but reject the legitimacy or legality of the rules by which this monarch is selected.[44]

And most importantly, the judgment contained the following interpretation of the Statute of Westminster on the need for unanimity in the Commonwealth in order to change the "foundation documents":

> As a result of the Statute of Westminster it was recognized that any alterations in the rules of succession would no longer be imposed by Great Britain and, if symmetry among Commonwealth countries were to be maintained, any changes to the rules of succession would have to be agreed to by all members of the Commonwealth. This arrangement can be compared to a treaty among the Commonwealth countries to share the monarchy under the existing rules and not to change the rules without the agreement of all signatories.[45]

It is thus evident that any change in the succession provisions, according to this Canadian interpretation, would require legislation, at least in Canada, to validate its application there.

There are others, however, who believe that such obstacles should not, in practice, prevent any changes being made. The Fabian Commission argued that requirement of the Commonwealth nations must be sought is "unconvincing". The Commission argued stated that:

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41 *Ibid*

42 2003 CanLII 41404 (ON S.C.) and is reported at [2003] O.T.C 623 and (2003) 109 C.R.R., References are to the Internet version; http://www.canlii.org/on/cas/onsc/2003/2003onsc11019.html (last viewed 16 March 2009). Mr O'Donoghue appealed against the decision, but the appeal was summarily disallowed by the Ontario Court of Appeal ([2005] O.J. No.965, docket C40337).

43 *Ibid*, para 23

44 *Ibid,* para 27

45 *Ibid,* para 33

> It ignores the divisibility of the Commonwealth of the Crown in those states where the Queen is Head of State, as well as various amendments to the constitutions of these independent countries.[46]

The Fabian Commission stated that the concept of a divisible monarchy has been developed most clearly in Australia where, by 1973, the Australian Parliament was referring to Elizabeth II and Queen of Australia. In 1986 the *Australia Act* removed the residual powers of the British Government to intervene in the government of Australia or its individual states. The Act provides that:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or Territory as part of the law of the Commonwealth, of the State or of the Territory.[47]

The Fabian Commission quoted Peter Harry of the Commonwealth Institute as stating:

> It is highly debatable whether the members of the Commonwealth would need to ratify any alterations or reforms of the British monarchy. When there was a referendum on the monarchy in Australia in November 1999 the Queen stated that it was a matter entirely for the Australians and kept out of the debate completely. Likewise, Britons would be entitled to expect the Commonwealth nations to refrain from interfering with British reforms of the monarchy. It is worth mentioning that the Commonwealth is a voluntary association of independent nations not bound by legal treaties of any kind. It would also be incredibly difficult if it were the case. The constitutions of Australia and New Zealand for instance can only be changed through national referendums resulting in a majority of voters in a majority of states voting for the change.[48]

In practice, the Fabian Commission argued, that:

> …With due consultation we believe it would not be difficult to obtain agreement among Commonwealth countries which retain the Queen as their Head of State on the kinds of reform proposed in this report. It looks very doubtful that any modern state would object to changes of the rules of succession removing discrimination on grounds of gender or religious affiliation. In this sense we do not believe that the position of the Queen as Head of State of other countries presents an obstacle to reforming the monarchy in the UK.[49]

Jack Straw stated during the Second Reading debate on Dr Evan Harris's Private Members' Bill on the Crown succession that:

> There is a slightly arcane argument about whether, as the preamble to the statute, that statement has legal force – I shall not offer a view, because preambles to modern statutes are unusual – but it plainly has huge moral force. No serious British Government of any complexion could ignore part of a solemn compact with, originally, the dominions and now with the Commonwealth.[50]

He also stated that:

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46 *The Future of the Monarchy: The Report of the Fabian Commssion,* 2003, p90

47 As quoted in *The Future of the Monarchy: The Report of the Fabian Commission,* 2003, p89

48 From written evidence to the Commission on the Future of the Monarchy from Peter Harry of the Commonwealth Institute, cited in *The Future of the Monarchy: The Report of the Fabian Commssion,* 2003, p90-91.

49 *The Future of the Monarchy: The Report of the Fabian Commission,* 2003, p91

50 HC Deb 27 March 2009 c628

> …my right hon. Friend [the Prime Minister] also said that he was ready to consult other relevant Commonwealth Heads of Government, not least at the Commonwealth Heads of Government meeting later this year.[51]

# 4 Government position

In 2009 Dr Evan Harris introduced the *Royal Marriages and Succession to the Crown (Prevention of Discrimination) Bill.* This aimed to remove provisions which prevent the marriage of the monarch or heirs to the throne to Catholics, amend the common law to give women an equal place in the line of succession, and repeal the *Royal Marriages Act 1772.* On the day of the second reading debate in the Commons, it was reported in the press that the Government were in discussions with the Palace and the Commonwealth about changing the law. The *Guardian* reported that:

> In a major departure from the line taken by Tony Blair, who rejected calls to overturn the ban, the prime minister has decided to take steps towards reforming the laws drawn up when Britain was consumed by anti-Catholic sentiment.
>
> Brown has raised the matter with the palace, which is said to be open to dialogue. The prime minister has also talked about the changes with leaders of commonwealth countries, who would have to give their approval.[52]

During the debate on Evan Harris's Bill, Jack Straw quoted a radio interview given by the Prime Minister earlier in the day. He said:

> The Prime Minister has made it clear that we take the issue seriously, and we accept that at the heart of the measures that we are considering, there is discrimination, which should have no place in a modern society. On the radio this morning, my right hon. Friend the Prime Minister said:
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> > "This is a very complex issue that has been a matter of controversy and discussion for decades, indeed over the centuries. What we must do it to protect the position of the Queen as head of the established Church, the Church of England. So nothing we must do must affect that. But there are clearly issues about the exclusion of people from the rights of succession, and there are clearly issues that have got to be dealt with, not just in Britain, but would have to be dealt with across the whole of the Commonwealth. So this is not an easy set of answers, but I think in the 21st century people do expect discrimination to be removed, and they do expect us to be looking at all these issues".[53]

Jack Straw indicated that there was not yet "a precise timetable" for changes:

> I am afraid I am not ready to specify a precise timetable. I can say to the hon. Gentleman, however, that as a result of the pressure that he has exerted by means of the Bill and other concerns that have been expressed, as it were, on both sides of the confessional spectrum – not least in Scotland – this is now a higher priority for Government than it has been.[54]

On 26 November 2009 Evan Harris raised the matter with Gordon Brown at Prime Minister's Questions:

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51 HC Deb 27 March 2009 c621
52 'Brown in talks to end ban on Catholics joining royal family', *The Guardian,* 27 March 2009
53 HC Deb 27 March 2009 c620
54 HC Deb 27 March 2009 c624

> **Dr. Evan Harris (Oxford, West and Abingdon) (LD):** In March, when the Lord Chancellor talked out my private Member's Bill to end the discrimination against Catholics in royal marriages and against women in the line of succession, he said that the Government recognised that this discrimination should end. Can the Prime Minister confirm that he is, as the Lord Chancellor said, ready to consult the relevant Commonwealth Heads of Government this week and that he is confident that we will then be able to sort this out, so that the all-party-
>
> **Mr. Speaker:** Order. We get the drift. I call the Prime Minister.
>
> **The Prime Minister:** The Act of Settlement is outdated, and I think that most people recognise the need for change. Change can be brought about only by not just the United Kingdom, but all realms where Her Majesty is Queen making a decision to change. That is why it is important to discuss this with all members of the Commonwealth, including countries such as Australia and Canada. That is the process that will be undertaken in due course.[55]

Previously, the Government had stated that it has no plans to legislate in this area. In 1999 Tony Blair was asked:

> **Ms Roseanna Cunningham:** To ask the Prime Minister if he will make it his policy to seek to amend the law to *(a)* allow members of the Royal family to marry a Catholic without losing their right to inherit the throne and *(b)* allow Roman Catholics to inherit the throne; and if he will make a statement. [99658]
>
> **The Prime Minister** *[holding answer 26 November 1999]:* The Government have always stood firmly against discrimination in all its forms, including against Roman Catholics, and it will continue to do so.
>
> The Government have a heavy legislative programme aimed at delivering key manifesto commitments in areas such as health, education, crime and reform of the welfare system. To bring about change to the law on succession would be a complex undertaking involving amendment or repeal of a number of items of related legislation, as well as requiring the consent of legislatures of member nations of the Commonwealth. It would raise other major constitutional issues. The Government have no plans to legislate in this area. [56]

On 28 March 2008, in a statement to the House of Commons, Jack Straw announced the publication of the draft Constitutional Renewal Bill and an accompanying White Paper and summary of consultation responses. Following the statement, Jack Straw was asked about the Act of Settlement by Jim Devine:

> **Mr. Jim Devine (Livingston) (Lab):** I welcome my right hon. Friend's statement, particularly his comment that this is not the final blueprint. I ask him to include provision for the abolition of the Act of Settlement, because it discriminates directly against Roman Catholics. That is legalised sectarianism, which has no role to play in the 21st century.
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> **Mr. Straw:** Let me say to my hon. Friend that I speak on behalf of the Prime Minister: because of the position that Her Majesty occupies as head of the Anglican Church, this is a rather more complicated matter than might be anticipated. We are certainly ready

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55 HC Deb 25 November 2009 c532
56 HC Deb 13 December 1999 c57-8W

to consider it, and I fully understand that my hon. Friend, many on both sides of the House and thousands outside it, see that provision as antiquated.[57]

However, as Frank Cranmer has written:

Two days later, however, in the No. 10 morning press briefing, the Prime Minister's spokesman seemed to dismiss the idea that any kind of reform was possible, since:

> to bring about changes to the law on succession would be a very complex undertaking; it would involve the amendment or appeal [*sic*] of a number of items of related legislation, but it would also require the consent of the legislators of member nations of the Commonwealth. [Morning Press Briefing from 27 March 2008]

So that looks like a 'no', then – at least for the moment.[58]

[57] HC Deb 25 March 2008 c27

[58] Frank Cranmer, 'Parliamentary report', *Ecclesiastical Law Journal,* 2008, p352