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.

The note then 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 recent attempts to change the laws of succession and Government statements of their position on doing so.

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*

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1 The Legal Background

According to common law, the title to the crown of England descends lineally to the issue of the reigning sovereign, males being preferred to females, and subject to the right of primogeniture. The common law provisions are subject to certain statutory limitations as to religion and with particular reference to Roman Catholics. These are the *Bill of Rights 1688*, the *Act of Settlement 1700* and the *Act of Union 1700*, all reinforced by the provisions of the *Coronation Oath Act 1680* and the *Accession Declaration Act 1910*.[1]

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.[2] 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 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. [3]

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.[4]

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

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

3 Commons Journal 28 Jan 1688

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

> in all and every such case or cases the people of these realmes shall be and are hereby absolved of their allegiance.[5]] 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[6]] 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 assembled and by the authoritie of the same declared enacted and established accordingly

The Bill of Rights, in effect, excludes Roman Catholics or those who marry Roman Catholics from the succession and provides for the Protestant succession. It requires the monarch on his or her accession to make before Parliament a declaration rejecting Roman Catholicism.

There are two current examples where the marriage of someone in line to the throne to a Roman Catholic has resulted in their removal from the line of succession.[7] The Earl of St Andrews and HRH Prince Michael of Kent both lost the right of succession to the throne through marriage to Roman Catholics. Any children of these marriages remain in the succession provided that they are in communion with the Church of England.

In 2008 it was announced that Peter Phillips (the son of the Queen's daughter, Princess Anne) would marry his partner, Autumn Kelly. It emerged that she had been baptised as a

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5 Annexed to the original Act in a separate schedule

6 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

7 A list of the first 40 in line to the throne is available at http://www.royal.gov.uk/output/page5655.asp (last viewed 22 August 2008)

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.[8]

1.2 Coronation Oath Act 1688

The specific connection at this stage with the Church of England came in the *Coronation Oath Act* of the same year which requires the King and Queen to swear, during the 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 [9]

This oath has been modified without statutory authority. The present Queen 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.[10]

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",[11] 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.

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

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8 "Fiancée secures royal succession by abandoning her Catholic Faith', *The Times,* 1 May 2008

9 C*oronation Oath Act 1688* (1 Will & Mar chap 6), s 3

10 For more information see Library Standard Note, SN/PC/00435, *The Coronation Oath*

11 *Act of Settlement 1700* (12 & 13 Will 3 chap 2), in long title

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*[12], 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.[13]

1.4 Act of Union with Scotland 1706

The position of the established Protestant Presbyterian Church of Scotland was safeguarded in the *Act of Union with Scotland*. Article II of the Articles of Union reiterated and confirmed the provisions of the *Act of Settlement*:

> ARTICLE II
>
> **Succession to the monarchy**-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

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

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

> 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 right and liberties 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 liberties of the subject and settling the succession of the crown.

And from Article XXV:

> **Subjects not liable to oath, test, or subscription, inconsistent with the Presbyterian Church government; successor to swear to maintain the said settlement of religion**- And further her Majesty with advice aforesaid expressly declares and statutes that none of the subjects of this kingdom shall be liable to put all and every one of them for ever free of any oath test or subscription within this kingdom contrary, to or inconsistent with the aforesaid true Protestant religion and Presbyterian Church government worship and disipline as above established and that the same within the bounds of this Church and kingdom shall never be imposed upon or required of them in any sort And lastly that after the decrease of her present Majesty (whom God long preserve) the soveraign succeeding to her in the royal government of the kingdom of Great Britain shall in all time coming at his or her accession to the crown swear and subscribe that they shall inviolably maintain and preserve the foresaid 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.

1.5 Accession Declaration Act 1910

This Act specifies 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*. It 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. [14]

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…

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[14] *Accession Declaration Act 1910* (10 Edw 7 & 1 Geo 5 chap 29), schedule

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.

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. [15]

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. [16]

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.[17]

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

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

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 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. [18]

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 Removal of legislative restrictions?

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 the Lord Chancellor and Secretary of State for Justice, Jack Straw:

> **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.[19]

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

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

[19] HC Deb 31 March 2008 c554W

> 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.[20]

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.[21]

3.1 Consent of the Commonwealth

The *Statute of Westminster 1931* requires the United Kingdom to obtain the assent of all the Parliaments in the Commonwealth before altering the law of succession. It 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 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.[22]

However, Robert 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.[23]

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 in order to change the succession to the throne. He 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,

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20 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p126
21 *Ibid,* p128
22 *Statute of Westminster 1931*
23 Robert Blackburn, *King and Country: Monarchy and the Future King Charles III,* 2006, p126

> 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.[24]

Vernon Bogdanor argues that although 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, 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". Although the title of the monarch might be varied from country to country, the person to which the titles apply must be the same person across the Commonwealth.[25]

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.[26] 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)*[27]*.*
>
> *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*[28]

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.*[29]

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.

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[24] Vernon Bogdanor, *The Monarchy and the Constitution,* 1995, p45

[25] *Ibid*, p269

[26] The authors are indebted to Mr D Doherty of Nepean, Ontario, for drawing this judgment to their attention. Its reference is 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. 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).

[27] *Ibid*, para 23

[28] *Ibid,* para 27

[29] *Ibid,* para 33

3.2 Recent parliamentary activity

Private Members' Bills

There have been a number of Private Members' Bills and Ten Minute Rule Bills that have attempted to address the issue of succession to the Crown and Royal marriages. These are all set out in the Parliamentary Information List, *Attempts to Amend Crown Succession.*[30]

In the 2004-05 Session two attempts were made to change the law. Ann Taylor presented a Private Member's Bill to the House on 12 January 2005. This was not reached for debate and was objected to on reading of the Remaining Orders on 4 March 2005.[31] Clause 2 of the Bill would have removed the prohibition on Roman Catholic consorts. Lord Dubs had previously presented a Bill in the Upper House on 8 December 2004 with a similar provision to enable Monarchs and heirs to the throne to have Roman Catholic consorts.[32] However, Lord Dubs withdrew his motion for a second reading following a debate on 14 January 2005 and subsequently withdrew the Bill.[33]

Edward Leigh presented a Bill entitled *Royal Marriages (Freedom of Choice)* (*Bill 79*) *2004/05* under the ten-minute rule on 8 March 2005.[34] The Bill had not been printed at the date of revision. Mr Leigh stressed he did not wish to change the rules relating to the religion of the monarch, but only those relating to the religion of a spouse.

The most recent attempt was made by John Gummer in his ten-minute rule Bill, *Catholics (Prevention of Discrimination) Bill 2006/07.* Introducing the Bill at first reading he stated:

> In a civilised society there ought to be no reason to introduce this Bill. If we proposed a Bill on the Floor of the House of Commons that would make it illegal for the heir to the throne to marry a Muslim, a Methodist or a Mormon, that would be intolerable in a free society, yet the heir to the throne is still not allowed to marry a member of what is, on any Sunday, the largest worshipping community in this country. That is an insult to the Catholic community because it suggests that, somehow or other, being a Roman Catholic means being less of a citizen than someone belonging to any other religious denomination.[35]

Other attempts had been made by Kevin McNamara in 2001 and Lord Forsyth of Drumlean in 1999. The *Treason Felony, Act of Settlement and Parliamentary Oath Bill,* was a ten-minute rule bill introduced by Kevin McNamara.[36] The debate on the motion to allow the Bill to be introduced was agreed to by 170 votes to 32 on 19 December 2001.[37] The Queen's consent to the Bill was signified on 19 July 2002 but the Bill failed to gain a second reading by the end of the session.

The Bill had three purposes: to amend section 3 of the *Treason Felony Act 1848* to establish that it be no longer an offence to express an opinion in favour of republicanism or advocating

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30 Parliamentary Information List, SN/PC/04663, *Attempts to Amend Crown Succession*

31 *Succession to the Crown (No 2) Bill* (Bill 36 of 2004-05), available to view here: http://www.publications.parliament.uk/pa/cm200405/cmbills/036/2005036.pdf

32 Succession to the Crown Bill (HL Bill 11 of 2004-05), available to view here: http://www.publications.parliament.uk/pa/ld200405/ldbills/011/2005011.pdf

33 For the full debate, see HL Deb 14 January 2005, cc495-515

34 HC Deb vol 431 cc1392-4, available at http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm050308/debtext/50308-06.htm#50308-06_head1

35 HC Deb 20 February 2007 cc154-156

36 Available at: http://pubs1.tso.parliament.uk/pa/cm200102/cmbills/077/2002077.pdf

37 HC Deb 19 December 2001, cc 319-323

the abolition of the monarchy; to amend the *Act of Settlement 1700* to provide that persons in communion with the Roman Catholic Church are able to succeed to the Crown; and to amend the Parliamentary Oath.

Section 2 of the *Act of Settlement*, described above, confirmed the exclusion of Catholics from the throne; clause 2(1) of Mr McNamara's Bill would have repealed this section. During the introductory speech, Mr McNamara described sections 2 and 3 of the *Act of Settlement* as "extremely offensive" (col. 320). He was opposed by Dr Ian Paisley, who gave examples of continental countries where particular religious tenets were required of the monarch, and stated that a Private Member's Bill was an unsuitable vehicle for such a change.

An attempt to amend the Act was also made by Lord Forsyth of Drumlean in 1999. Press reports had suggested that Lord Forsyth of Drumlean and Lord Fraser of Carmyllie were intending to introduce a Private Member's Bill in the House of Lords to amend the *Act of Settlement* and to allow the monarch to marry a Roman Catholic.[38] Lord Forsyth's motion seeking the Queen's consent to present a Bill was not agreed to.[39] *Erskine May* explains that where a Peer wishes to introduce a Private Member's bill which is "*directed substantially to the Royal prerogative or interests […] an Address is moved asking for the Queen's consent before the Bill is introduced*."[40] The text of Lord Forsyth's motion read as follows: [41]

> Moved, That an humble Address be presented to Her Majesty praying that Her Majesty may be graciously pleased to allow that Her undoubted prerogative and interest may not stand in the way of the consideration by Parliament during the present Session of any measure to remove the bar on a person who is not, or who is married to a person who is not, a Protestant to succeed to the Crown, and for connected purposes.

Lord St John of Fawsley, who spoke against this motion, voiced an opinion that it was not appropriate that a change of this nature should be effected by a Private Member's bill:[42]

> My second point is that this is a matter of extreme complexity. The status of the Sovereign's Coronation Oath, made in 1952, is brought into the issue. The Address involves the amending of not only one statute, but of many, including the Act of Union with Scotland of 1706. Under the Statute of Westminster 1931, if the Address were to lead to legislation, that legislation would have to be approved by all the relevant Commonwealth governments and by their parliaments. Therefore I ask your Lordships to draw the conclusion that surely such a major matter is best set in train--and should be set in train by the Government and Opposition parties officially acting together and not by a single Peer, even one so respected as my noble friend, whose intentions are beyond reproach.

This view had also been expressed in the closing speeches on the second reading motion on Lord Archer's *Succession to the Crown Bill [HL]* in February 1998, where Lord Williams of Mostyn, Home Office Minister, stated that the Government intended taking the matter forward and that a Private Member's bill was not "an appropriate vehicle for so important a change".[43]

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38 For example, see "Tory peers aim to lift monarchy ban on Catholics", *Scotsman,* 8 November 1999
39 HL Deb 2 December 1999, cc917-919
40 *Erskine May Parliamentary Practice (*22 ed.), 1997, p465
41 HL Deb 2 December 1999 c917
42 *Ibid*, c918
43 HL Deb 27 February 1998 c917

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…[44]

3.3 Scottish Parliament

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[45] and resolved as follows: [46]

> 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*.[47]

3.4 Government position

Despite continuing pressure from individuals and sporadic press attention, the Government has 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

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44 HC Deb 28 June 2006 c259

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

46 *Ibid*, c1754

47 http://www.scottish.parliament.uk/whats_happening/research/pdf_res_papers/rp99-17.pdf

> Commonwealth. It would raise other major constitutional issues. The Government have no plans to legislate in this area. [48]

More recently, in 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.[49]

On 28 March 2008, in a statement to the House of Commons, Jack Straw, the Lord Chancellor and Secretary of State for Justice, 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.
>
> **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 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.[50]

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48 HC Deb 13 December 1999 c57-8W
49 HL Deb 14 January 2005 cc510-511
50 HC Deb 25 March 2008 c27