

2012

From Agnatic Succession to Absolute Primogeniture: The Shift to Equal Rights of Succession to Thrones and Titles in the Modern European Constitutional Monarchy

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FROM AGNATIC SUCCESSION TO ABSOLUTE
PRIMOGENITURE:
THE SHIFT TO EQUAL RIGHTS OF SUCCESSION TO
THRONES AND TITLES IN THE MODERN
EUROPEAN CONSTITUTIONAL MONARCHY

*Christine Alice Corcos**

2012 MICH. ST. L. REV. 1587

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INTRODUCTION

On October 28, 2011, the heads of the British Commonwealth member states agreed to remove barriers to the succession of the first-born child of the sovereign, whether male or female, to the throne of the United Kingdom.¹ Such a rule—the rule of absolute, or full (cognatic) primogeniture²—ensures that the oldest child, regardless of gender, inherits the crown. In addition, the heads of state agreed to remove the bar to the marriage of members of the Royal Family to Catholics,³ although the sovereign cannot be a Catholic, since the King or Queen of the United Kingdom is the head of the Church of England.⁴ The media reported little, if any, opposition to

1. John F. Burns, *British Monarchy Scraps Rule of Male Succession in New Step to Modernization*, N.Y. TIMES, Oct. 29, 2011, at A4. The change was head-snapping. In 2008, the British government abandoned an attempt to change succession rules only a week after planning to introduce the Single Equality Bill. See Andrew Pierce, *U-Turn on Royal Succession Law Change*, THE TELEGRAPH, Apr. 28, 2008, at <http://www.telegraph.co.uk/news/uknews/theroyalfamily/1905565/U-turn-on-royal-succession-law-change.html> (visited April 12, 2013).

2. As opposed to ordinary primogeniture, where the firstborn son inherits the estate “to the exclusion of younger siblings.” BLACK’S LAW DICTIONARY 1311 (9th ed. 2009).

3. For an extensive discussion of the mechanisms involved in changing the various statutes involved in the Commonwealth countries, see generally Anne Twomey, *Changing the Rules of Succession to the Throne* (Sydney Law Sch. Legal Studies Research Paper No. 11/71, 2011) [hereinafter Twomey, *Changing the Rules*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943287; Anne Twomey, *The Australian Crowns and the Rules of Succession*, QUADRANT, June 2009, at 44-45.

4. See Burns, *supra* note 1, at A4.

the decision.⁵ Indulging in some enthusiastic alternative historical “what-if-ing” the *Daily Mail* chirruped:

If the new rules had been in force in 1509 Margaret Tudor would have taken the throne instead of Henry VIII. That could have meant the Reformation would never have taken place and Elizabeth I would never have been Queen. If the practice had been changed as recently as the last century, Britain could have had two Queen Victorias back to back. Princess Victoria, the Princess Royal would have acceded to the throne in 1901 instead of King Edward VII. When she died just a few months later, her son Kaiser Wilhelm II would have ascended the throne—something which could have prevented the First World War. The Queen of England now would have been the completely unknown Princess Marie Cecile of Prussia.⁶

While under these rules Margaret, the oldest surviving child, and older surviving daughter, of Henry VII, would have succeeded him,⁷ the likelihood that the England of Tudor times would have put these rules into place is nil. But suppose we play the game. Had absolute primogeniture been the rule, one cannot necessarily assume that the Reformation might not have touched England’s shores. While Henry VIII turned to the Protestant faith in part because it promised him a solution to the sticky problem of divorce, the Protestant religious revolution attracted others dissatisfied with the Roman Catholic Church, including many in England as well as on the continent.⁸ To suggest that it would have *no* influence (rather than *less* influence) in England is a rather large leap.

5. *Girls Equal in British Throne Succession*, BBC NEWS (Oct. 28, 2011), <http://www.bbc.co.uk/news/uk-15492607>.

6. Tim Shipman & Damien Gayle, *If Wills and Kate Have a Girl First, She'll Be Queen! Commonwealth Agrees Historic Change to Give Sex Equality in Royal Succession*, MAIL ONLINE (Oct. 28, 2011), <http://www.dailymail.co.uk/news/article-2054467/UK-royal-succession-laws-Commonwealth-agrees-historic-change-sex-equality.html>. The article’s title is perhaps overly optimistic as well, since this hypothetical first-born daughter has to materialize, and has to outlive both her father and live to see the continuation of the monarchy. *See id.*

7. On the life of Margaret Tudor, see MARIA PERRY, *THE SISTERS OF HENRY VIII: THE TUMULTUOUS LIVES OF MARGARET OF SCOTLAND AND MARY OF FRANCE* (1998). Margaret married as her first husband James IV of Scotland. *Id.* at 10. Margaret’s granddaughter was Mary Stuart, the daughter of Margaret’s son James V. *Id.* at 224.

8. If we can give the Reformation a beginning date, it began in 1517 when theologian Martin Luther famously nailed his Ninety-Five Theses on the Power and Efficacy of Indulgences (*Disputatio pro declaratione virtutis indulgentiarum*) to the doors of the Castle Church in Wittenberg, Germany. Michael Mullett, *Martin Luther's Ninety-Five Theses*, HIST. REV., Sept. 2003, at 46, 47. Even if the English monarch had not joined the movement, many of the German princes did, and as the Swedish king (eventually) did, for example. *See, e.g.*, C.V. WEDGWOOD, *THE THIRTY YEARS WAR* 505 (1973). The Reformation ended in 1648 with the signing of the Treaty of Westphalia; at that point, the Catholic monarchs and the Pope recognized that the Protestant countries had successfully defended their beliefs. *See id.* at 525-26.

The *Daily Mail's* second hypothetical involving Queen Victoria's daughter suggests an even bigger leap.⁹ Had absolute primogeniture been the rule in effect in 1901 (or earlier, so that the pressure to provide male heirs was not so great), and assuming that the first Victoria were ever born, the younger Victoria would have thought seriously before selecting a husband like the nephew of the King of Prussia, a young man who was likely to inherit a throne.¹⁰ The marriage of two sovereigns, an alliance that would bring together two nations, and with it the possibility that one of them might become subservient to the other, was one that was unpalatable to most subjects living in monarchies of the period. Indeed, it was one of the reasons that female sovereigns had so much difficulty finding suitable consorts, and a reason that many subjects and many political philosophers resisted the idea of female rule.¹¹ Thus, few countries that accepted the idea of monarchy also accepted the idea of absolute primogeniture.

Thus, had Victoria been her mother's heir, she almost certainly would not have married the heir to another throne, and her own heir would almost certainly not have been Kaiser Wilhelm.¹² As for the reference to the real life Elizabeth II as "Princess Marie Cecile," no such person would exist at all.

9. See *Girls Equal in Succession to British Throne*, *supra* note 5.

10. Both contemporaries and the Princess Royal herself described her marriage as a love match, but had she known that she was to inherit the throne, she also would have understood the considerations involved, as did her mother when she first came to the throne. See CAROLLY ERICKSON, *HER LITTLE MAJESTY: THE LIFE OF QUEEN VICTORIA 74-84* (1997). When looking over possible husbands, the young Queen Victoria thought seriously about the implications of marrying a reigning monarch or the heir to a throne, and eventually chose a husband who was neither. See *id.*; Brenda Ralph Lewis, *Victoria & Albert*, 22 BRIT. HERITAGE 18, 21, 24-25 (2001). As I discuss, until recently royal families and the countries they head have been concerned about securing the throne against the potential claim of a foreign-born heir; at the same time, such families actively seek out spouses of royal rank for their heirs apparent, and these spouses almost necessarily come from other ruling houses. See *infra* Section II.A. This tension, and irony, is obvious. Some royal families, however, notably the Hapsburgs, made a policy, over several generations, of marrying heirs, and so increasing their power and domains. See generally ADAM WANDRUSZKA, *THE HOUSE OF HABSBURG: SIX HUNDRED YEARS OF A EUROPEAN DYNASTY* (Cathleen Epstein & Hans Epstein trans., Doubleday & Co. 1964) (1956) (discussing the pro-foreign marriage policy of the Hapsburgs). The Austrian branch of the family took as its motto: "*Bella gerant alii, tu felix Austria nube!*" (Let others fight wars, but you, happy Austria, marry). *Id.* at 74. The strategic alliances began with the double marriage of Philip and Margaret of Burgundy. *Id.* at 80. The empire grew further through the children and heirs of Maximilian of Austria I, eventually elected Holy Roman Emperor, and the marriage of Maximilian and Mary of Burgundy, to Juana and Juan of Castile (the oldest children of Isabel I and Ferdinand II). See *id.* This policy led the Hapsburgs eventually to built the largest empire in Europe and the New World. *Id.*

11. See *infra* Section II.A.

12. Even had the Princess Royal married the future Frederick III, any number of factors might have combined to change events in order that Kaiser Wilhelm might not have been born. See ERICKSON, *supra* note 10, at 145.

In countries preparing for the advent of a female sovereign, matters can move much more smoothly. Assuming that all things proceed as expected, Sweden's next sovereign will be female, in spite of the fact that the reigning monarch has a son. When Carl XVI Gustaf's daughter Viktoria was born on July 14, 1977, her father—the youngest of a family of five children, of whom four were daughters—did not necessarily favor the notion that his first-born child should be heir to the throne regardless of sex.¹³ Because Carl XVI was male, he automatically benefited from this circumstance by becoming heir to the throne.¹⁴ When his own son Carl Phillip was born, the eagerly anticipated male child displaced Viktoria for a few months and was recognized as heir apparent,¹⁵ but the Swedish Act of Succession changed the rules.¹⁶ The adoption of this statute signals a shift in attitudes toward the rights of women generally in matters of property and inheritance. While women had inherited the Swedish throne in the past, they had always done so in the absence of male heirs.¹⁷ The rules that changed the possibility of female inheritance of the Swedish throne came in 1810 with the Swe-

13. See Lance Campbell, *Swedish Queen Will Be People's Choice*, ADVERTISER, Feb. 19, 2005, at 50 (“King Carl grumbles that while Victoria is doing a sterling job of preparing to reign, he would still prefer that Prince Carl Philip, almost two years younger, should inherit the headgear.”).

14. Between 1818, beginning with the Bernadotte dynasty and 1980, the Swedish monarchy followed agnatic succession. *See id.*

15. The term “heir apparent” refers to the person who is considered by right of birth next in line to succeed to the throne of a reigning monarch. *See BLACK'S LAW DICTIONARY, supra* note 2, at 792. Under a system that prefers male succession, even if females can succeed, a female child can never be “heiress apparent.” *See id.* She can only be “heiress presumptive,” the heir who is “presumed” to succeed to the throne, since the monarch could always be “presumed” to father (or “mother” if the sovereign is female) a male who might displace the female. *See id.* The legal fiction would presumably maintain even if, for example, the female monarch is past menopause, especially in this now technologically advanced age. *See id.* It would certainly maintain if the male monarch is of any age, since the monarch might still father a son who would displace an “heiress presumptive.” *See id.*

16. *See The Act of Succession*, SVERIGES RIKSDAG (Jan. 5, 2012), <http://www.riksdagen.se/en/How-the-Riksdag-works/Democracy/The-Constitution/The-Act-of-Succession/>. The present King and Queen have three children. *H.M. King Carl XVI Gustaf*, SWEDISH ROYAL CT., <http://www.kungahuset.se/royalcourt/royalfamily/hmkingcarlxvigustaf.4.396160511584257f218000644.html> (last visited Feb. 23, 2013). Crown Princess Viktoria married Daniel Westling on June 19, 2010. *See Swedish Crown Princess Viktoria Weds Fitness Trainer*, BBC NEWS (June 19, 2012), <http://www.bbc.co.uk/news/10357860>. She gave birth February 23, 2012 to a daughter. *See Sweden's Princess Viktoria Gives Birth to Baby Daughter*, BBC NEWS (Feb. 23, 2012), <http://www.bbc.co.uk/news/world-europe-17144550>. According to the new succession rules, this child is now second in line to the throne after her mother. *See id.*

17. Queen Christina had inherited the Swedish throne in 1632, reigned from 1632 to 1654, and then abdicated in favor of her cousin, Charles Gustavus. *See generally* GEORGINA MASSON, *QUEEN CHRISTINA* (Secker & Warburg, 1968). Ulrica Eleanora ruled from 1719 to 1720. The first Swedish queen, Margaret, ruled from 1389 to 1412. JOSEPH DAHMUS, *SEVEN MEDIEVAL QUEENS* 261, 275 (1972).

dish king's adoption of the Gascon Jean Bernadotte,¹⁸ an officer in Napoleon I's army and the consequent importation of the Salic Law.¹⁹ The change in 1980 made Sweden the first European monarchy to recognize the principle of equal succession to the throne.²⁰ Further, the birth of Princess Viktoria's daughter in February 2012 suggests that Sweden will see successive queenship, a spectacle that few other constitutional monarchies have witnessed,²¹ since the norm is male, not female, succession.

Further, three other young women wait as their fathers fill the roles of heir-apparent in their respective kingdoms of Norway,²² the Netherlands,²³ and Belgium.²⁴ In addition, members of the Spanish public freely discuss whether rules of succession should change to allow the Infanta Leonor, elder daughter of the Prince of Asturias, the heir to the throne, to inherit the kingdom, whether or not a son is ever born to her parents. After her birth:

18. When Bernadotte succeeded to the throne in 1818, he adopted the regnal name Charles XIV John. *Charles XIV John*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/107277/Charles-XIV-John> (last visited Feb. 23, 2013). His descendant Carl XVI Gustaf reigns today.

19. Interestingly, prior to the adoption of the Napoleonic Code in 1804, the Basques in the French part of the Basque country recognized the idea of a single first-born heir, who nevertheless could not dispose of the property without the permission of the rest of the siblings. See Marie-Pierre Arrizabalaga, *Succession Strategies in the Pyrenees in the 19th Century: The Basque Case*, 10 HIST. FAM. 271, 271-72, 276 (2005). However, the advent of the Napoleonic Code swept away these traditional practices. *Id.* at 272. "The *Civil Code* of 1804 imposed equal partition among all the children (male and female) when the economic equilibrium of the house and land was threatened. Since most families owned small properties, successive partition could eventually cause bankruptcy." *Id.*

20. I § SUCCESSIONSORDNING (Svensk författningssamling [SFS] 1810:0926) (Swed.). For the duties of the King under the Swedish constitutional monarchy, see *Duties of the Monarch*, SWEDISH ROYAL CT., <http://www.kungahuset.se/royalcourt/monarchy/the-monarchyinsweden/dutiesofthemonarch.4.396160511584257f2180003302.html> (last visited Nov. 5, 2012). In its Fact Sheets, the Swedish Institute explains the workings of the Swedish government. See *Government: The Swedish System of Government*, SWEDEN.SE, <http://www.sweden.se/eng/Home/Society/Government-politics/Facts/Swedish-System-of-Government/> (last visited Feb. 23, 2013).

21. The rare recent examples include those of grandmother, daughter, and granddaughter Queens Wilhelmina, Juliana, and Beatrix in the Netherlands and sisters Grand Duchesses Marie-Adelaide and Charlotte of Luxembourg. See *Queens (20th and 21st Centuries)*, HET KONINKLIJK HUIS, <http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/history/queens-%2820th-and-21st-centuries%29/> (last visited Feb. 23, 2013); *Charlotte*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/107521/Charlotte> (last visited Feb. 23, 2013).

22. The Crown Prince of Norway has a daughter who will succeed him even though she has a younger brother. See *Order of Succession*, KONGEHUSET (Mar. 5, 2009), <http://www.kongehuset.no/c27302/artikkel/vis.html?tid=28654>.

23. *Throne Succession*, HET KONINKLIJK HUIS, <http://www.koninklijkhuis.nl/encyclopedie/monarchie/koninklijk-huis/tronopvolging/> (last visited Feb. 23, 2013).

24. Princess Elisabeth of Belgium, born in 2001, is the oldest child of Prince Philippe, the heir apparent to King Albert II. See *Royal Family*, BELGIAN MONARCHY, <http://www.monarchie.be/royal-family> (last visited Feb. 23, 2013).

The right-wing newspaper *El Mundo* led the calls for a constitutional change “The birth of a daughter accentuates the need to reform the Constitution,” it argued. It was illogical that “a society that is working to eliminate all elements of sexism from its laws does not do the same with its monarchy.”²⁵

Why have many of the constitutional monarchies in Europe—note that, except for Norway, they are also member states of the EU²⁶—made these changes abandoning the male succession preference, and how have they done it? In fact, they have done it through their legal systems, in the same way that they originally enforced agnatic succession or male preference.²⁷

One reason for the relatively rapid change in attitude may be the increasing turn toward “commoner” brides among the royal families of Europe. Male heirs to the throne today do not simply choose non-royal brides—that is, wives who are not from other princely or royal houses. Increasingly they choose brides who are not even from aristocratic (noble) houses—brides who have, if not working class, at least upper middle class

25. Edward Owen, *Clamour to Let Baby Be Future Queen*, *TIMES* (LONDON), Nov. 1, 2005, at 35.

26. See 1992 Treaty on European Union pmbl. (as in effect 1992) (listing some of the current members of the EU). Sweden, for example, changed its rules before it joined the EU in 1995. See *Sweden*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/sweden/index_en.htm (last visited Feb. 23, 2013). The United Kingdom joined in 1973. *United Kingdom*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/unitedkingdom/index_en.htm (last visited Feb. 23, 2013). Belgium joined in 1952 as a founding member. *Belgium*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/belgium/index_en.htm (last visited Feb. 23, 2013). The Netherlands also joined in 1952 as a founding member. *Netherlands*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/netherlands/index_en.htm (last visited Feb. 23, 2013). Denmark joined in 1973. *Denmark*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/denmark/index_en.htm (last visited Feb. 23, 2013). Spain joined in 1986. *Spain*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/spain/index_en.htm (last visited Feb. 23, 2013). Luxembourg joined as a founding member in 1952. *Luxembourg*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/luxembourg/index_en.htm (last visited Feb. 23, 2013). Norway is not an EU member state but maintains close ties to the EU. *Norway and the European Union*, NORWAY MISSION TO THE EU (Oct. 20, 2011), http://www.eu-norway.org/eu/norway_and_the_eu/.

27. While a discussion of monarchic succession outside Europe is beyond the scope of this Article, consider, for example, the current “succession crisis” in Japan. Emperor Akihito has two sons, both of whom have daughters. The Emperor’s younger son has one son. The Japanese line of succession passes only through males. The Japanese Parliament and public have been debating for some time whether females should inherit the throne. See *Focus: Imperial Succession Issue Behind Talks on Female Members’ Status*, *Japanese Pol’y & Pol.*, Dec. 5, 2011 (<http://www.thefreelibrary.com/FOCUS%3A+Imperial+succession+issue+behind+recent+talks+on+female...-a0274125295>) (last visited April 16, 2013); Japanese Imperial Household Agency website at <http://www.kunaicho.go.jp/eindex.html> (last visited April 16, 2013) (giving genealogy and succession rules of Empire of Japan).

backgrounds.²⁸ Crown Prince Frederik of Denmark married an advertising executive from Australia,²⁹ Prince Willem Alexander of the Netherlands married the daughter of a former official in the Argentinian military regime,³⁰ Prince Felipe of Spain married a journalist—and divorced at that³¹—and in 2001, the Crown Prince of Norway married a young woman who had a child by a drug dealer.³² As one commentator points out, “We are a long

28. The present King of Norway Harald V married a commoner, Sonja Haraldsen, in 1968 after overcoming opposition from his parents. See *Her Majesty Queen Sonja*, KONGEHUSET (Apr. 10, 2012), <http://www.kongehuset.no/c27282/artikkel/vis.html?tid=28738>. Similarly, Carl Gustav XVI of Sweden married Silvia Sommerlath, who was not only a commoner but also German-born. *H.M. Queen Silvia*, SWEDISH ROYAL CT., <http://www.kungahuset.se/royalcourt/royalfamily/hmqueensilvia.4.396160511584257f2180001483.html> (last visited Feb. 23, 2013). Princess Beatrix, the heiress to the Dutch throne, ran into similar opposition when she announced her 1966 engagement to Claus von Amsberg, a German diplomat who had been a member of the Hitler Youth and had served in the Wehrmacht. Marlise Simons, *Claus von Amsberg, 76, Popular Dutch Prince*, N.Y. TIMES, Oct. 7, 2002, at B8.

29. *Danish Prince Marries Australian*, BBC NEWS (May 14, 2004), <http://news.bbc.co.uk/2/hi/europe/3711837.stm>; *Her Royal Highness the Crown Princess*, KONGEHUSET, <http://kongehuset.dk/english/the-royal-house/Crown-Prince-Couple/hrh-the-crown-princess> (last visited Feb. 23, 2013).

30. *Dutch Prince Marries His Maxima*, BBC NEWS (Feb. 2, 2012), <http://news.bbc.co.uk/2/hi/europe/1797233.stm>.

31. See *Wedding Bells For Spain's Royals*, BBC NEWS (May 22, 2004), <http://news.bbc.co.uk/2/hi/europe/3735213.stm>; see also Roland Flamini, *Analysis: Future Queens to Be 'Commoners'*, UPI.COM (Nov. 3, 2003), http://www.upi.com/Business_News/Security-Industry/2003/11/03/Analysis-Future-queens-to-be-commoners/UPI-14101067885896/.

32. *Wild Child Weds Norwegian Prince*, CNN WORLD (Aug. 25, 2001), http://articles.cnn.com/2001-08-25/world/norway.haakon_1_bishop-gunnar-staalseth-mette-marit-tjessem-hoiby-party-girl?_s=PM:WORLD. Compare the marriage of Albert, Duke of York, second son of George V and Queen Mary of Great Britain, to Elizabeth Bowes-Lyon, daughter of the Earl of Strathmore. See ELIZABETH LONGFORD, *THE QUEEN MOTHER* 7-8, 21-28 (1981) (describing the courtship and wedding). At the time, no male member of the royal family had legally married a commoner since the time of James II when James himself married Anne Hyde, daughter of the Earl of Clarendon. See *Corrections and Clarifications*, GUARDIAN (Nov. 21, 2010), <http://www.guardian.co.uk/theguardian/2010/nov/22/corrections-clarifications-royal-wedding-commoners> (showing some debate over the use of the terms non-royal versus commoner). The current Prince of Wales has married two commoners, Diana Spencer and Camilla Shand. See Sarah Lyall, *Charles Calls End to the Affair: He'll Happily Wed His Camilla*, N.Y. TIMES, Feb. 11, 2005, at A1. Arguably the most spectacularly unequal marriage in terms of social rank in the British Royal Family in recent memory has been that of Prince William of Wales, the elder son of Charles and Diana, to Catherine Middleton, on April 29, 2011. See *Times Topics, Kate Middleton—the Duchess of Cambridge*, N.Y. TIMES (Sept. 14, 2012), http://topics.nytimes.com/top/reference/timestopics/people/m/kate_middleton/index.html?8qa. Middleton is neither royal nor a member of a noble house. See *The Duchess of Cambridge*, OFFICIAL WEBSITE BRIT. MONARCHY, <http://www.royal.gov.uk/ThecurrentRoyalFamily/TheDuchessofCambridge/TheDuchessofCambridge.aspx> (last visited Feb. 23, 2013). Her lack of status and the Queen's unwillingness to grant her the status of “Her Royal Highness” has led to one particular consequence. On June 26, 2012,

way from 1936 when Britain's King Edward VIII abdicated because of government opposition to his marriage to Wallis Simpson, an American divorcee."³³ We have also come a long way from the late 1950s when Princess Margaret Rose of England, the present queen's younger sister, gave up her chosen husband, Group Captain Peter Townsend, because his first marriage ended in divorce.³⁴ Prince William's recent marriage to Kate Middleton³⁵ revitalized the debate over revision of the succession rules to the British throne³⁶ to the extent that within a matter of months the Commonwealth,

news surfaced that the Queen has re-issued the Order of Precedence in the Royal Household, which forces Catherine, as a commoner, when her husband is not present, to curtsy to the royally born women of the family. See *Duchess of Cambridge Must Curtsey to 'Blood Princesses'*, BBC NEWS (June 25, 2012), <http://www.bbc.co.uk/news/uk-18580322>; Sam Greenhill, *Kate Downgraded: Duchess Is Told to Curtsey to 'Blood Princesses' Beatrice and Eugenie As New Protocols Push Future Queen Down the Royal Rankings*, MAIL ONLINE (June 25, 2012), <http://www.dailymail.co.uk/news/article-2163963/Will-Duchess-Cambridge-curtsey-Princess-Beatrice-Eugenie.html>. The only royal wife who has to curtsy to Catherine in all circumstances is Sophie, the wife of the Earl of Wessex, who not incidentally is also a "commoner." Greenhill, *supra*. Again, the daughters in this case, Eugenie and Beatrice, have taken the style of their father, Andrew, automatically, while apparently the "commoner" wives of Charles and William have not. See *id.* In Camilla's case, the Queen opted to give the newcomer a boost in precedence. Richard Eden & Roya Nikkhah, *Royal Wedding: New Bride Kate Middleton Takes Her Place in the Royal Hierarchy*, TELEGRAPH (May 1, 2011), <http://www.telegraph.co.uk/news/uknews/royal-wedding/8485767/Royal-wedding-new-bride-Kate-Middleton-takes-her-place-in-the-Royal-hierarchy.html>. In Catherine's case, the Queen has not yet done so. See *id.* However, presumably once Charles become King and Camilla his consort, William's wife would become the second ranking royal lady in the land as the wife of the heir apparent, and all the other royal ladies, including the Princess Royal and the daughters of the Duke of York, would have to curtsy to her. See *id.* However, royal genealogists were busy before the wedding tracing Catherine's lineage, and uncovered such interesting information as the family connections between William and Catherine as that of Sir Thomas Fairfax and Agnes Gascoigne. See *The Ancestry of Catherine Middleton*, WILLIAM ADDAMS REITWIESNER GENEALOGICAL SERVICES, <http://www.wargs.com/royal/kate.html> (last visited Feb. 23, 2013).

33. Flamini, *supra* note 31.

34. Sarah Lyall, *Peter Townsend Dies at 80; Princess Margaret's Love*, N.Y. TIMES, June 21, 1995, at A16, available at <http://www.nytimes.com/1995/06/21/obituaries/peter-townsend-dies-at-80-princess-margaret-s-love.html>; see also ANNE DE COURCY, SNOWDON: THE BIOGRAPHY 68-69 (2008). Vernon Bogdanor discusses the constitutional dimensions of Margaret's decision, noting that once she was 25, she could have given notice to the Privy Council and gone ahead with the marriage. VERNON BOGDANOR, THE MONARCHY AND THE CONSTITUTION 56-57 (1995). But she probably would have lost her rights to the throne and her payments from the Civil List. *Id.* at 57.

35. *Royal Wedding Sparks Succession Debate*, CBC NEWS (Jan. 18, 2011), <http://www.cbc.ca/news/world/story/2011/01/18/uk-succession-rules-william-middleton.html>.

36. The Queen elevated Middleton to the rank of Royal Highness on the wedding day, April 29, 2011. See Martin Beckford, *Prince William and Kate Middleton's New Titles Revealed*, TELEGRAPH (April 29, 2011), <http://www.telegraph.co.uk/news/uknews/royal-wedding/8482573/Prince-William-and-Kate-Middletons-new-titles-revealed.html>. She did

under the leadership of Prime Minister David Cameron, agreed to change them.³⁷

One commentator wrote in *The Guardian*:

I now realise how misguided the royal family has been in its insistence on good breeding as a condition for marrying into it. We like to think that we live in a meritocracy. The idea that the institution of the monarchy should be accessible only to people of the right heredity feels quite unacceptable today. And thanks to Diana, the old excuse that only royals or aristocrats have the necessary equipment to handle the job of a monarch's spouse no longer carries any conviction. Until this week we had never heard Kate Middleton speak in public, but her performance during Tom Bradby's ITV interview with her and William was a revelation. She looked far more at ease than Princess Diana ever did, and she spoke with confidence and fine judgment. Only once did she stumble, and this was when Bradby asked her if she felt "intimidated" at the prospect of following in the footsteps of Diana. This made her blabber incoherently until William chipped in to say that "no one is trying to fill my mother's shoes" and that Kate would carve out her own future and do so brilliantly. I found myself believing him.³⁸

The shift to non-royal, non-aristocratic brides tracks an overall societal change to more gender equality. Women demand equal pay for equal work, certainly in the Western world, and increasingly in other parts of the world. They have been entering male-dominated professions for over a century. They have shed old assumptions about what constitutes proper "female" behavior, particularly in the past thirty years, and along with it what constitutes proper "male" behavior. Women in the European constitutional monarchies under discussion have seen females become Prime Ministers,³⁹ corporate executives,⁴⁰ renowned sports figures,⁴¹ and millionaires.⁴² They

not, however, make her a "Princess." *Id.* Catherine takes her husband's style as Duchess of Cambridge. *Id.*

37. See James Chapman, *British Throne Law Backdated Ahead of Duke and Duchess of Cambridge's First Baby*, MAIL ONLINE (June 4, 2012), <http://www.dailymail.co.uk/news/article-2154698/British-throne-law-backdated-ahead-Duke-Duchess-Cambridges-baby.html?ito=feeds-newsxml>; Nicholas Watt, *Royal Succession Gender Equality Approved by Commonwealth*, GUARDIAN (Oct. 28, 2011), <http://www.guardian.co.uk/uk/2011/oct/28/royal-succession-gender-equality-approved>. The new rules, whenever they come into force, will apply to the descendants of Prince William. *Id.*

38. Alexander Chancellor, *Why Kate Middleton Is the Perfect Choice*, GUARDIAN (Nov. 18, 2010), <http://www.guardian.co.uk/uk/2010/nov/19/kate-middleton-perfect-choice>.

39. Gro Harlem Brundtland was the first woman to become Prime Minister of Norway. See *Biography of Dr. Gro Harlem Brundtland*, UN, <http://www.un.org/News/dh/hlpanel/brundtland-bio.htm> (last visited Feb. 23, 2013). She was also Director General of the World Health Organization. *Id.* Margaret Thatcher was the first female Prime Minister of the UK, serving from 1979 to 1990. See *BBC History—Margaret Thatcher*, BBC HISTORY, http://www.bbc.co.uk/history/people/margaret_thatcher (last visited Feb. 23, 2013).

40. Andrew Clark and Tom Bawden, *UK Lags Behind Nordic Nations in Equality for Female Executives*, GUARDIAN (Feb. 19, 2011), <http://www.guardian.co.uk/business/2011/feb/20/nordic-nations-equality-female-executives> (providing that 12% of executives in Britain are female).

compete daily and successfully with males in politics, business, the learned professions, sports, the arts, and other occupations. Why then should they be “less than” men in the one position that is most symbolic in the lives of their nations—head of state?

In addition, changes in the laws of succession to various thrones have raised questions concerning rules of inheritance to aristocratic titles. Women in noble families are now objecting more and more vociferously to the idea that men should inherit the family title, in line with ideas of male primogeniture. In some cases, women have no claim on noble titles or entailed estates at all.⁴³ In increasing numbers, these women are now turning to the legal system to challenge what they see as gender discrimination.⁴⁴ Particularly in those monarchies that have now adopted a rule of absolute primogeniture, these women allege that a parallel scheme under which males should continue to inherit noble titles to the exclusion of or in preference to women is both illogical and inequitable.⁴⁵

While the world in general may be moving toward other forms of government and abandoning constitutional monarchy as a method of governance, there seems to be no reason why we should abandon a rule of gender equality as long as we maintain constitutional monarchy. The reasons for male primogeniture or agnatic succession have long since passed away as a necessary principle to maintain constitutional monarchy, even if we assume the need for constitutional monarchy.

In Part I of this Article, I discuss types of hereditary succession, including agnatic succession and male primogeniture, and the various reasons for their adoption. In Part II, I discuss the political and historical objections to female rule. In Part III, I explain the shift from traditional succession rules to the cognatic succession rules. In Part IV, I compare the changes in two particular monarchies: Spain and the United Kingdom, and examine more closely the objections raised by aristocratic women who currently find themselves at a disadvantage because of the succession rules applied to the inheritance of titles. I analyze the legal arguments these women have made and could make in national and international courts to attack current inheritance laws, and look at pending bills in the national legislatures. I conclude by suggesting that the national legislatures in constitutional monarchies which have adopted absolute primogeniture must act to harmonize the in-

41. One example is tennis champion Virginia Wade, ranked number 1 in Great Britain for ten years. She won the Wimbledon Singles Title in 1977. *See generally* VIRGINIA WADE, <http://virginia-wade.com/> (last visited April 8, 2013).

42. *See, e.g.*, Punkaj Goswami, *Top 10 Self Made Women Millionaires from Britain*, BORN RICH (Apr. 13, 2010), <http://www.bornrich.com/entry/top-10-self-made-women-millionaires-from-britain/>.

43. *See infra* Subsection IV.B.2.

44. *See infra* Part IV.A.1.

45. *See* Owen, *supra* note 25, at 35.

heritance of titles so that they pass to the eldest child or the nearest relation, regardless of gender, of the last title-holder, in order to demonstrate that they understand the principles of gender equality. Adherence to the rule of constitutional monarchy is one thing; one accepts the notion of fundamental unfairness that one family is “born to rule.” Compounding the unfairness by continuing to elevate the importance of one sex over the other must end.

I. TYPES OF HEREDITARY SUCCESSION

A. Rules of Inheritance and Their Purposes

Around the world, nations and ethnic groups use many different methods to determine the rules of inheritance, whether those rules apply to thrones or titles or to tangible and intangible property. Religion, history, politics, and law all play their part in determining which rules a population selects to make such choices. In those nations of Europe which have or have had monarchies, we can see many different choices, and we see the workings of all of these influences. Each one demonstrates that those who make the rules are, on the whole, less likely to prefer women than men as inheritors of thrones, titles, and property of all kinds:

There are indeed three possible arrangements for hereditary succession. The first regulates the succession by means of the so-called Salic law, which entirely excludes females from the succession. This rule governed succession to the French monarchy, so that there were never any queens of France, except, of course, for queen consorts. The second rule provides that the right of succession passes to the eldest child of the sovereign, regardless of gender, females enjoying the same right of succession as males The third alternative, which regulates the succession in Britain, provides that, under the common law, the Crown descends on the same basis as the inheritance of land. This means that male heirs take precedence over female, with children representing their deceased ancestors; and, under the rule of primogeniture, the older son precedes the younger. It is thus in general only a male who, in Britain, can be heir apparent. If the heir to the throne is female, she can only be heir presumptive rather than heir apparent, for her claim can always be defeated by the birth of a son to the sovereign who would then become heir apparent.⁴⁶

In many countries, the preference for male inheritance or leadership and against female inheritance or leadership, whether the choice is among various types of agnatic succession, male primogeniture, or some type of election,⁴⁷ was and is to create some stability in the regime. The assumption

46. BOGDANOR, *supra* note 34, at 42-43. Since the October 2011 decision, Bogdanor's statement about the rule in the UK is of course incorrect; however, the legislation changing the rule has not yet been adopted. Further, his general description of different types of succession remains accurate.

47. Bogdanor points out a legislature's ability to make such an election, giving the example of Parliament's selection of William and Mary in 1689. *Id.* at 43.

was, and to some extent continues to be, that men can provide physical and intellectual leadership to a greater extent than can women. Men in many cultures received military training. If they did not necessarily receive more education than the women in their families, society did not perceive such a lack of intellectual attainments as a hindrance, since they could surround themselves with (male) counselors and others (usually also males) who could guide them in the approved direction. A sovereign did not believe he needed daughters or other female heirs⁴⁸ in order to govern a country and pass on his right to rule and preserve his dynasty. He did believe he needed male heirs, including sons to protect his rights as he perceived them.⁴⁹ What females he might eventually need he could obtain through the marriage of his sons to women in the sovereign families of other countries.⁵⁰ Of course, the irony is obvious—the females who became the wives of these sons had to come from somewhere, and often these young women caused political and dynastic, if not social, friction, not just at court but through, for example, marriage contracts that their parents or lawyers did not draw up appropriately. Children of the marriage might assert rights to the thrones and kingdoms from which these princesses had come before marriage. Even if these princesses did give up any dynastic rights they had to the thrones of their families, their ambitious husbands or descendants might well resurrect these claims for political or other reasons, as did Edward III of England.⁵¹

48. Male monarchs did, however, use their daughters and other female relatives to create political ties with other ruling families. *See, e.g.,* WANDRUSZKA, *supra* note 10, at 80–81 (discussing the Austrian Habsburgs); OWEN CONNELLY, *NAPOLEON’S SATELLITE KINGDOMS* 61, 133, 181 (1965) (discussing Napoleon I’s practice of establishing relatives on the thrones of satellite states).

49. It would be an error to believe that early and medieval monarchs saw their territorial possessions as “nations” in the modern sense; “nationhood” as we see it today did not arise until the early nineteenth century, although heads of state certainly spoke of their countries as “France” or “England” for example. *See* HANS KOHN, *THE IDEA OF NATIONALISM: A STUDY IN ITS ORIGINS AND BACKGROUND* 258 (Transaction Publishers 2d ed. 2005) (1944) (postulating that Jean-Jacques Rousseau is the philosopher whose work is necessary to the creation of the modern notion of the nation).

50. Of course, one might argue—with some credibility—that women in noble or princely families had to come from somewhere, so some male sovereign had to be happy with females. *See generally* S.J. Payling, *The Economics of Marriage in Late Medieval England: The Marriage of Heiresses*, 54 *ECON. HIST. REV.* 413, 413 (2001) (examining male primogeniture and the “preference for the direct female over the collateral male heir”). Certainly not all male sovereigns objected to daughters on principle. *See id.* But they wanted to leave their thrones to sons. *See id.* The sovereign who had only daughters feared the end of his dynasty as well as disaster for the country. *See id.* Likewise, the noble or the country gentleman who had no sons found himself at a disadvantage. *See id.* Not only was his name likely to die out, but he needed to provide his daughters with a dowry. *See id.*

51. Another example is that of the marriage of Louis XIV and Maria Theresa of Spain, which was contingent on the bride’s renunciation of her rights to the Spanish throne and the payment of her dowry. The dowry was never paid. Charles II of Spain eventually left his throne to Philip of Anjou, a grandson of the couple, who became Philip V (born

Absent claims made by children of the marriage, other problems might occur. The husband of a childless wife might want to put her aside and seek another spouse, but a marriage contract might have attempted to prevent such an outcome.⁵² Yet sometimes a way must be found.⁵³

Indeed, in some situations, too many sons might be a problem, as England's Henry II discovered, when his sons rebelled against him openly.⁵⁴ Tired of waiting for him to die so that they could each inherit a crown, and unhappy that he would not satisfy their desires for independence in his lifetime, they launched strike after strike against him, singly or together, sometimes abetted by their mother, Eleanor of Aquitaine, or by one of his enemies.⁵⁵ The Emperor Charlemagne⁵⁶ and the Plantagenet Henry II⁵⁷ broke up their massive holdings to pacify their sons because, as was often the case, they had more than one ambitious male child.⁵⁸ Such a move was necessary to keep peace in the family.

1683 died 1746). The Bourbon succession was opposed by the Austrians, who had another candidate, the Archduke Charles of Austria, later Holy Roman Emperor Charles VI, the father of Maria Theresa, for whose succession rights he fought so valiantly. *See infra* text accompanying note. 115.

52. One of the most famous and notorious examples is that of Henry VIII and his first wife, Catherine of Aragon. The marriage was not technically childless, because the couple had a living child, Mary. Henry, however, argued that because Catherine had not given birth to a living male child, their "childlessness" was a sign from God that the marriage was illegitimate and must be dissolved. *See* Virginia Murphy, *The Literature and Propaganda of Henry VIII's First Divorce*, in *THE REIGN OF HENRY VIII: POLITICS, POLICY, AND PIETY* 135 (Diarmaid McCulloch, ed, Palgrave Macmillan, 1995).

53. Prior to the Reformation, the most common reason for annulment (the proper term for dissolution of marriage) was the discovery that the husband and wife were related within "forbidden degrees" of family relationship. As this relationship was certainly known to the couple and their relatives before the marriage, they normally had received a Papal dispensation (permission to marry regardless of the relationship) before they entered into the marriage. When for dynastic or other reasons one (or both) of the spouses wished to dissolve the marriages, they asked the Pope for an annulment. One of the most famous examples of the high medieval period is the dissolution of the marriage of Louis VII and Eleanor of Aquitaine, who were related within the forbidden degrees. *See* Constance B. Bouchard, *Consanguinity and Noble Marriages in the Tenth and Eleventh Centuries*, 56 *SPECULUM* 268 (1981).

54. *See* W.L. WARREN, *HENRY II* 122-23 (1973).

55. *See id.* (describing the vast coalition against Henry II).

56. *See generally* Matthew Innes, *Charlemagne's Will: Piety, Politics, and the Imperial Succession*, 112 *ENG. HIST. REV.* 833 (1997) (describing Emperor Charlemagne).

57. In the event, the Plantagenet King John (ironically nicknamed "Lackland") inherited virtually all of his father's lands, because his brother Richard I died without legitimate heirs. *See King John*, *ENG. MONARCHS*, http://www.englishmonarchs.co.uk/plantagenet_3.htm (last visited Feb. 23, 2013).

58. William the Conqueror (William I) also broke apart his holdings to appease his sons. DAVID CARPENTER: *THE STRUGGLE FOR MASTERY BRITAIN 1066-1284*, at 125 (2003). His son Robert succeeded to Normandy as Robert II; as duke, Robert was under feudal law a vassal of the King of France, not the King of England. *Id.* William II (William Rufus) inherited England. *Id.* His third son Henry received money. *Id.* In 1100, when William II died

Daughters posed less of a problem since they did not necessarily inherit the throne unless (as in England) there were no male heirs; a royal father could pacify them with some dower lands and marry them off to a royal suitor or make another suitable match for them.⁵⁹ A daughter married to a royal heir in another country routinely renounced her inheritance rights if she had any,⁶⁰ but quite often any children, grandchildren, or other descendants of the marriage considered such renunciations without effect and attempted to reclaim succession rights through her.⁶¹ Thus Edward III of England attempted to claim the French throne through his mother Isabel, setting off the Hundred Years' War.⁶² The French, however, refused to recognize Isabel's rights, claiming, somewhat belatedly, that Isabel as a female could not claim the throne; and further could not pass on her rights to her children. Thus her children had no inheritance rights.⁶³

The Hundred Years' War was in many ways the illustration of both the problem with female succession and its solution. The French refused to accept the idea of a throne passing to a daughter, in this particular case, a daughter who might be the illegitimate daughter (Joan of Navarre) of a French King, Louis X. But while denying Joan's rights, they could, and probably should, have accepted the accession of her cousin, the daughter of Philip V. Instead, they imported a tribal law of dubious applicability, setting off a more than century-long war and creating a legal precedent that eventually infected not just the French royal succession and the German territories, but also reached as far north as Sweden, as far west as the Netherlands, and as far south as Spain.

under unexplained circumstances during a hunting expedition in the New Forest, Henry succeeded him as Henry I. *Id.* at 134. Normandy did not become part of the English king's direct holdings again until the succession of Henry's grandson Henry II (Plantagenet), who as duke of Normandy was vassal to the King of France (thus setting off much of the Plantagenet conflict with the French sovereigns). *See id.* at 148.

59. For some examples of marriage patterns in royal houses, see generally Patricia H. Fleming, *The Politics of Marriage Among Non-Catholic European Royalty*, 14 *CURRENT ANTHROPOLOGY* 231 (1973).

60. *Peace of the Pyrenees*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/484830/Peace-of-the-Pyrenees> (last visited Feb. 23, 2013).

61. Most prominently such situations gave rise to Edward III's claim to the French throne in 1337 through his mother Isabel, the daughter and last surviving child of Philip IV, and to the Bourbon claims to the Spanish throne after the death of Charles II in 1700. Edward III, however, conveniently overlooked the claim of his cousin Joan, queen of Navarre (the daughter of Louis X), his three cousins, daughters of his uncle Philip V, and his cousin Blanche, Duchess of Orleans, the daughter of Charles IV, in order to lay claim to the French throne in 1354.

62. Isabel was the daughter of Philip IV of France and Joan I of Navarre. ALISON WEIR, *QUEEN ISABELLA: TREACHERY, ADULTERY, AND MURDER IN MEDIEVAL ENGLAND* 9 (2005).

63. *See infra* Section II.B.

B. Agnatic Succession

Agnatic succession is a theory of inheritance that excludes females and their descendants from the throne. Under agnatic seniority, the succession to a throne would pass from the (male) monarch to his next eldest brother, and so on, until no brothers remain, and then to the eldest male of the next generation.⁶⁴ Under the type of agnatic succession followed in France, based on the Salic Law (*Lex Salica*), the crown passes from the male sovereign through his eldest surviving son, for example, to his eldest surviving son, and so on.

The *Lex Salica* was a Germanic tribal code⁶⁵ that dates from the time of the Merovingian king Clovis⁶⁶ and faded from memory until, at the latest, the early 1400s.⁶⁷ If the eldest male heir had no son, or grandson, then the throne passed to the nearest male heir in that generation (the next brother, for example). According to the *Lex Salica* as interpreted by the Valois lawyers and their theorists, the most pertinent section of the resurrected code was the following: "Of the Salian land let no portion pass to a woman, but all the land of this nature, let belong to the virile sex."⁶⁸ An example of the agnatic method of succession was in use in the Electorate (later the Kingdom) of Hanover; after 1714 the thrones of Great Britain and Hanover were joined in a personal union, but when Victoria became queen of Great Britain, her uncle acceded to the title of King of Hanover because its inheritance was controlled by the Salic Law.⁶⁹

As historian Craig Taylor points out, for French medieval jurists, the Salic Law provided justification that the female right to succession was in-

64. Saudi Arabia, for example, currently uses this system. Nick Ottens, *Saudi Prince Nayef, Next in Line to Throne, Dies*, ATLANTIC SENTINEL (June 16, 2012), <http://atlanticsentinel.com/2012/06/saudi-prince-nayef-next-in-line-to-throne-dies/>.

65. See generally LEX SALICA: THE TEN TEXTS WITH THE GLOSSES, AND THE LEX EMENDATA (J.H. Hessels ed., 1880).

66. See PATRICK J. GEARY, BEFORE FRANCE AND GERMANY: THE CREATION AND TRANSFORMATION OF THE MEROVINGIAN WORLD 90 (1988).

67. Clovis reigned from 476 to 496, but the *Lex Salica* was not revived until the 1400s. Craig Taylor, *The Salic Law, French Queenship, and the Defense of Women in the Late Middle Ages*, 29 FRENCH HIST. STUD. 543, 543 (2006).

68. Ralph Giesey discusses the uses of this passage at length in his article *The Juristic Basis of Dynastic Right to the French Throne*, in 51 TRANSACTIONS AM. PHILOSOPHICAL SOC'Y 3, 17-22 (1961), although he rethinks his analysis somewhat in LE RÔLE MÉCONNU DE LA LOI SALIQUE: LA SUCCESSION ROYALE, XIV-XVI SIÈCLES (2007).

69. On the adoption of the Salic Law to deny the English king's claims to the French throne, see generally Taylor, *supra* note 67, at 543 n.2. The Guelphs imported the Salic Law into the Hanoverian succession when a daughter of the house married a Frankish ancestor of the line in the 9th century. See *Guelphs*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/doc/1E1-Guelph-U.html> (last visited Feb. 23, 2013).

consistent with the French theory of monarchy, and French royalist writers of the period used the *Lex Salica* with abandon:

[T]here is overwhelming evidence that the polemical treatises produced by Valois officials in the fifteenth century were used by administrators and diplomats as summaries of the complicated disputes with the English and other opponents of the Crown, because they offered clear statements of the Valois position on most points that might be raised during negotiations. Moreover, there can be no doubt that pressure from English claimants to the throne throughout the Hundred Years' War played a central role in the development of French justifications for the exclusion of women from the royal succession.⁷⁰

The *Lex Salica* fed the contemporary notion that women were incapable, not just of governing, but of transmitting the right to govern. But the Salic Law is not simply something of an invention in terms of French succession law. It is also primarily a justification for those who simply wanted to bar women and their offspring from the throne. Nowhere is this clearer than in its use by the Valois lawyers to deny the accession, in successive decades, of the daughters of Louis X, Philip V, and Charles IV.⁷¹

Some countries, notably the Netherlands and Luxembourg, also used a type of Salic succession called semi-salic, in which males from any branch of the family inherited the throne in preference to females until all male heirs in all branches were eliminated. At that point, females could be considered as heirs. Such a system could effectively bar females from succession depending on how it was applied.

A similar succession system would be based on a type of rotation in which the king would be chosen from a pool of eligible males—each of that generation and each presumably equally entitled to the throne. In either case, no female would ever be qualified to rule.

C. Male Primogeniture

Another type of succession, adopted fairly early in many European countries in order to establish some sort of stability, is male primogeniture. Thus, the male sovereign who claims the title by right establishes that the title will descend through his family—namely to his eldest surviving son, then to the eldest surviving son of his eldest surviving son, and so on.⁷² If his eldest son dies without male heirs, then the title descends to his second son. If his eldest son has no sons, then the title would devolve upon the second son as well. This system is also a type of agnatic succession, but relies

70. Taylor, *supra* note 67, at 547-48 (footnotes omitted).

71. Edward III of England made his claim through his mother on the assumption not simply that women could transmit their claims, but also that these daughters, his first cousins, were illegitimate. Their mothers were accused of adultery, and two were found guilty. See *infra* Section II.B.

72. BLACK'S LAW DICTIONARY, *supra* note 2, at 1311.

on “primogeniture” or birth order.⁷³ It also does not exclude females absolutely, but prefers males. If the male line of a particular heir fails, then the eldest daughter of the most recent male sovereign may succeed to the throne. Male primogeniture was, until the fall of 2011, the rule of succession in the UK, Denmark, and Norway; it is still the rule in Spain.

Because males had a particular place in society, and male nobles learned the art of war as well as the art of government, males were the preferred sex. Consider Erasmus’ *The Education of a Christian Prince* (1516), which discusses what the royal heir should know about making treaties, about preserving peace and making war, about making marriage alliances, about making laws, about diplomacy and about understanding what people want of him (perceiving the meaning of flattery), and about understanding his place in the world.⁷⁴ The emphasis is on the male, not on the female—and this from one of the premier educators of the Renaissance.⁷⁵

Political scientists Andrej Kokkonen and Anders Sundell argue that

[a] succession based on primogeniture solves both the regime’s coordination problem and the autocrat’s crown prince problem. In autocracies practicing primogeniture there is under ordinary circumstances only one viable contender for the throne—the crown prince—who automatically will become the new autocrat the day the incumbent autocrat dies. A crown prince therefore solves the coordination problem by providing the regime with a natural focal point. If the members of the regime remain loyal to the crown prince the regime will live on after the incumbent autocrat passes away.

73. A number of geneticists and scientific historians note that talent for governing does not locate itself solely in the male, in the first-born, or in the first-born male, suggesting that basing the principle of government rule on familial inheritance can be questioned. See, e.g., David Starr Jordan, *The Inbred Descendants of Charlemagne: A Glance at the Scientific Side of Genealogy*, 13 SCI. MONTHLY 481 (1921) (discussing the lineage of political leaders and high achievers whose ancestry can be traced to younger sons or daughters of royalty and who then “fell into” the middle or “lower” classes but managed to demonstrate superiority). In addition, basing the selection of the individual from that family who is to rule on birth order rather than on talent or demonstrated ability, for example, might be thought of as an odd way to choose a leader. *Id.* To quote the character Dennis in the film *Monty Python and the Holy Grail*, responding to King Arthur’s claim of supremacy not simply based on his grant of the sword Excalibur (but also on his descent from Uther Pendragon):

Listen. Strange women lying in ponds distributing swords is no basis for a system of government. Supreme executive power derives from a mandate from the masses, not from some farcical aquatic ceremony. . . . [Y]ou can’t expect to wield extreme executive power simply ‘cause some watery tart threw a sword at you.

MONTY PYTHON AND THE HOLY GRAIL (Sony Pictures 1975).

74. See generally ERASMUS, *THE EDUCATION OF A CHRISTIAN PRINCE* (Lisa Jardine ed., University of Toronto reprt. 2003).

75. Erasmus eventually came to the conclusion that education for women was not such a bad idea, after he met the daughters of Sir Thomas More. See ERASMUS ON WOMEN 10 (Erika Rummel ed., University of Toronto 1996). However, some women wrote their own guides on the education of women; the earliest generally known treatise is CHRISTINE DE PIZAN, *LIVRE DES TROIS VERTUS* (The Treasure of the City of Ladies or the Book of the Three Virtues) (Sarah Larson trans., Penguin rev. ed. 2003).

Apart from pointing out a successor, primogeniture in normal circumstances also solves the crown prince problem by appointing the autocrat's son successor. This assures that the successor is considerably younger than the incumbent autocrat. Tullock argues that "the son is wise to simply wait for his father to die," as he because of his young age will be able to enjoy the rents of being the autocrat for many years after the fathers [sic] death. Brothers, generals or other possible successors are more likely to be of age with the incumbent autocrat, and thus have lower incentives to be patient.

A third advantage with primogeniture is that the crown prince is likely be relatively young when he comes to power, why members of the regime will not have to worry about the problem of succession for many years. They can rest assured that they for a long time will be able to collect the rents that the new autocrat promises to share with them. In the words of Bueno de Mesquita et al: "an autocrat's tenure depends upon her ability to promise private goods in the future and ill health and decrepitude diminishes this capacity." Thus, primogeniture makes it less attractive for regime members to attempt a risky coup.

In autocracies where the succession is based on election, or is uncertain for other reasons, there are always several potential contenders for the throne. The members of the ruling regime cannot know for certain who will be the new autocrat the day the incumbent autocrat passes away and will have difficulties coordinating their efforts to uphold the regime when he dies. They are therefore likely to constantly look out for strong potential contenders to bet on in a grab for power—especially when the incumbent autocrat is old and does not seem to have much time left to rule. To remain loyal is to miss an opportunity to increase one's chances of becoming a member of the new privileged elite by acting before other potential contenders.

Neither can potential contenders for the throne be certain that they will inherit the [sic] autocrat one day. There is always a risk that another contender will be elected, or grab power, the day the incumbent autocrat dies. The contenders in autocracies where the succession is based on election, or is uncertain for other reasons, also tend to be older than crown princes in autocracies based on primogeniture, as it takes more time to amass the power resources needed to be a viable contender in the former systems. Therefore, the contenders cannot be as patient as crown princes in systems based on primogeniture. In short, a contender "may miss the rents from becoming the autocrat, if he does not do something himself to become so."⁷⁶

Because of the importance of national defense as well as the necessity of staving off internal conflicts, many male sovereigns distrusted the notion that female heirs were as appropriate as male heirs to secure their kingdoms. Even spectacularly successful queens like Isabel I of Castile failed to convince them.

76. Andrej Kokkonen & Anders Sundell, *Delivering Stability—Primogeniture and Autocratic Survival in European Monarchies 1000–1800*, at 5-6 (QOG, Dept. of Political Sci., Univ. of Gothenburg Working Paper Series 2012:3, 2012), available at http://www.qog.pol.gu.se/digitalAssets/1367/1367572_2012_3_kokkonen_sundell.pdf (citations omitted).

D. Elective Succession (Elective Monarchy)

The crown of Poland was also vested in an elected sovereign from the Sixteenth through the Eighteenth centuries.⁷⁷ In 1384, Jadwiga, the daughter of Louis I, was elected and installed as “King” rather than Queen, to signify that she ruled on her own.⁷⁸

The Holy Roman Empire, traditionally thought to have been founded by Charlemagne, also acquired its rulers through election, although by the early sixteenth century, the title of Holy Roman Emperor became vested de facto in the male members of the Hapsburg family, which controlled many of the lands of the former Carolingian empire. That domination ended in 1740 when most of those lands including Austria came into the hands of the heiress of the last male Hapsburg to be elected Holy Roman Emperor, Charles VI.⁷⁹ Maria Theresa,⁸⁰ the daughter of Charles VI, married Francis

77. On Poland's elective monarchy, see generally JULIA SWIFT ORVIS, A BRIEF HISTORY OF POLAND 98-166 (1916). Sweden itself acquired an elected King in 1810 when the Rikstag chose a French marshal, Jean Bernadotte, to succeed the childless Carl XIII, who reigned from 1809 to 1818. See *The Bernadotte Dynasty*, SWEDISH ROYAL CT., <http://www.kungahuset.se/royalcourt/monarchy/themonarchyinsweden/thebernadottedynasty.106.1a6f639212652d9b15a8000224.html> (last visited Feb. 25, 2013). The new king, who took the name Charles XIV John, founded the Bernadotte dynasty which still reigns. See *The Swedish Royal Court: The Royal Family: The Bernadotte Dynasty*, SWEDISH ROYAL COURT, <http://www.kungahuset.se/royalcourt/royalfamily/thebernadottedynasty.4.396160511584257f218000814.html> (last visited April 8, 2013). Until 1905 the Swedish royal house also the royal house of Norway, since the countries were united. See *The Dissolution of the Union of Norway and Sweden*, 1 AM. J. INT'L L. 440 (1907). Carl XVI Gustaf is a direct descendant of Charles XIV John and his French queen Desirée. See *The Bernadotte Dynasty*, *supra*. Napoleon himself managed to install his family and supporters as dynasts on a number of thrones. His brother Joseph married Queen Desirée's sister Julie (née Clary), and they ruled Spain and Naples during the first Napoleonic period. See CONNELLY, *supra* note 48, at 95-96; MICHAEL ROSS, THE RELUCTANT KING 71, 146 (1976). His brother Louis ruled Holland with Josephine's daughter Hortense. See CONNELLY, *supra* note 48.

78. GUIDA M. JACKSON, WOMEN WHO RULED 88-89 (1990).

79. In 1740 the long string of elections was interrupted when Austria passed into the hands of an archduchess, Maria Theresa. See RICHARD M. WATT, THE KINGS DEPART (2003); A.J.P. TAYLOR, THE HAPSBURG MONARCHY, 1809-1918: A HISTORY OF THE AUSTRIAN EMPIRE AND AUSTRIA-HUNGARY 15 (1990). The office of Holy Roman Emperor became de facto vested in a member of the Hapsburg family, and finally in the son and/or heir of the Archduke of Austria, who received the title of King of the Romans. See TAYLOR, *supra*, at 15-20. Napoleon's granting to his son of the title King of Rome was a deliberate slap at the waning power of the Hapsburgs, although it was also a reminder that the boy was a grandson of the reigning Emperor, Francis II (through Napoleon's second wife, Marie Louise of Austria).

80. Maria Theresa, who had sixteen children with Francis I, is probably better known to U.S. citizens, if at all, as the mother of Marie Antoinette, the ill-fated wife of French King Louis XVI. Both were guillotined during the French Revolution of 1789, he in January 1793, she in October of that year. On Maria Theresa and her daughter see *Antonia*

of Lorraine,⁸¹ who duly became Holy Roman Emperor (Francis I) based on the votes of the HRE Electors, but an Austrian enemy, Frederick the Great of Prussia, refused to accept Maria Theresa's accession to the Austrian Archduchy, and launched the War of the Austrian Succession (1740–1748).⁸² Again, his argument was that Maria Theresa, as a woman, was ineligible because of the Salic Law, to inherit the Austrian throne, even though her father had promulgated the Pragmatic Sanction of 1713, a legal device also attempted a century later by Ferdinand VII in order to smooth the path of his older daughter Isabella to the Spanish throne.⁸³ Like the Pragmatic Sanction of 1830, the Pragmatic Sanction of 1713 succeeded in causing massive upheaval and war.⁸⁴

Another kingship that passed by election was that of Bohemia. When King Matthias, who was also the Holy Roman Emperor, died without an obvious heir in 1618, some of the Bohemian nobles rejected the candidate proposed by Matthias (the Catholic Ferdinand of Styria), preferring the Protestant Frederick of the Palatinate, the son-in-law of James I of England.⁸⁵ However, Ferdinand managed to be elected the next Crown Prince of Bohemia, an event that eventually launched the Thirty Years' War.⁸⁶ During

Fraser, *Marie Antoinette: The Journey* (Anchor, 2002), 3-25; on Marie Antoinette's execution, see Fraser, *supra*, at 438-440.

81. *Francis I*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/216709/Francis-I> (last visited Feb. 25, 2013).

82. REED S. BROWNING, *THE WAR OF THE AUSTRIAN SUCCESSION* 39 (1993).

83. *See infra* Subsection I.E.1.

84. The problem was exacerbated because both Hungary and Bohemia, though part of the Austrian Empire, had elective monarchies, and expected that if the Hapsburg male lines were extinct, that they were to return to their old rules of electing their sovereigns. Frederick the Great thus also argued that he was validating the Hungarian and Bohemian rights to elect their sovereigns. Nevertheless, Charles VI obtained the agreement of the other existing European powers to the Pragmatic Sanction of 1713 and to the eventual accession of his daughter to his lands. *See Pragmatic Sanction of Emperor Charles VI*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/eb/article-9061169/Pragmatic-Sanction-of-Emperor-Charles-VI> (last visited Feb. 25, 2013). As a result of the War of the Austrian Succession, Charles Albert of Bavaria obtained some Austrian lands, leaving Maria Theresa and Francis I in possession of Austria and the rest of the Austrian Empire. *See id.* The Hapsburgs and their successors remained in control of the title "Holy Roman Emperor" until the coronation of Napoleon Bonaparte as Emperor of France.

85. Indeed, many medieval Germanic kingdoms passed from ruler to ruler via election. *See supra* Section I.B.

86. *See* BRENNAN C. PURSELL, *THE WINTER KING: FREDERICK V OF THE PALATINATE AND THE COMING OF THE THIRTY YEARS' WAR* 45 (2003); WEDGWOOD, *supra* note 8, at 75. Frederick V and his wife Elizabeth of England (the "Winter Queen") had several children, including the Electress Sophia (1630-1714). The Act of Settlement 1701, named Sophia heiress presumptive to Anne, the eventual Queen of England; Sophia did not, however, survive Anne. Sophia's son George, Elector of Hanover, became the first Hanoverian King of England, but if Sophia had survived Anne, she would obviously have become Queen Reg-

the sixteenth and seventeenth centuries, Transylvania also chose its rulers by election.⁸⁷ Generally, those regimes that chose the monarchs by election chose them from a particular family or close group of families, and preferred males to females.

Tanistry is succession by election, practiced particularly by the Celtic tribes.⁸⁸ The “tanist” was the elected heir to the king, and was a member of the royal family, selected because he was the ““eldest and worthiest”” of the family.⁸⁹ On occasion a king’s son might succeed to the title his father held, but this outcome was by no means certain. The king was elected for life because the electors deemed him to be the best qualified for the office, and his successor (tanist) was elected during his lifetime.⁹⁰ However, the tanist was generally a member of the former king’s (or chief’s) family, or a male member of a small group of leading families. One obvious example of an individual who succeeded to the throne of Scotland through tanistry is Macbeth (Mac Bethad mac Findlaích) who succeeded Duncan I and reigned 1040-1057.⁹¹

The Irish particularly practiced tanistry;⁹² Evelyn Cecil points out that the successful candidate for tanist needed only to add the element of hereditary succession in order to create a regime of primogeniture.⁹³ Tanistry does not allow for female succession.⁹⁴

nant. Her niece, the unhappy Sophia Dorothea of Celle, married George I in 1682. See PAUL MORAND, *THE CAPTIVE PRINCESS: SOPHIA DOROTHEA OF CELLE* 27-28 (1972).

87. See Graeme Murdock, “*Freely Elected In Fear: Princely Elections and Political Power in Early Modern Transylvania*,” 7 J. EARLY MODERN HIST. 213, 214 (2003).

88. EVELYN CECIL, *PRIMOGENITURE: A SHORT HISTORY OF ITS DEVELOPMENT IN VARIOUS COUNTRIES AND ITS PRACTICAL EFFECTS* 12-13 (1895).

89. See *id.*

90. *Tanistry*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/eb/article-9071183/tanistry> (last visited Feb. 25, 2013).

91. NICK AITCHISON, *MACBETH: MAN AND MYTH* 13 (1999) (discussing the fact and fiction in Macbeth as well as the uses of tanistry in bringing Macbeth to the throne).

92. CECIL, *supra* note 88, at 15.

93. *Id.*

94. *Id.*

E. Other Theories of Succession⁹⁵1. *Succession Through Marriage*

Of course, women rulers may come to the throne via some other method—via marriage, for example. One notable queen who achieved power in this way was Catherine I of Russia (born Martha Skavronska), the wife of Peter the Great, who became the first female ruler of the country. Although reputed to be illiterate, and perhaps the daughter of a peasant,⁹⁶ she captivated Peter with her beauty, becoming his second wife in 1707. They had several children, of whom two lived into adulthood, Elizabeth and Anna.⁹⁷ Catherine's elevation to the throne and her succession did not allow her to make a gift of the crown to anyone she chose, nor did either of her daughters succeed her immediately. Instead, Peter II, the son of the Tsarevich Alexis, and the grandson of Peter the Great, inherited the throne, indicating that the country had reverted to male primogeniture.⁹⁸ Similarly, a male consort could obtain the crown through gift, as with the Scottish Crown Matrimonial.⁹⁹ If a consort, male or female, received such a gift, obviously the nation ran the risk that the throne could then be inherited by a family which was not the original ruling family, and more probably related to the female spouse than a male spouse, because the original sovereign was more likely to be male than female. Thus, it is unlikely that either rulers or their subjects, given the choice, would opt to allow a spouse the option of alienating

95. Other theories include proximity, which combines kinship with a claim of relationship through closeness of generations. G.W.S. BARROW, *KINGSHIP AND UNITY: SCOTLAND 1000–1306*, at 158, 165 (1981). One example of proximity is the claim made by Robert the Bruce, grandfather of the eventual King, to the throne of Scotland against other claimants. Bruce's descent was convoluted and through a younger daughter of David II and William the Lion. *See id.*

96. PHILIP LONGWORTH, *THE THREE EMPRESSES: CATHERINE I, ANNE AND ELIZABETH OF RUSSIA 3-4* (1973).

97. ROBERT K. MASSIE, *PETER THE GREAT: HIS LIFE AND WORLD* 375, 377 (1980). Peter also had a son, the Tsarevich Alexis, by his first marriage, whom he eventually executed for treason and rebellion. *Id.* at 709.

98. *See generally* 1 NICHOLAS RIASANOVSKY & MARK STEINBERG, *A HISTORY OF RUSSIA* (8th ed. 2011).

99. *See infra* note 141 and accompanying text. Today, certain succession laws specifically bar royal spouses from inheriting the throne: "The spouses of the monarch's relatives to the second degree are members of the Royal House, but are not in line of succession to the throne The spouses of relatives of the monarch may never succeed to the throne." *Succession to the Throne*, HET KONINKLIJK HUIS, <http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/monarchy/succession-to-the-throne/> (last visited Feb. 25, 2013).

the throne and passing it into the hands of the children of a second marriage.¹⁰⁰

Ultimately, in spite of aberrations such as the oncs under Peter the Great, who named his second wife as his heir, going so far as to have her crowned in 1724,¹⁰¹ and Peter III, whose wife seized the throne, conspired in his assassination, and reigned as Catherine II (Catherine the Great) for thirty-four years,¹⁰² male primogeniture became the norm in most European countries, Salic or semi-Salic law in others, most of them because of their legal and/or political relationship to France. Whether nations were Roman Catholic or Protestant, if they were monarchies, grand duchies, or principalities, they adopted the view that the most orderly state of affairs was to hand the throne from eldest surviving male to eldest surviving male, and absent an oldest or only surviving male, then to an oldest or only daughter. Only in some cases, primarily those influenced by the Salic Law were females completely eliminated from the succession. In some cases, the “semi-Salic” rule prevailed. In these cases, while a female could not rule, she could pass her rights of succession to a male heir.

2. *Ultimogeniture*

Some commentators on message boards have suggested that the “youngest” child of the sovereign should inherit the throne. “Why the first-born child though? This move just rubber-stamps ageism within our society. It would make more sense for the youngest child to have priority[;] statistically their reign would be longer.”¹⁰³ This theory of succession, called ultimogeniture, has some merit, and some cultures have followed the custom of ultimogeniture. In the early medieval period, both in France and in England, the youngest son and daughter of noble or peasant might have inherited the property, primarily to keep the estate together.¹⁰⁴ Other groups have practiced ultimogeniture to some extent, including some in Japan.¹⁰⁵ Ultimogeni-

100. There exist rare examples in which the legislative branch agreed to allow the consort, who was also the reigning king, to continue to rule after the death of the sovereign; William III of Great Britain was not only the husband of Mary II, but he was also a son of the Princess Royal and thus after Mary and her sister, third in line to the British throne. See *infra* note 169 and accompanying text.

101. See ROBERT K. MASSIE, *CATHERINE THE GREAT: PORTRAIT OF A WOMAN* (2011) (noting that Catherine ruled independently as Tsarina from 1725 to 1727).

102. See *generally id.*

103. Diamondrush, Comment to *Girls Equal in British Throne Succession* BBC NEWS (Oct. 28, 2011), <http://www.bbc.co.uk/news/uk-15492607>.

104. See FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 271 (1895).

105. See, e.g., Akira Hayami, *The Myth of Primogeniture and Impartible Inheritance in Tokugawa Japan*, 8 J. FAM. HIST. 3, 4 (1983); Gary A. Rendsburg, *David and His Circle in Genesis XXXVIII*, 36 VETUS TESTAMENTUM 438, 440 (1986) (comparing alternative inher-

ture, as traditionally practiced, serves to preserve the estate and/or power of the family. The youngest of the family often gives up opportunities that older siblings eagerly seize in order to stay at home and care for aging parents.¹⁰⁶ In return, the youngest child receives a reward—the entire, or the bulk, of the estate.¹⁰⁷

Ultimately, of all of these theories, the most popular in European countries until the last few decades have been agnatic succession and male primogeniture. Both of these theories have caused dissention as European society has confronted issues of gender equality. Some commentators have argued that the *Lex Salica* was never intended to bar females from a throne.¹⁰⁸ Certainly, using the Salic Law (or continuing to adhere to male primogeniture) in this way raises questions about the nature of the throne: Is it property in the same way that an individual's house or furniture is property, or does it have additional significance? Is the throne merely a symbol or does it have real existence? If the latter, then excluding one sex from the right to inherit raises questions in a time when we accept, more and more, the idea of gender equality as settled. Further, if there is a property interest in the throne, or to extend our sphere of interest, a title of nobility, can a claimant litigate her interest in it? Or are such matters solely for the political sphere to decide?

II. TRADITIONAL OBJECTIONS TO FEMALE RULE

A. The Queen Regnant as Wife

Apart from the assumption that females were less able to lead troops in battle and less intelligent than males, assumptions that were not necessarily validated by observation, many nobles and counselors as well as rulers themselves disfavored female heirs because a female ruler would have difficulty controlling her husband. John Knox, who published the tract *A Monstrous Regiment of Women*,¹⁰⁹ ranted against what he saw as the domination of women in the political and social world, and most particularly against the rule of both Mary Stuart in Scotland and Elizabeth Tudor in

itance models, including ultimogeniture, in Genesis with the monarchy of David and Solomon).

106. See Hayami, *supra* note 105, at 4.

107. See *id.*

108. See generally Craig Taylor, *The Salic Law and the Valois Succession to the French Crown*, 15 FRENCH HIST. 358 (2001) (discussing the growth of Salic Law during medieval times).

109. JOHN KNOX, *THE FIRST BLAST OF THE TRUMPET AGAINST THE MONSTROUS REGIMENT OF WOMEN* (Edward Arber ed., Southgate 1878) (1558).

England.¹¹⁰ For Knox, the Bible taught that God had made women to serve men, and thus women should not rule nations.¹¹¹ Here, he parted ways with other early Protestant leaders like John Calvin, who suggested that the Biblical example of Deborah proved that some women, at least, could lead society.¹¹²

For many men, including those who held views not nearly as extreme as Knox, a woman on the throne was problematic because in order to secure the succession she needed to marry, and the practicalities of mid-sixteenth century European political life limited her choices. Because queens regnant and powerful queens consort were so thick on the ground during the period, the question of the education of female rulers was particularly troublesome, and a number of writers examined it.¹¹³

A female sovereign faced dangers in marrying a foreign prince, since such a choice would bring with it a foreign alliance, possibly with a country whose interests might be inimical to those of her own country.¹¹⁴ Thus, the

110. See *id.* at i-x. On the contemporary resistance to the rule of female sovereigns, and the role of religion in that controversy, see Judith M. Richards, "To Promote a Woman to Bear Rule": *Talking of Queens in Mid-Tudor England*, 27 *SIXTEENTH CENTURY J.* 101, 101 (1997) ("[B]efore the accession of Queen Mary in 1553, England had never crowned a queen regnant. This was despite the strong claims to the throne of Maud, the daughter and only surviving heir of Henry I in the twelfth century, and, more recently, of Elizabeth of York, eldest daughter of Edward IV."). Maud, or Matilda, was the mother of Henry II (often referred to as Henry Fitzempress, because Matilda's first husband was Henry V, Holy Roman Emperor). *Id.* at 105. When Matilda's brother William, heir to the throne, died in the Wreck of the White Ship, she became her father's heir, but some of Henry I's barons preferred the claims of her cousin Stephen, even though he was descended from her aunt Adela, her father's sister. See *id.* Note the claims here of proximity over primogeniture. Henry tried to enforce Matilda's claims, and she was recognized as "Lady of the English," rather than "Queen," by some of the barons, during her lifetime. See *id.* n.14. She and Stephen battled over the crown of England throughout their lifetimes, and her son Henry joined her in the fight when he was 14 (1147). See *id.* n.13. In 1153, Stephen finally acknowledged Henry as his successor, after Stephen's own son Eustace died suddenly.

111. See Robert M. Healey, *Waiting For Deborah: John Knox and Four Ruling Queens*, 25 *SIXTEENTH CENTURY J.* 371, 376 (1994).

112. See *id.* at 373.

113. See, e.g., Constance Jordan, *Feminism and the Humanists: The Case of Sir Thomas Elyot's Defence of Good Women*, 36 *RENAISSANCE Q.* 181, 182 (1983).

114. Mary Tudor married a foreign prince, her cousin Philip of Spain, a union that was rocky both because of the mismatched natures of the individuals involved and because of the mismatched natures of the nations involved. See Glyn Redworth, "Matters Impertinent to Women": *Male and Female Monarchy Under Philip and Mary*, 112 *ENG. HIST. REV.* 597, 597 (1997). The English did not relish the idea of a King and Philip and his Spanish advisors insisted that he be granted the title of King. *Id.* at 598. Mary wanted to please her much younger husband. *Id.* at 600. Philip wanted an heir; Mary was unlikely to be able to provide one. See *id.* at 604. Meanwhile, her attractive younger half-sister bided her time. See *id.* at 599. The disastrous outcome could have been predicted by the decision to grant Philip the title of King Consort and his subsequent role as "[l]ess than a king regent but more than a king consort." See *id.* at 597. Redworth argues that Philip successfully moved to negate the

choice of a foreign husband had to be handled carefully. While a king might choose a foreign princess as a wife, and thus also might enter into a foreign alliance, the assumption was that he could resist any entreaties that his wife might make concerning the necessity to enter into a foreign war, for example, on behalf of her native land.¹¹⁵ A queen regnant would be less able to do so, because, the thought ran, she was weak and would be more likely to give in to her husband's desire to send her troops to defend his native country. In addition, a queen would be likely to make her husband "King Consort." Such a title in the hands of a foreign prince might be the equivalent of making him king, as some of Mary Tudor's advisors feared could happen in the case of her husband Philip of Spain.¹¹⁶ Similarly, a queen consort did not have legal independence of action; she relied on the king and/or the legislative branch to give her any power that she might wish to exercise.¹¹⁷ For example, when Henry VIII left for war with France in 1513, he specifically named Catherine of Aragon, his queen at the time, as Regent. Those queens consort who exceeded acceptable social and political norms risked disapproval, censure, or worse.¹¹⁸

terms of the marriage treaty in order to exert power in England and to act as King in order to pursue Spanish aims in England. *See id.* at 602.

115. Note that the fictions of dynastic marriages always entailed the notion that such marriages meant closer connections between the countries of the parties. Thus, in order to ensure peace, for example, and end a war, the heads of state often used marriage between their heirs, or between the heir apparent of one country and the daughter in another's family in order to further ensure the peace drafted by a treaty. An example exists in the Treaty of the Pyrenees, signed in 1659 to end the war between France and Spain, itself brought on by the Thirty Years' War. *See* JOHN A. LYNN, *THE FRENCH WARS 1667-1714: THE SUN KING AT WAR* 13 (2002). As part of the Treaty, the French obtained the promise of marriage between Maria Theresa, the daughter of Philip IV of Spain and their king, Louis XIV. The two were double first cousins (Anne of Austria, the mother of Louis XIV, was in fact the daughter of Philip III, King of Spain, and sister of Philip IV. Philip III himself married Elisabeth of France, the sister of Louis XIII, Anne's husband). *Id.* In exchange for the promise to renounce her claim to the Spanish throne, Maria Theresa also received the promise of a dowry, which was never paid. *Id.* at 35. This circumstance led to the War of Devolution in 1668 and eventually to the installation of a French prince on the Spanish throne in 1700, and to the installation of the Salic Law in Spain (thus the exclusion of women from the line of succession to the Spanish throne). *Id.* at 13. Interestingly, what led to war in 1668 was that Louis claimed that his wife had the right to the succession of Brabant, now roughly the Spanish Netherlands, and since her dowry had not been paid, her rights still existed. *See generally id.*

116. *See* Judith M. Richards, *Mary Tudor As 'Sole Quene'? Gendering Tudor Monarchy*, 40 *HIST. J.* 895, 905-06 (1997)

117. *See* Richards, *supra* note 116, at 897.

118. Prime examples are Isabel of France, the wife of Edward II of England, who was nicknamed the "She-Wolf of France," and Marie Antoinette, the Austrian-born wife of Louis XVI of France, who was eventually guillotined along with her husband during the French Revolution. *See* WEIR, *supra* note 62, at xviii; ANTONIA FRASER, *MARIE ANTOINETTE: THE JOURNEY* 440 (2002).

Queens consort were trained to know their duties, based on centuries of tradition.¹¹⁹ When necessary, they might carry out some political functions, and perhaps act as Regent, as did Catherine of Aragon, but only with the support of the King and the government. They ought never to attempt to usurp the functions of the sovereign.¹²⁰ Their primary duties were to see to the royal household, make the king happy, or at least satisfied, and produce heirs.¹²¹ Queens or princesses who displeased their husbands or failed in their duties might be put aside, usually through divorce, sometimes through an annulment if they failed to produce a male heir, or if Roman Catholic, asked to retire to a convent.¹²² Some problem could always be found with their marriage contracts, or they could be accused of improprieties,¹²³ and set aside (their marriages annulled), or murdered.¹²⁴

119. The training continues, as the current Duchess of Cambridge went into “training” shortly before her marriage and continues to support her husband in his duties. The Guardian notes that some compare her supportive work as a consort to William to that of the Duke of Edinburgh as consort to the Queen. See Philip Barkham, *Kate Middleton: William’s Very Private Princess-to-be*, GUARDIAN (Apr. 26, 2011), <http://www.guardian.co.uk/uk/2011/apr/26/kate-middleton-william-private-princess>.

120. At least, so the theory went. Those queens who were suspected of trying to do so earned the enmity of their new subjects. See WEIR, *supra* note 62, at 202. For example, the French-born princess Isabella, who married Edward II of England, soon earned the title the “She-Wolf of France,” a title that does not seem quite fair, even though she did eventually take a lover, the much more interesting Roger Mortimer, probably because of Edward’s interest in male companions. See *id.* at xviii, 202. She was the mother of Edward III, and passed her claim to the French throne to him; Edward III’s claim was rejected by the French. See *infra* Section II.B; CATHERINE FLETCHER, *THE DIVORCE OF HENRY VIII: THE UNTOLD STORY FROM INSIDE THE VATICAN* 5 (2012) (discussing the examples of Margaret Tudor and Louis XII of France).

121. See, e.g., JOHN CARMİ PARSONS, *ELEANOR OF CASTILE: QUEEN AND SOCIETY IN THIRTEENTH-CENTURY ENGLAND* 3 (1995).

122. Among the women of royal blood who did so, voluntarily or not, was Juana, known as “La Beltraneja,” the putative daughter of Henry IV, the King of Castile. Her claim to succeed her father was heavily disputed for that reason and set off the four year War of the Castilian Succession (1474-1478). See Elizabeth A. Leffeldt, *Ruling Sexuality: The Political Legitimacy of Isabel of Castile*, 53 *RENAISSANCE Q.* 31, 35 (2000). Her rival was her aunt Isabel I, who married Ferdinand of Aragon, thus uniting the two major kingdoms of the Spanish peninsula. However, one obvious exception was Catherine of Aragon, who, when confronted by Henry VIII, actively resisted both his demands for a divorce and his request that she retire to a nunnery so that he could marry Anne Boleyn. See FLETCHER, *supra* note 120, at 5-6.

123. One example of marital infidelity was the partial cause of the eventual end of the Capetian line of sovereigns. I discuss this example below. See *infra* text accompanying notes 125-24. On the Tour de Nesle affair generally see Jim Bradbury, *The Capetians: The History of a Dynasty* (Continuum, 2007), at 275.

124. See CAROLINE P. MURPHY, *MURDER OF A MEDICI PRINCESS* 328 (2009) (discussing the life of Isabella de Medici and her death at the hands of her husband Paolo Giordano Orsini, Duke of Bracciano. In some cases, royal husbands were in the way. In 1567 European courts were shocked to hear of the murder at Kirk o’Field of Henry Stuart, the second husband of Mary Stuart. Mary had long since tired of Henry, and probably regretted her

Thus, those women who acceded to thrones as queens consort knew they needed to produce an heir to the throne, and given the mortality rate of children, the best course was to produce as many children as possible, as quickly as possible. The “Affair of the Tour de Nesle” provides a spectacular example of marital infidelity as it demonstrated to both the French and the English how very fragile and how very indelicate the matter of succession could become. In the way that the French royal family decided to handle it, it also resulted in the demise of the Capetian monarchy and the transfer of the throne to the Valois line and the introduction of the Salic Law—the rule that females could not succeed to the throne, as well as the beginning of the Hundred Years’ War.

The three sons of Philip IV of France had married princesses of the house of Burgundy to secure claims to that very rich territory. Margaret of Burgundy, married to Louis and her sister-in-law Blanche of Burgundy, married to Charles, had begun affairs with two knights attached to the French court. Isabel of France, the daughter of Philip IV married to Edward II of England, and her husband were visiting the French court and somehow discovered the affair. She revealed all to her brothers. Her two sisters-in-law were convicted of adultery and divorced; the two knights were executed. Blanche’s sister Joan, married to the third son, Philip V, who was deemed to be a “co-conspirator,” was also imprisoned.¹²⁵

Margaret’s daughter Joan, who inherited the kingdom of Navarre, was denied the right to succeed Louis on the grounds that her paternity was disputed. Eventually, all three brothers succeeded to the French throne; none left a surviving son to succeed him.¹²⁶

Those women who became queens regnant like Isabel of Castile marshaled their forces as quickly as possible. They not only understood the value of real authority and of apparent authority, but also the importance of making it clear to the nobility and people who supported them that their

marriage to him, but whether she really conspired in his murder is unclear. On his marriage to Mary and violent death, see ALISON WEIR, *MARY, QUEEN OF SCOTS, AND THE MURDER OF LORD DARNLEY* (Random House, 2004).

125. On the Tour de Nesle affair and its aftermath see generally Elizabeth Brown, *The King’s Conundrum: Endowing Queens and Loyal Servants, Ensuring Salvation, and Protecting the Patrimony in Fourteenth-Century France*, in *MEDIEVAL FUTURES: ATTITUDES TO THE FUTURE IN THE MIDDLE AGES* 115 (J. A. Burrow and Ian P. Wei, eds.; Boydell Press, 2000) and WEIR, *supra* note 62. On the dangers that an adulterous queen posed generally and well as the romance of the “adulterous queen” in literature, see PEGGY MCCracken, *THE ROMANCE OF ADULTERY: QUEENSHIP AND SEXUAL TRANSGRESSION IN OLD FRENCH LITERATURE* (University of Pennsylvania Press, 1998) (discussing the literary image, importance, and transformation of the queen’s body).

126. Louis left a son, John I, or John the Posthumous, by his second wife but that child died at the age of five days. See *John I*, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/304656/John-I> (last visited April 9, 2013).

consorts did not rule them or their lands.¹²⁷ Isabella's granddaughter Mary Tudor and her advisors attempted to limit the power of her husband Philip of Spain and Burgundy when the pair married in 1553.¹²⁸ The marriage treaty limited his political power, an outcome that cannot have pleased him even though he received the title of King Consort.¹²⁹ Eventually, Mary listened to Philip on the issue of foreign policy far more than was good for the country.¹³⁰

Nor was Mary Stuart politically intelligent when she married her cousin Henry Stuart, Lord Darnley, and granted *him* the same title.¹³¹ Her problems may have stemmed partly from her education and training, first at the hands of her mother, Mary of Guise, and her mother's family,¹³² and her exposure to the court of France while she was Dauphine and then Queen of France,¹³³ and partly from her own inclinations.¹³⁴ Mary Stuart seems often not to have understood the necessity of compromise, particularly with regard to her own situation as a woman attempting to govern among men with a strong sense of their own importance.¹³⁵ Her mother and uncle, the Cardinal of Lorraine, had promised her first husband the Crown Matrimonial, which had the Dauphin obtained it, would have effectively given him and his heirs by any wife the right to rule Scotland.¹³⁶ "Scotland would be held by each successive dauphin as an *apanage* or duchy of France. A central tenet of the Guise dynastic plan was that every future dauphin would be king of Scotland whether Mary's heirs or not, establishing the country's subordination forever."¹³⁷ While Parliament acquiesced in this agreement,¹³⁸ the Hamiltons, claimants to the Scottish throne should Mary's line fail, obviously had other thoughts on the subject. They "joined with the Protestants

127. See Lehfeldt, *supra* note 122, at 35-36; Richards, *supra* note 116, at 895 (arguing that Mary Tudor and her advisors deliberately chose language that identified her with her male predecessors and that Elizabeth Tudor used Mary as a model).

128. Redworth, *supra* note 114, at 598.

129. See SUSAN DORAN, *MONARCHY AND MATRIMONY* 6-7 (1996).

130. *Id.* at 7.

131. MARY QUEEN OF SCOTS, <http://www.scotlandsmary.com/> (last visited Feb. 25, 2013). Mary Stuart actually needed the consent of the Scottish Parliament in order to grant Darnley the title, but never received it; it does not seem that Parliament ever opposed the grant. JOHN GUY, *QUEEN OF SCOTS: THE TRUE LIFE OF MARY STUART* 206-08 (2004).

132. See STUART CARROLL, *MARTYRS AND MURDERERS: THE GUISE FAMILY AND THE MAKING OF EUROPE* (2009).

133. GUY, *supra* note 131, at 501.

134. See Jane E.A. Dawson, *Mary Queen of Scots, Lord Darnley, and Anglo-Scottish Relations in 1565*, 8 INT'L HIST. REV. 1, 7 (1986).

135. See, e.g., Julian Goodare, *The First Parliament of Mary, Queen of Scots*, 36 SIXTEENTH CENTURY J. 55, 55 (2005) (discussing Mary's two year delay in calling her first Parliament and her political decisions thereafter).

136. GUY, *supra* note 131, at 90.

137. *Id.*

138. *Id.*

to oppose” the offer of the Crown Matrimonial, and Francis never received it.¹³⁹ The French marriage illustrated the potential, and danger, of an alliance between two sovereigns. In the event, Francis ruled France for less than two years, and Mary returned to Scotland.¹⁴⁰

Darnley also demanded the Crown Matrimonial.¹⁴¹ Both Mary and Parliament would have had to agree to the grant, and neither did so; Darnley never received the Crown Matrimonial.¹⁴² Both Mary Tudor and Mary Stuart came to grief, Mary Stuart to greater tragedy than Mary Tudor, and both gave queens regnant a bad name.

Thus, the difficulty with a queen regnant was that while she might rule the country, her husband could potentially rule her, because of the traditional gender norms that required that a wife, no matter her rank, be subservient to her husband. Thus, he would ultimately rule the country. If he were a foreign prince, a distinct possibility because members of royal houses made dynastic marriages, he would bring with him the influence of the foreign country. If he were a subject, for example a member of an aristocratic family, then he was not her social equal. That brought up other problems. He would then not be able to claim equality of birth, and his marriage to her would cause problems among members of other aristocratic families in the country, who believed that he would be furthering the cause of his own family to their detriment. One can see all of these objections raised in the marriage of Mary Tudor, the older daughter of Henry VIII, to Philip II of Spain. He, being the ruler of another country, wanted to be co-ruler of England, a demand that was resisted by the (primarily male) English nobility. Similarly, when Mary Stuart married Henry Darnley, who was a second cousin, but also an aristocrat, and not a ruler, she made him King Consort, and he proceeded to capitalize on that elevation in dignity. Finally, Elizabeth I of England raised all of these objections when her Council repeatedly asked her to marry. When presented with suitors of royal rank, she objected that they brought with them entangling alliances.¹⁴³ In her extensive study of Elizabeth’s marriage policy, Susan Doran suggests that the queen’s decisions were primarily political, but that she also considered the problems raised by her predecessor’s marriage.¹⁴⁴ Elizabeth, Mary Tudor, and Mary Stuart all had great difficulty challenging the traditional gendered views of their roles,

139. *Id.*

140. *See id.* at 128.

141. *Id.* at 232. Darnley also descended (through Margaret Tudor’s daughter Margaret Douglas) from Henry VII and had a claim on the English throne and through Mary Stuart, sister of James III, had a claim on the Scottish throne. So Mary’s marriage to him made dynastic sense.

142. *Id.* at 232.

143. *See* Susan Doran, *Religion and Politics at the Court of Elizabeth I: The Habsburg Marriage Negotiations of 1559-1567*, 10 *ENG. HIST. REV.* 908, 911 (1989).

144. *Id.* at 912.

which translated into greater or lesser problems with their queenships, even though none of them would have defined their difficulties in that way. Mary Tudor was never able to accomplish what she really wanted to do, which was bring back the Catholic Church to supremacy in England, and Mary Stuart ended by abandoning her throne and her son, and fleeing to England, where she spent more than twenty years in exile, and then was executed by Elizabeth I for plotting against her. Elizabeth, who made the decision never to marry, was able to fulfill a great many policies by managing the men around her because she had no man at her side.¹⁴⁵

B. The Female as Heir

Several famous historical examples stand for the notion that the refusal to allow women to succeed to a throne will cost money and blood. The desire to acquire and hold the ultimate prize—a throne—is so overwhelming that it overtakes and consumes all else. Thus, throughout the centuries, certain men and their supporters have also sought to argue that women have, if not equal, at least certain rights, in regard to monarchical or aristocratic inheritance, if only to validate their own rights to a crown or a title. One of the most famous is the example of England's Edward III, who maintained that he had a colorable right to the French throne, inherited through his mother, Isabel of Valois, the last surviving child of the French king Philip IV.¹⁴⁶ Edward plunged his country into a bloody, lengthy, and costly war with France to validate that right and dragged his ally, Burgundy, into the conflict as well. Equally, other men and their advisors and supporters—some of them lawyers¹⁴⁷—were willing to maintain that the opposite was true. Philip's distant male relatives, ensconced on the French throne, waged a desperate century-long battle (1337–1453) to prevent the English king from imposing himself and his descendants on the small French nation, then much less important in terms of geography and commerce than it would be two or three centuries later. Ironically, Edward's great-grandson, Henry V, who took the claim derived from Isabel of France quite seriously, validated it on the battlefield, and then followed it up with a marriage contract that ensured that any child born of his marriage to the daughter of the King of France would inherit both England and France. This agreement, the Treaty

145. See generally Anne McLaren, *Gender, Religion, and Early Modern Nationalism: Elizabeth I, Mary Queen of Scots, and the Genesis of English Anti-Catholicism*, 107 *AM. HIST. REV.* 739 (2002) (discussing gendered roles and the difficulties of queenships as applied particularly to a Stuart succession).

146. See generally WEIR, *supra* note 62 (discussing the life of Isabel of Valois).

147. See generally FRANKLIN J. PEGUES, *THE LAWYERS OF THE LAST CAPETIANS* (1962).

of Troyes,¹⁴⁸ disinherited the eldest son of the King of France, the future Charles VII and settled the succession on the children of Henry V and his wife, Catherine of Valois, the daughter of Charles VI. Notice the importance of the letter of law to seal the deal as it were—the victory on the battlefield underscored what Henry V was fighting for—to validate the claim passed down from Edward III through his mother, and through any child of Henry and a daughter of the current French king.

Ultimately, for the English, the result would be the loss of all their French possessions on the Continent except the port city of Calais.¹⁴⁹ Finally, they lost Calais as well.¹⁵⁰ For the French, the Hundred Years' War (*La Guerre de Cent Ans*) would begin to create a national identity, as well as solidify the notion that only a man could be sovereign of the country, because male rulers led them to victory over the English and their allies, the Burgundians.¹⁵¹ Through war, and through a series of carefully crafted marriages (and divorces), the French kings established the supremacy of the French sovereign over other peers in the geographical region while staving off English claims staked primarily on the notion that a female could transmit her rights through, if not her daughters, then certainly her sons. But that notion—that no woman could inherit the French throne—did not take hold until well into the fourteenth century. Part of the reason was that the French kings were extraordinarily lucky in producing male heirs to the throne. "The case for Philip V was legally not a strong one. The fact that there had never been a queen regnant in France did not demonstrate, of itself, that there never could be, unless an accident of genealogy be esteemed automatically to constitute a custom of the realm."¹⁵²

When Edward III first put forth his claim, it was by no means clear that simply because that claim derived from his mother, he was ineligible to succeed.¹⁵³ It was more likely that the French considered him ineligible to be King of France because he was already King of England, under feudal law a vassal of the King of France.¹⁵⁴ With Edward's claim, however, we see a merger of dynastic and national policy; thus Philip and his supporters were forced to respond that his claim was based not just on inheritance (law) but

148. See Theodor Meron, *The Authority to Make Treaties in the Late Middle Ages*, 89 *AM. J. INT'L L.* 1, 11-13 (1989).

149. See generally David Potter, *The Duc de Guise and the Fall of Calais 1557-1558*, 98 *ENG. HIST. REV.* 481 (1983).

150. *Id.*

151. However, for centuries the kings (and queens) of England maintained the fiction that they were also de facto kings of France. See John Milton Potter, *The Development and Significance of the Salic Law of the French*, 52 *ENG. HIST. REV.* 235, 238 n.1 (1937).

152. *Id.* at 236.

153. Taylor, *supra* note 67, at 548.

154. See generally MARC BLOCH, *FEUDAL SOCIETY* (L.A. Manyon trans., 2d ed. 1962).

on the legal principle that the claim to the throne could not descend through females.¹⁵⁵ Thus, Edward and any heirs of his mother Isabel were barred from the French succession.¹⁵⁶

The English Wars of the Roses provided another example of a fight over succession, in which one side, in this case the “Red Rose of Lancaster,” ultimately derived its claim not only via descent through a woman, Margaret Beaufort, but “on the wrong side of the blanket,” because Margaret was the great-granddaughter of John of Gaunt, Duke of Lancaster, son of Edward III (he of the Hundred Years’ War), by his mistress, and then third wife Katherine Swynford.¹⁵⁷ The Beaufort clan, which consisted of the three sons and one daughter of John of Gaunt’s third marriage, were eventually legitimized, with the proviso that they would never have any claim to the English throne.¹⁵⁸

Margaret thus represented a tenuous link to Edward III, but enough that Henry VII (Tudor) was willing to lay claim to the English throne on behalf of it. In order to bolster his claim, however, he also married Elizabeth of York, the oldest surviving daughter of and heiress presumptive¹⁵⁹ of the last King of England whose claim was relatively untarnished, after Henry

155. Potter, *supra* note 149, at 237.

156. *See id.*

157. Katherine’s sister Philippa de Roet had married Geoffrey Chaucer, the author of the *Canterbury Tales*. Their son Thomas became Speaker of the House of Commons; Thomas’s daughter Alice married John de la Pole, first Duke of Suffolk, a powerful man at the court of Henry VI. Their son John married (1) Lady Margaret Beaufort, his cousin, who had a claim to the English throne (annulled); and (2) Elizabeth of York, sister of the future Edward IV of England. Their son John de la Pole, Earl of Lincoln, was for a time the heir presumptive to the throne of England (during the reign of his uncle Richard III). *See* MICHAEL K. JONES & MALCOLM G. UNDERWOOD, *THE KING’S MOTHER: LADY MARGARET BEAUFORT, COUNTESS OF RICHMOND AND DERBY* (1992); ALISON WEIR, *MISTRESS OF THE MONARCHY: THE LIFE OF KATHERINE SWYNFORD, DUCHESS OF LANCASTER* (2007).

158. *See* WEIR, *supra* note 157, at 293. Note that all English kings and queens since are descended from John of Gaunt and Katherine Swynford. *See id.* Note also that all of Henry VIII’s wives were related to one another and to him within the forbidden degrees of consanguinity. *See The Plantagenet Descent of Henry and His Queens*, TUDOR HIST., <http://www.tudorhistory.org/trees/wivestree.jpg> (last visited Feb. 25, 2013) [hereinafter *Plantagenet Descent*]; ANTONIA FRASER, *THE WIVES OF HENRY VIII* (1992).

159. On Elizabeth of York’s descent and her marriage to Henry, *see* THOMAS PENN, *THE WINTER KING: HENRY VII AND THE DAWN OF TUDOR ENGLAND* (Simon & Schuster, 2013) at 5-6. Both Edward IV’s younger brother Richard III and Richard’s supporters attempted to put forward the idea that Elizabeth and her sisters were illegitimate, in order to bolster the claim of Richard III to the throne. To do so, they argued that Edward’s marriage to his wife Elizabeth Woodville was bigamous, and that Edward had actually been married to Eleanor Talbot, a daughter of the first Earl of Shrewsbury. Parliament bastardized the children of Edward and Elizabeth in 1483. *See* ARLENE NAYLOR OKERLUND, *ELIZABETH OF YORK: QUEENSHIP AND POWER* 141 (2011).

won the throne on the battlefield from her uncle Richard III.¹⁶⁰ As she was still living, she renounced any claims she had to the title of queen in favor of her son, as did his new bride; both arguably had better claims than he did. But he was one thing that they were not—he was male.¹⁶¹

Henry VII spent most of his reign attempting to secure his throne against threats to it, both from abroad and from other claimants, including “pretenders”—those who claimed to be members of previous English royal houses.¹⁶² His anxiety over such real threats, and the death of his oldest son, Arthur, Prince of Wales, explains much of his successor’s behavior. When Henry VIII came to the throne at the early age of eighteen, he understood that one of his first tasks was to continue his dynasty and make certain of the claims of the Tudor family to the throne by fathering an heir. When his wife Catherine of Aragon,¹⁶³ the widow of his older brother Arthur, produced of her many pregnancies only one surviving daughter, Mary Tudor, Henry worried that the Tudor line would end with him, because he had no living legitimate brothers or sons, and no acceptable alternative heirs, his father and he having sent any likely possible other claimants to early graves courtesy of the executioner.¹⁶⁴

160. Shakespeare has enshrined Richard, the last Plantagenet King, in popular culture with these words: “A horse, a horse, my kingdom for a horse!” WILLIAM SHAKESPEARE, *RICHARD III* act 5, sc. 4.

161. JONES & UNDERWOOD, *supra* note 157, at 11. Note also that Henry VII was descended from Charles VI of France through his father Edmund Tudor, Earl of Richmond, the son of Owen Tudor and Catherine of Valois (1401–1437) (daughter of Charles VI). THOMAS PENN, *WINTER KING: HENRY VII AND THE DAWN OF TUDOR ENGLAND* xx-xxi (2011). By her first marriage, Catherine had been Queen of England to Henry V and the mother of Henry VI. *Id.* Note also that her sister Isabelle (1389–1409) had been Queen of England through her first marriage to Richard II. *Isabelle of France*, *RICHARD II’S TREASURE*, <http://www.history.ac.uk/richardII/isabelle.html> (last visited Feb. 25, 2013). She married as her second husband the poet Charles, Duke of Orleans (1394–1465). *Charles, duc d’Orléans*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/432785/Charles-duc-dOrleans> (last visited Feb. 25, 2013). By his second wife, Mary of Cleves, Charles was the father of Louis XII of France, who married as his third wife Mary Tudor, the younger sister of Henry VIII of England. *Mary Tudor*, *ENCYCLOPÆDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/367582/Mary-Tudor> (last visited Feb. 25, 2013).

162. See PENN, *supra* note 161, at 24–31 (discussing Henry’s pursuit of the pretender Perkin Warbeck and its effect on Henry’s reign).

163. *Catherine of Aragon (1485–1536)*, BBC HIST., http://www.bbc.co.uk/history/historic_figures/catherine_of_aragon.shtml (last visited Feb. 25, 2013). She was the daughter of Isabella I of Castile and Ferdinand II of Aragon. *Id.*

164. See generally HAZEL PIERCE, MARGARET POLE, *COUNTESS OF SALISBURY, 1473–1541: LOYALTY, LINEAGE AND LEADERSHIP* (2003) (discussing the life and death of the daughter of George, Duke of Clarence, a son of Edward IV and a possible claimant to Henry VII’s throne). That the Tudor monarchs always disposed of possible rivals legally does not make their actions any less brutal.

This situation explains in part Henry's first frantic and then demanding requests to the Pope for an annulment of his marriage from Catherine.¹⁶⁵ Ultimately, it led to the political and religious break with Rome, and Henry's serial marriages with Anne Boleyn, Jane Seymour, Anne of Cleves, Katherine Howard, and Katherine Parr,¹⁶⁶ which produced only two more children, one the longed-for son, the future Edward VI,¹⁶⁷ and one a despised daughter, the iconic Elizabeth I.¹⁶⁸ While Henry discarded wife after wife, he did so (arguably) legally, divorcing or annulling his wives, even though he executed two of them for treason.

Even when an English queen took power "as of right" as well as at the invitation of Parliament, as when Princess Mary and her husband William, the son of the Princess Royal, became co-rulers in 1689 as Mary II and William III, William did not cease to rule over the kingdom when Mary died in 1694.¹⁶⁹ The Bill of Rights adopted in 1689 settled the succession on the co-rulers Mary and William, and then in the event that either should predecease the other, the survivor would continue to rule.¹⁷⁰ After his or her death, any child of theirs would inherit the throne. Absent any heirs of William and Mary, Mary's sister Anne inherited the throne, and then the crown would pass to her children, and failing them, to any children that William might have by any other wives.¹⁷¹ The preference was for a male/female pair, rather than for a succession of two female rulers, partly because of the fear that the kingdom might be weakened to the extent that the exiled king

165. This annulment, referred to as "the King's Great Matter," has been the subject of many plays, films, and television miniseries, including in part the recent television series bodice ripper *The Tudors*, which if not historically accurate, at least has the merit of providing us with an enormous number of pretty people to watch.

166. Interestingly, all six of Henry's wives, as well as Henry himself, were descended from the Plantagenet King Edward I, so they were arguably all related to him within prohibited degrees of consanguinity. See generally DAVID LOADES, *THE SIX WIVES OF HENRY VIII* (2009). Obviously he could not make a habit of asking the Pope for an annulment on those grounds, even if he had remained a loyal son of the Church. In addition, three of his wives, Anne Boleyn, Katherine Howard, and Jane Seymour, were cousins. See *id.* For the degrees of relationship of Henry's wives, see *Plantagenet Descent*, *supra* note 158.

167. See generally DIARMAID MACCULLOCH, *THE BOY KING EDWARD VI AND THE PROTESTANT REFORMATION* (1999). Edward VI was born in 1537 and died in 1553. *Id.* at 1, 215.

168. Many good biographies of Elizabeth I, born in 1553 and died in 1603, exist, but see generally ALISON WEIR, *THE LIFE OF ELIZABETH I* (1998).

169. On the reigns of Mary and Anne, see generally MAUREEN WALLER, *UNGRATEFUL DAUGHTERS: THE STUART PRINCESSES WHO STOLE THEIR FATHER'S CROWN* (2002).

170. *Bill of Rights 1689*, WWW.PARLIAMENT.UK, <http://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections/billofrights/> (last visited Feb. 25, 2013).

171. As the son and heir of the Princess Royal, thus cousin of both Mary and Anne, William had his own claim to the English and Scottish thrones. JOHN VAN DER KISTE, *WILLIAM AND MARY 114-15* (2003).

might attempt to invade from abroad (which in fact his grandson did some years later):

Having therefore an entire confidence that his said Highness the prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights which they have here asserted, and from all other attempts upon their religion, rights and liberties, the said Lords Spiritual and Temporal and Commons assembled at Westminster do resolve that William and Mary, prince and princess of Orange, be and be declared king and queen of England, France and Ireland and the dominions thereunto belonging, to hold the crown and royal dignity of the said kingdoms and dominions to them, the said prince and princess, during their lives and the life of the survivor to them, and that the sole and full exercise of the regal power be only in and executed by the said prince of Orange in the names of the said prince and princess during their joint lives, and after their deceases the said crown and royal dignity of the same kingdoms and dominions to be to the heirs of the body of the said princess, and for default of such issue to the Princess Anne of Denmark and the heirs of her body, and for default of such issue to the heirs of the body of the said prince of Orange. And the Lords Spiritual and Temporal and Commons do pray the said prince and princess to accept the same accordingly.¹⁷²

Parliament's concern was with the possible return of James II and a Catholic family that might re-capture the English throne, especially since opposition to James's policies had helped to bring about the Glorious Revolution in the first place.¹⁷³ James II and his second family never returned to England. Eventually, new laws set in place the current regime, which forbade anyone in the line of succession to marry a Catholic.¹⁷⁴ Until October 2011, persons in line of succession, even those far down in the line, legally were required to request permission of the sovereign to marry or they would lose their place in the line of succession.¹⁷⁵ Thus, Prince Ernst of Hanover asked the Queen's permission to marry Princess Caroline of Monaco, a Catholic, even though Ernst is far down the list of possible successors to the throne.¹⁷⁶

172. *Bill of Rights 1689*, *supra* note 170.

173. See generally JOHN MILLER, *JAMES II* (2000).

174. Act of Settlement, 12 & 13 Will. 3, c. 2 (1701) (Eng. & Wales); see also I. Naamani Tarkow, *The Significance of the Act of Settlement in the Evolution of English Democracy*, 58 POL. SCI. Q. 537 (1943) (discussing the political maneuverings behind the decision to limit succession to the crown to Sophia of Hanover and her descendants and the resulting increase in Parliamentary democracy). Prince Michael of Kent gave up his position in the royal succession when he married his wife Marie-Christine von Reibnitz. *Prince and Princess Michael of Kent: Marriage and Family*, BRIT. MONARCHY, <http://www.royal.gov.uk/ThecurrentRoyalFamily/PrinceandPrincessMichaelofKent/Marriageandfamily.aspx> (last visited Feb. 25, 2013).

175. Royal Marriages Act, 12 Geo. 3, c. 11 (1772) (Gr. Brit.), available at <http://www.legislation.gov.uk/apgb/Geo3/12/11>.

176. *Princess Caroline Weds Again*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-202_162-29789.html.

Examples of queens regnant in other countries exist, but opposition to their accession existed also, and as one might expect, queens who reigned in their own right are many fewer than kings. The Scandinavian and Iberian countries in particular allowed for female succession,¹⁷⁷ subject to male primogeniture, prior to the spread of the Salic Law into that area through the accession of various Germanic houses.¹⁷⁸

None of the women who reigned as queens in their own right saw themselves as “feminist” in any of the senses that we understand the word today, but all of them thought they had the right to be queen.

III. CHANGES IN SUCCESSION RULES AND THE SHIFT TO COGNATIC SUCCESSION

A. Sweden

In 1980, the Swedish Act of Succession¹⁷⁹ abandoned agnate succession and substituted the principle of equal rights so that the first-born child of the monarch, whether male or female, would become heir or heiress apparent to the throne. “Heir apparent” or “heiress apparent” means literally the person who seems in line to inherit the throne (or sovereign title) from the monarch, or title-holder. These phrases contrast with “heir presumptive” or “heiress presumptive,” an individual who might be displaced by an heir (or heiress) born to the monarch or title-holder. The Swedish Act of Succession limits succession to the throne to the present King, his descendants, and the King’s uncle, so the new rules do not affect previous generations.¹⁸⁰ Thus, while cognatic succession is the rule, it is prospective; the king’s sisters do not benefit. The Swedish Act of Succession was submitted to parliament rather than the result of an act of the King; thus it bears the imprimatur of the will of the people. It is now part of the Swedish constitution.

177. See, e.g., discussion *infra* Section III.E.

178. See, e.g., Act of Succession (1953) (Den.), available at http://www.stm.dk/_p_12711.html. On February 24, 2009, the Swedish court announced the engagement of Crown Princess Viktoria, Duchess of Västergötland, and her boyfriend of several years, Daniel Westling, who was later created Prince of Sweden and Duke of Västergötland on their marriage. See *Engagement Between Crown Princess Victoria and Daniel Westling*, SWEDISH ROYAL CT., <http://www.kungahuset.se/royalcourt/royalfamily/latest-news/2009/2009/engagementbetweencrownprincessvictoriaanddanielwestling.5.6b0698e911fa8f90058800052.html> (last visited Feb. 25, 2013).

179. Proposition [Prop.] 1977/1978:71 Lag om ändring i successionsordningen [Act Amending Succession] [government bill] (Swed.).

180. *Id.*

B. Norway

Until 1990, Norway followed a rule of primogeniture in which the throne passed to males first and then to females, but females could succeed to the throne. Article 6 of the Norwegian Constitution describes the rule of succession:

The order of succession is lineal, so that only a child born in lawful wedlock of the Queen or King, or of one who is herself or himself entitled to the succession, may succeed, and so that the nearest line shall take precedence over the more remote and the elder in the line over the younger.

An unborn child shall also be included among those entitled to the succession and shall immediately take her or his proper place in the line of succession as soon as she or he is born into the world.

The right of succession shall not, however, belong to any person who is not born in the direct line of descent from the last reigning Queen or King or a sister or brother thereof, or is not herself or himself a sister or brother thereof.

For those born before the year 1971, Article 6 of the Constitution as it was passed on 18 November 1905 shall, however, apply. For those born before the year 1990 it shall nevertheless be the case that a male shall take precedence over a female.¹⁸¹

Notice that those females who might have been born into the line of succession prior to 1971 were completely excluded from the throne since Norway also adopted the Salic Law. For example, the present King, Harald V, has two sisters who are excluded.¹⁸² However his daughter Märtha Louise, born in 1971, is within the line of succession, although she follows her brother Haakon, born two years after her.¹⁸³ Haakon himself currently has two children, a daughter and a son; the daughter now takes precedence over the son, because she was born before him (in 2004).¹⁸⁴ The reasons for *excluding* Harald V's sisters seem to have to do with predictability. Apparently the thought is that it would be a harsh result now to dispossess Harald V of the throne that he has occupied since 1991 and expected to pass on to his son, and to dispossess Haakon, who has lived with the expectation that he would inherit the throne. However, installing absolute primogeniture only with regard to Haakon's children, and preserving male primogeniture with regard to his sister, and excluding the present sovereign's sisters seems somewhat convoluted. Allowing Harald's sisters to take after Märtha Louise (that is, adopting male primogeniture for the relatives of the current sover-

181. GRUNNLOV [CONSTITUTION], May 17, 1814, art. 6 (Nor.).

182. See *Order of Succession*, KONGEHUSET (Mar. 5, 2009), <http://www.kongehuset.no/c27302/artikkel/vis.html?tid=28654>.

183. *Id.*

184. See *id.* Haakon's children are Her Royal Highness Princess Ingrid Alexandra and His Highness Prince Sverre Magnus, second and third in line, respectively. *Id.*

eign and absolute primogeniture for the future sovereign and his descendants) would simplify the rules. Harald's sisters would still take, if ever, after Haakon's sister and her descendants, so to deny them any rights at all to the succession seems unfair.¹⁸⁵

C. The Netherlands

As early as 1884, the Netherlands took a pragmatic approach to a dynastic problem, and abandoned the Salic Law extremely early, when it found itself facing a situation in which the only heir to the throne was female.¹⁸⁶ William III's three sons had all died before him, and he and his second wife had a small daughter, Wilhelmina.¹⁸⁷ The Staats-Generaal (the national legislative body) voted to make Wilhelmina heiress presumptive. When William III died in 1890, she became queen and her mother Emma was named Regent.¹⁸⁸ The Netherlands now has seen unbroken rule by queens regnant since that time.¹⁸⁹ Queen Wilhelmina abdicated in 1948 by her only daughter Queen Juliana, who herself abdicated in 1980 to be succeeded by the current Queen, Beatrix.¹⁹⁰ In 1983, the country adopted the principle of cognatic successions; the eldest child, male or female, is heir apparent.¹⁹¹ Beatrix is the first Dutch queen in over a century to give birth to sons (she has three); her eldest son and his wife have three daughters.¹⁹² On January 28, 2013, Queen Beatrix announced she would abdicate in favor of

185. Interestingly, currently after the Norwegian crown prince, the succession was as follows: his daughter Ingrid, his son, and then three females: his sister Märtha (Mrs. Behn) and her two daughters. *Id.* A recent Norwegian statute legislating gender equality has caused some unhappiness in the business world. See Yvonne Roberts, *You're Fired!*, *GUARDIAN* (Mar. 5, 2008), <http://www.guardian.co.uk/lifeandstyle/2008/mar/06/women.discriminationatwork?INTCMP=ILCNETTXT3487> (discussing the impact of a 2003 law); see also Maria Reinertsen, *Only Gender Quotas Can Guarantee Women in the Boardroom*, *GUARDIAN* (Mar. 2, 2011), <http://www.guardian.co.uk/commentisfree/2011/mar/02/gender-quotas-norway-women-boardroom?INTCMP=ILCNETTXT3487>.

186. *Queens (20th and 21st Centuries)*, HET KONINKLIJK HUIS, [http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/history/queens-\(20th-and-21st-centuries\)/](http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/history/queens-(20th-and-21st-centuries)/) (last visited Feb. 26, 2013).

187. *Kings (19th Century)*, HET KONINKLIJK HUIS, [http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/history/kings-\(19th-century\)/](http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/history/kings-(19th-century)/) (last visited Feb. 26, 2013).

188. *Queens (20th and 21st Centuries)*, *supra* note 186.

189. *Id.*

190. *Id.*

191. *Succession to the Throne*, HET KONINKLIJK HUIS, <http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/monarchy/succession-to-the-throne/> (last visited Feb. 26, 2013).

192. *Queens (20th and 21st Centuries)*, *supra* note 186; *The Prince of Orange*, HET KONINKLIJK HUIS, <http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/members-of-the-royal-house/the-prince-of-orange/> (last visited Feb. 26, 2013).

her son, Crown Prince Willem-Alexander, bringing one more young woman that much closer to direct succession to a throne under the new regime of full primogeniture.¹⁹³

Why had the Salic Law ever been exported to the Netherlands? The area was originally part of the Frankish lands; as early as Charlemagne's era, the Salic Law held sway.¹⁹⁴ In the late nineteenth century, the country finally abandoned the Salic Law, for pragmatic reasons. By the time William III died in 1890, all three of his sons had pre-deceased him, leaving only a daughter, Wilhelmina, to inherit the throne.¹⁹⁵ At that time, the associated crown of Luxembourg passed to a relative, Wilhelmina's great-uncle Adolphe.¹⁹⁶ The current House of Luxembourg descends from him,¹⁹⁷ interestingly through the female line (Charlotte, Grand Duchess of Luxembourg).¹⁹⁸ When William III died in 1890, his daughter Wilhelmina (1880–1962) inherited the throne, although she was not crowned until 1898.¹⁹⁹

Full primogeniture and succession to the throne applies to relations to the third degree from the sovereign. Relatives further removed from the sovereign cannot accede to the throne.²⁰⁰

Under the Membership of the Royal House Act, membership of the Royal House is reserved to relatives of the monarch in the first and second degree of consanguinity

193. Ian Traynor, *Queen Beatrix of the Netherlands Abdicates in Favour of Son*, *GUARDIAN* (Jan. 28, 2013), at <http://www.guardian.co.uk/world/2013/jan/28/queen-beatrix-netherlands-abdicates>.

194. SALIC LAW, http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Salic_law.html (last visited Feb. 26, 2013).

195. *Kings (19th Century)*, *supra* note 187; *Queens (20th and 21st Centuries)*, *supra* note 186.

196. *Dossiers*, INFORMATIONS ET ACTUALITÉS DU GOUVERNEMENT LUXEMBOURGEOIS, http://www.gouvernement.lu/dossiers/famille_grand_ducale/chregneuk/infobase/souverain.html (last updated Aug. 7, 2003).

197. *See id.*

198. The male line failed and Adolphe's son William IV discarded the Salic Law in his own turn in order to allow his oldest daughter Marie Adelaide to inherit the title of Grand Duchess. *See discussion infra* Section III.F.

199. *Queens (20th and 21st Centuries)*, *supra* note 186. For the current line of succession see the Dutch Royal House's website, *Succession to the Throne*, *supra* note 191. The Dutch Royal Family has been blessed with females for the past hundred and forty years. Queen Beatrix had three sisters, and has six granddaughters. In line for the throne after her own two sons (although she actually has three) are three granddaughters of the Crown Prince, then her third son, and then yet another granddaughter. Her second son Johan Friso, eliminated from the line of succession for marrying without the consent of Parliament, also has two daughters. *Life of Dutch Prince Johan Friso Remains in Peril*, *CBS NEWS* (Feb. 18, 2012), http://www.cbsnews.com/8301-31749_162-57380844-10391698/life-of-dutch-prince-johan-friso-remains-in-peril/.

200. *Succession to the Throne*, *supra* note 191.

and their spouses. Under the Constitution, succession to the throne is reserved to relatives of the monarch in the first, second and third degree of consanguinity.²⁰¹

This kind of limitation, also in place in other constitutional monarchies such as Monaco,²⁰² seems to be an attempt to curtail not just an excess of honors and titles handed out to members of the royal family, which was a curse in centuries past, but also the cost of maintaining the royals, which citizens of a monarchy see as a burden in cost-conscious times,²⁰³ particularly when they consider the great wealth of royal families and individual royals.²⁰⁴

D. Belgium

Like the Netherlands, Belgium also subscribes to the principle of full primogeniture; the country only adopted this principle in 1991.²⁰⁵ Prior to that year, the Salic Law barred women from succession to the throne.²⁰⁶ Full primogeniture applies only with respect to the children of the present monarch, Albert II.²⁰⁷ Again, the rejection of retroactivity seems intended to ensure some kind of uniformity and expectations on the part of males that they would not be dispossessed of the expectation they have had in the past that their inheritance rights, however unfair, would remain in place. Note, however, that once absolute primogeniture takes hold, as it has particularly in Belgium, the likelihood that remote relations will come to the throne is—well—remote, particularly when it combines with a limitation on the definition on membership in the royal house (as in the Netherlands).

201. *Id.*

202. *See* 1962 CONST. art. 10 (Monaco).

203. Queen Elizabeth is reportedly facing a “pay freeze” until 2015. Her household received more than \$77 million in taxpayer funds in 1991–1992, but only \$32 million in 2010–2011. *See* Lauren Moraski, *Queen Elizabeth II Faces Pay Freeze: Report*, CBS NEWS (Dec. 6, 2011), http://www.cbsnews.com/8301-31749_162-57337427-10391698/queen-elizabeth-ii-faces-a-pay-freeze-report/.

204. Forbes estimated Queen Elizabeth II’s personal fortune at \$450 million in 2010, and Prince Albert II of Monaco’s at \$1 billion. Tatiana Serafin, *The World’s Richest Royals*, FORBES (July 7, 2010), <http://www.forbes.com/2010/07/07/richest-royals-wealth-monarch-wedding-divorce-billionaire.html>.

205. THE BELGIAN MONARCHY 10 (Brigitte Balfourt & Eddy Van Paemel eds., 2010), available at http://www.belgium.be/en/binaries/280410_monarchie_EN_tcm115-103847.pdf.

206. *Id.*

207. *The Belgian Succession*, HERALDICA.ORG, http://www.heraldica.org/topics/royalty/belgian_succ.htm#primo (last updated Apr. 28, 2005). It excludes the daughter of Leopold III; there may be another justification for this as she married the heir to the grand duchy of Luxembourg, and might have given up her rights to the Belgian throne in any case. But of course it also excludes any descendants of daughters and daughters of non-reigning sons of Leopold I, Leopold II, and Albert I. *See id.*

E. Denmark

In 1953, the Danes voted into existence a change in the succession laws that allowed the oldest daughter of Frederik IX, Princess Margrethe, to accede to the throne in preference to her uncle.²⁰⁸ At the same time, the voters approved a new Constitution.²⁰⁹ Prior to that date, Denmark followed the rule of agnatic primogeniture, which would have barred her from becoming queen. The vote followed on the proposal's passage by two successive Parliaments, as was constitutionally required by the Constitution of 1915.²¹⁰ Margrethe became the first queen regnant of Denmark since medieval times, succeeding her father in 1972.²¹¹

Until 2009, Denmark followed the same type of succession as did the United Kingdom at that time—male primogeniture. However, through a lengthy process involving votes in two Parliaments²¹² as well as a vote in a referendum,²¹³ the process changed to allow absolute primogeniture.²¹⁴ The current Constitution (1953) continues to refer to the Act of Succession of 1953, even though that Act no longer applies: “Section 2: The form of government shall be that of a constitutional monarchy. Royal authority shall be inherited by men and women in accordance with the provisions of the Act of Succession to the Throne of March 27, 1953.”²¹⁵

In 2009, Danish voters elected by referendum to change the rules of succession to allow the first born of the sovereign to succeed to the throne.²¹⁶ The change becomes effective with the children of the current

208. *Denmark: Succession to the Throne Act*, ICL (May 29, 2010), http://www.servat.unibe.ch/icl/da01000_.html; see also Peter Kurrild-Klitgaard, *Conditional Consent, Dynastic Rights and the Danish Law of Succession*, HOELSETH.COM, <http://www.hoelseth.com/royalty/denmark/dk-suc-law.html> (last updated Jan. 3, 2010) (analyzing in particular the application of 1953's Act of Succession to the dynastic rights of Princess Benedikte, sister of Queen Margrethe II).

209. See GRUNDLOVEN [CONSTITUTION] June 5, 1953 (Den.).

210. See *id.* ch. 1, § 2.

211. GRETHE JACOBSEN, LESS FAVORED—MORE FAVORED: QUEENSHIP AND THE SPECIAL CASE OF MARGRETE OF DENMARK, 1353–1412, at 11 (2004), available at http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A16A_Jacobsen-ENG.pdf. Jacobson argues that Margrethe obtained the throne not through inheritance, since she was the wife of the king, but through a demonstration of her abilities; she was chosen to lead the nation. *Id.* at 7, 13–14.

212. *Females Get the Nod in Denmark*, TVNZ (June 3, 2006), <http://tvnz.co.nz/view/page/411366/738664>.

213. *Denmark Votes to Change Royal Succession Rules*, DEUTSCHE WELLE (June 8, 2009), <http://www.dw.de/dw/article/0,,4310654,00.html>.

214. *Id.*

215. GRUNDLOVEN [CONSTITUTION] June 5, 1953 (Den.).

216. *Denmark Votes to Change Royal Succession Rules*, *supra* note 213.

ruler, Queen Margrethe II,²¹⁷ whose eldest child, Frederick, has four children: Christian, Isabella, and twins born in January of 2011.²¹⁸ Said Prime Minister Lars Lokke Rasmussen, the change in the gender rules “was important for gender equality.”²¹⁹

The referendum was the last in a rather cumbersome procedure that began in 2008 with the passage in the Danish Parliament of a bill to provide for complete cognatic succession. The bill passed again in 2009, and the voters then approved the decision.²²⁰

F. Luxembourg

The Family Pact of June 30, 1783, applying to the House of Orange-Nassau, which controlled both the Netherlands and Luxembourg, assured that males would succeed to the thrones of the two countries to the exclusion of females, unless no male heir was available in any branch of the family.²²¹ At that point, a female heir might be considered.²²² Throughout the nineteenth century, no woman ruled the Grand Duchy, because it was governed by the King of the Netherlands in a personal union. In 1890, when Wilhelmina became queen of the Netherlands, the Luxembourgeois throne passed to her uncle Adolphe, and in 1905 to his son William IV.²²³ William had six daughters, but no sons, which caused a dynastic crisis.²²⁴ He decided to change the succession rules to include his daughters and their progeny; all successive rulers of Luxembourg have descended from his second daughter Josephine Charlotte.²²⁵

William IV’s oldest daughter Marie Adelaide succeeded her father but abdicated under pressure in 1919 because of her perceived friendliness toward the Germans.²²⁶

217. Margarethe established the rights of succession in a document when she acceded to the throne. See Kurrild-Klitgaard, *supra* note 208.

218. *His Royal Highness Crown Prince Frederik*, DANISH MONARCHY, <http://kongehuset.dk/english/the-royal-house/Crown-Prince-Couple/hrh-the-crown-prince> (last visited Feb. 26, 2013).

219. *Denmark Votes to Change Royal Succession Rules*, *supra* note 213.

220. *Danish Referendum on Royal Succession*, POLITIKEN.DK (Feb. 24, 2009), <http://politiken.dk/newsinenglish/article656371.ece>. Note that a male sovereign’s wife is called the queen, whereas a female sovereign’s husband is not the king. *Id.*

221. The agreement making up the 1783 pact under which the House of Nassau-Orange controls the Duchy is article 3 of the Luxembourg Constitution. CONSTITUTION DU GRAND-DUCHE DE LUXEMBOURG [CONSTITUTION] Oct. 17, 1868, art. 3.

222. *Id.* This exclusion of females except if no males existed *in any branch of the family* is described as Semi-Salic law but as applied in Luxembourg.

223. Ruth Putnam, *The Luxembourg Chamber of Deputies*, 14 AM. POL. SCI. REV. 607, 610 (1920).

224. *See id.*

225. *Id.* at 609.

226. *Id.* at 610, 616-17.

On signing CEDAW, the Convention on the Elimination of all Forms of Discrimination Against Women, in 1979, the government of Luxembourg had made a reservation with respect to Article 3 of its constitution because of the rules of succession.²²⁷ It removed the reservation in 2008.²²⁸ Indicating that it wished to conform to CEDAW, in 2010 it took the further step of changing the rules of succession.

On September 16, 2010, the present Grand Duke, Henri II, introduced by decree a change in the house laws that would allow females equal succession to the throne.²²⁹ This process had actually begun with his address to the Luxembourg Chamber of Deputies on October 12, 2004, indicating that he wished to reform the House Laws.²³⁰

When the decree was first published in 2010, some commentators and journalists had difficulty deciphering to whom the rules applied. In particular, they wondered whether the rules were prospective (that is, whether the rules applied to the children of the present ruler, for example, or to future generations) or whether they also applied to members of the ducal house now living. This question is important, because once again it bears on the expectations of persons who have believed for some time—perhaps most of their lives—to succeed to the throne, or have assumed that they are within two or three degrees of succession to the throne.

Since the Luxembourg Constitution also provides that citizens of the Duchy are equal before the law,²³¹ the changes in the succession rules seem to be somewhat overdue. Luxembourg is also a founding member of the European Union,²³² a member of the Council of Europe,²³³ and a member of the United Nations.²³⁴

227. Loi du 15 décembre 1988 portant approbation de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, faite à New York, le 18 décembre 1979 [Law of December 15, 1988, approving the Convention on the Elimination of All Forms of Discrimination Against Women], JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG, Dec. 22, 1988, p. 1276, available at <http://www.legilux.public.lu/leg/a/archives/1988/0068/a068.pdf#page=>.

228. Décret grand-ducal du 16 septembre 2010 introduisant l'égalité entre hommes et femmes en matière de succession au trône [Decree of September 16, 2010, Introducing Equality Between Men and Women in Matters of Succession to the Throne], JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG, June 23, 2011, p. 720, available at <http://www.legilux.public.lu/adm/b/archives/2011/0055/b055.pdf#page=2>.

229. *Id.*

230. See Note Explicative, Annexe au Communiqué du Maréchalat, <http://www.monarchie.lu/fr/monarchie/droits-de-succession/annexe-au-communique-du-20062011.pdf> (last visited Feb. 28, 2013).

231. CONSTITUTION DU GRAND-DUCHÉ DE LUXEMBOURG [CONSTITUTION], Oct. 17, 1868, art. 10.

232. Luxembourg, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/luxembourg/index_en.htm (last visited Feb. 26, 2013).

G. The Disenchantment with Male Primogeniture

The change from male primogeniture and agnatic succession over the period from the seventeenth century to 1980, when Sweden made its revolutionary decision, has a number of roots. Practices varied from country to country, but the general rule, except in the German lands,²³⁵ seems to have been that the title and the bulk of the property should pass to the eldest male heir. First, the general rule in England, for example, that the crown, or the aristocratic title, and with it the bulk of the property of the family should pass to the eldest male heir necessarily accumulated the wealth of the family in one individual and his heir, to the exclusion of other family members.²³⁶

233. *Luxembourg*, COUNCIL OF EUR., [http://www.coe.int/web/coe-portal/country/Luxembourg? dynLink=true&layoutId=153&dlgroupId=10226&fromArticleId=](http://www.coe.int/web/coe-portal/country/Luxembourg?dynLink=true&layoutId=153&dlgroupId=10226&fromArticleId=) (last visited Feb. 26, 2013).

234. Luxembourg became a member on October 24, 1945. *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/index.shtml#l> (last visited Feb. 26, 2013).

235. In the German lands, the custom developed of dividing lands among the sons, rather than following male primogeniture. See Judith J. Hurwich, *Inheritance Practices in Early Modern Germany*, 23 J. INTERDISC. HIST. 699 (Spring 1993).

236. Douglas W. Allen discusses the deliberate accumulation of power in the hands of a “pre-modern aristocracy,” for example, as a economic phenomenon, but he points out that it tended to mimic the same sorts of results as did feudal inheritance, in that it allowed fathers to pass on both estates and titles intact to the first-born (usually) male heir.

Unlike the feudal system of entails, the family settlement was a *voluntary* act on the part of aristocrats to “bind their hands.” It not only restricted the uses of the lands, but it provided for other members of the family beyond the eldest son. Many large landowners who were not peers, did not constrain their land. At the same time, on many occasions when the opportunity presented itself for an aristocrat to leave the settlement, the option was rarely exercised. Indeed, in their sample Stone and Stone find less than 5 examples over 350 years. The strict family settlement dealt with more than just the land. An estate consisted of five elements: the “seat” or home, the landed estates, the furniture and other mobile capital, the family name, and any titles. The major goal of the settlement was to make sure that these elements all remained intact and bundled together. Thus, when there were multiple children the younger sons and daughters were give cash settlements in the form of annuities and dowries. They were not given part of the estate, which was passed on intact to the heir. More interesting was the desire to maintain the estate even when there was a failure in the male line. The family settlement would contain provisions allowing for a male cousin or other distant kin to inherit. If none were available, then the estate could pass to a daughter, and if she married the husband would often be required to adopt the family name. In this way, the estate was passed on to pseudo-kin. When an aristocratic line went extinct, the estate reverted back to the Crown, and the entire bundle could be reinstated at a later time. At all times, the goal was to preserve the estate in its entirety.

Douglas W. Allen, *A Theory of the Pre-Modern British Aristocracy*, 46 EXPLORATIONS IN ECON. HIST. 299, 307 (2009) (citations omitted). However, in Portugal, the holder of the title could divide lands or possessions that he or she acquired during his or her lifetime (though not possessions that he or she inherited) among his or her heirs as he wished, a rule that

Such a pattern of inheritance tended to cause resentment. It also tended to cause certain types of marriage patterns among the daughters of the family, and career choices among the sons, until women began to achieve the same sorts of freedoms as men had always enjoyed to make social and economic choices for themselves.²³⁷

At the same time, over the period 1750–1900, in the UK and in Europe, much of society was moving from an agrarian to an urban and industrialized society.²³⁸ The aristocratic classes received much less wealth, and consequently much less political power, from their titles and holdings. Class warfare²³⁹ and political revolution²⁴⁰ shifted the balance of power from the sovereign, the titled, and the landed classes to the industrial classes, those who acquired wealth through the creation of technology and of industry. Members of the newly formed and upwardly mobile business classes, for example in London, were much less interested in handing on their entire estates to a single heir and more likely to be interested in promoting the interests of their entire families.²⁴¹ Similarly, in France, a steadily declining

encouraged parents to treat their children somewhat equally with respect to those goods. See Nuno Gonçalo Monteiro, *Aristocratic Succession in Portugal (From the Sixteenth to the Nineteenth Centuries)* 133, 137 in *ELITES: CHOICE, LEADERSHIP, AND SUCCESSION* (Jão de Pina-Cabral and Antónia Pedrosa de Lima eds.; Berg, 2000).

237. The adoption of the Civil Code in a number of continental countries had a great deal to do with gender equality in the area of inheritance. See, e.g., Andreina di Clementi, *Gender Relations and Migration Strategies in the Rural Italian South: Land, Inheritance, and the Marriage Market*, in *WOMEN, GENDER, AND TRANSNATIONAL LIVES: ITALIAN WOMEN AROUND THE WORLD* 76, 85.

238. Many writers documented these changes in their work. Some of the most obvious examples are Charles Dickens, who wrote movingly in novels such as *Oliver Twist* about the treatment of orphans and *Bleak House* about the arcane byways of the law, and John Galsworthy, trained as a solicitor, who was particularly concerned about the impact of the law on women and the laboring classes. See Christine A. Corcos, *Legal Forsyte: Law in the Fiction of John Galsworthy* (unpublished manuscript) (on file with author). For the period from 1750 to 1830, see RUTH PERRY, *NOVEL RELATIONS: THE TRANSFORMATION OF KINSHIP IN ENGLISH LITERATURE AND CULTURE, 1748–1818*, at 29, 205, 380 (2004).

239. See PERRY, *supra* note 238, at 196.

240. Between 1789 and 1918 Europe saw a number of civil wars, general wars, and revolutions, including the French Revolution (1789–1793), the July Revolution (France, 1830), the Revolution of 1848 (France), the general wars between Napoleon I and the Allies (1793–1815), the Franco-Prussian War (1870–1871), the First World War (1914–1918) and the Russian Revolutions of 1905, February 1917, and October 1917. See generally *THE NINETEENTH CENTURY: EUROPE 1789–1914* (T.C.W. Blanning ed., 2000) [hereinafter *THE NINETEENTH CENTURY*].

241. See generally Nicholas Rogers, *Money, Marriage, Mobility: The Big Bourgeoisie of Hanoverian London*, 24 *J. FAM. HIST.* 19 (1999). One economic historian notes that while some nineteenth century businessmen left their land to one particular member of the family, often an eldest son, they made equal and lavish provision for other children, suggesting that these men tried to create equivalencies for their children in terms of the partitions of their fortunes. See F.M.L. Thompson, *Life After Death: How Successful Nineteenth-Century Businessmen Disposed of Their Fortunes*, 43 *ECON. HIST. REV.* 40, 41, 47 (1990).

birth rate pushed middle class families to examine strategies that would consolidate wealth even as the eventual adoption of the Civil Code forced them to partition family holdings.²⁴²

More and more European nations moved toward the model of constitutional monarchy, either more or less voluntarily²⁴³ or through revolution.²⁴⁴ As they did so, their citizens began to demand more rights²⁴⁵ and began to question whether the old model—that of “everything to the oldest son”—was the model that should be adopted, or whether a better model might be an equal partition among all the children.²⁴⁶

Further, female heirs began receiving the same kind of training as did males. As heir, Princess Elizabeth trained as a mechanic when she joined the Women’s Auxiliary Territorial Service during the Second World War.²⁴⁷ By doing so, she demonstrated not simply leadership but solidarity with her people, and also ability to learn the same sorts of skills that men learn. She was also appointed Colonel-in-Chief of the Grenadier Guards at fifteen and a Counsellor of State at eighteen.²⁴⁸ Similarly, as heir to the throne, Beatrix of the Netherlands attended the University of Leiden, passed her comprehensive exam in law, and earned a degree in 1961,²⁴⁹ during a period when royal women were just beginning to attend universities. Like Beatrix, Margrethe II of Denmark attended college. She earned degrees in philosophy

242. See J.G.C. Blacker, *Social Ambitions of the Bourgeoisie in 18th Century France, and Their Relation to Family Limitation*, 11 *POPULATION STUD.* 46, 47, 49 (1957).

243. On the development of constitutional monarchy in the UK, see ANN LYONS, *CONSTITUTIONAL HISTORY OF THE UK* (Routledge, 2003).

244. On the development of constitutional monarchy in France as a response to revolution, see Markus Joseph Prutsch, *Making Sense of Constitutional Monarchism in Post-Napoleonic France and Germany* (Palgrave Macmillan, 2012).

245. For reasons of space I am oversimplifying the great social, political and legal changes that took place during this period. For extended discussion, see generally *THE NINETEENTH CENTURY*, *supra* note 240.

246. Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 *AM. J. LEGAL HIST.* 145, 156 (1987); David R. Weir, *Tontines, Public Finance, and Revolution in France and England, 1688–1789*, 49 *J. ECON. HIST.* 95, 107 (1989); see also Joan Thirsk, *The European Debate on Customs of Inheritance, 1500–1700*, in *FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE, 1200–1800*, at 177 (Jack Goody, Joan Thirsk & E.P. Thompson eds., 1976).

247. SALLY BEDELL SMITH, *ELIZABETH THE QUEEN: THE LIFE OF A MODERN MONARCH* 20–21 (2012). The film *The Queen* makes reference to that part of her life in one scene when her Land Rover becomes stuck in a stream. *Id.* at 21.

248. *Early Public Life*, *BRIT. MONARCHY*, <http://www.royal.gov.uk/HMTheQueen/PublicLife/EarlyPublicLife/Earlypubliclife.aspx> (last visited Feb. 26, 2013).

249. *Education*, *HET KONINKLIJK HUIS*, <http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/members-of-the-royal-house/her-majesty-the-queen/education/> (last visited Feb. 26, 2013).

(Copenhagen University, 1960) and archaeology (Cambridge, 1961).²⁵⁰ She volunteered for military service with the Danish women's military,²⁵¹ and holds the titles Colonel-in-Chief of the Queen's Regiment and Colonel-in-Chief of the Princess of Wales' Regiment in the UK military.²⁵²

IV. A CLOSER LOOK AT THE TRANSITION FROM MALE PRIMOGENITURE TO ABSOLUTE SUCCESSION: THE SITUATION IN SPAIN AND THE UK

A. Spain

1. *The Current Situation in Spain: Male Primogeniture Under the Spanish Constitution*

Historically, the kingdoms that make up what is now the much of the geographic territory of the nation of Spain—Castile, Aragon, León,²⁵³ and part of Navarre—had traditionally accepted male primogeniture, although they allowed for female inheritance.²⁵⁴ The succession of Isabel I to the Castilian throne and her marriage to Ferdinand II of Aragon created the beginnings of what is now the modern Spanish state.²⁵⁵ Their daughter Juana inherited both kingdoms and passed them to her son Charles.²⁵⁶

Under the current Spanish Constitution, Article 57, the crown passes first to the male heirs and then to any female heirs of the sovereign (Juan Carlos), from older to younger, in the direct line:

The Crown of Spain is hereditary for the successors of *H.M. Don Juan Carlos I of Borbon*, legitimate heir of the historic dynasty. Succession to the throne will follow the regular order of primogeniture and representation, the first line always having preference over subsequent lines; within the same line, the closer grade over the

250. *Her Majesty Queen Margrethe 2*, DANISH MONARCHY, <http://kongehuset.dk/english/The-Royal-House/Regentparret/hm-the-queen> (last visited Feb. 26, 2013).

251. *Id.*

252. *Id.*

253. On the history of the Kingdom of León, see LEÓN REAL, <http://leonreal.es/index.php?lang=en> (last visited Feb. 26, 2013).

254. In the mid-twelfth century, women ruled three countries as queens regnant—England, Jerusalem, and León-Castile. See Therese Martin, *The Art of a Reigning Queen as Dynastic Propaganda in Twelfth-Century Spain*, 80 *SPECULUM* 1134 (2005) (discussing both the rule and the opposition to the rule of Matilda of England, Melisende of Jerusalem and Urraca of León-Castile); see also MARÍA DAMIAN YÁÑEZ NEIRA, *LA PRINCESA DOÑA SANCHÁ, HIJA PRIMOGENITA DE ALFONSO IX* 54 (1982), available at <http://www.saber.es/web/biblioteca/libros/tierras-de-leon/html/47/4princesa.pdf> (discussing the attempt of Alfonso IX of León to leave his kingdom to his daughter).

255. See HUGH THOMAS, *RIVERS OF GOLD: THE RISE OF THE SPANISH EMPIRE, FROM COLUMBUS TO MAGELLAN* 13-21 (2003).

256. See *id.* at 21, 397.

more remote; in the same grade, the male over the female; and in the same sex, the elder over the younger.

The hereditary Prince, from his birth or from the time he acquires the claim, will have the title of Prince of Asturias and the other titles traditionally linked to the successor to the Crown of Spain.

If all the lines entitled by law become extinct, the Parliament shall provide for the succession to the crown in the manner which is best for the interests of Spain.²⁵⁷

Critics have noted that the preference for male heirs expressed in Article 57 seems contrary to the expressions of human rights and human dignity in Article 10 and expressions of principles of equality in Article 14. Article 10 reads:

The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace.

The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.²⁵⁸

Article 14 reads: "Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance."²⁵⁹

The Universal Declaration of Human Rights, which lists the rights guaranteed by member states of the United Nations, guarantees equality of dignity and rights,²⁶⁰ equality of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,"²⁶¹ and equality before the law and equal protection of the law.²⁶² Spain is a member of the United Nations.²⁶³ Spain is also a party to a number of international human rights agreements, including some United Nations treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²⁶⁴ It is a member of the Council of Europe,²⁶⁵ and thus subject to the jurisdiction of the European Court of Human

257. CONSTITUCIÓN ESPAÑOLA, art. 57, B.O.E. n. 311, Dec. 27, 1978.

258. *Id.* art. 10.

259. *Id.* art. 14.

260. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III), art. 1 (Dec. 10, 1948).

261. *Id.* art. 2.

262. *Id.* art. 7.

263. *Member States, supra* note 234.

264. *Chapter IV: Human Rights*, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (last visited Feb. 3, 2013).

265. COUNCIL OF EUR., THE COUNCIL OF EUROPE: 800 MILLION EUROPEANS 24 (2012), available at http://www.coe.int/AboutCoe/media/interface/publications/800_millions_en.pdf.

Rights.²⁶⁶ Finally, Spain is a member state of the European Union.²⁶⁷ The EU's constituent Treaties, the Treaty on European Union (TEU),²⁶⁸ and the Treaty on the Functioning of the European Union (TFEU),²⁶⁹ as well as the Charter of Fundamental Rights of the European Union (Charter),²⁷⁰ create the structure of the EU and guarantee fundamental rights and protections for citizens of member states of the European Union.

The TEU's Preamble affirms the EU's and member states' "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law."²⁷¹ Article 2 affirms that

[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.²⁷²

Based on Article 19, the Council of the EU, working with the Parliament "may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."²⁷³ Based on this article, the Council has passed a number of Directives, including many that predate the TFEU, to address issues of gender discrimination.

Given that these directives, policy documents, and cases reiterate the principle of non-discrimination in the area of gender, albeit they do not mention the issue of the inheritance of titles, the matter would seem to be clear. Member state discrimination against women simply because they are women is impermissible. Member states need to present some other reason for the discrimination in order to justify it. In *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*,²⁷⁴ the European Court of Justice ruled that an employer may not discriminate on the basis of gender when

266. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 32-34, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 005.

267. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

268. Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter TEU].

269. Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

270. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1.

271. TEU pmb1. (as in effect 1992).

272. *Id.* art. 2 (as in effect 1992) (now TFEU art. 1).

273. TFEU art. 19.

274. Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, [1976] E.C.R. 455.

male and female employees are providing equal work for equal pay (now generally understood to be equivalent work for equal pay).²⁷⁵

However, the “job” of sovereign is not simply a “job.” It is not comparable to other positions in the country. If a constitutional monarchy altered the rules of succession prospectively, for example, so that cognatic primogeniture applied only to the children of the reigning sovereign, it might be difficult for a female royal who was not included (for example, if she were the sister of the sovereign) to argue that she was discriminated against with regard to the position of sovereign.²⁷⁶

The Spanish government is currently attempting to raise social awareness on the subject of equality of the sexes. Former Prime Minister of Spain José Luis Rodríguez Zapatero made it his policy to seek complete equality among his ministers; in his Cabinet, in fact, women made up 70% of his ministers, and the Defense Minister, when appointed, was seven months pregnant.²⁷⁷

The question of male primogeniture in Spain has become immeasurably more complicated over the past several years, not simply because the Prince of Asturias has no son (yet) to succeed to the throne, a circumstance that seems to trouble very few people in Spain. Attempts to change the succession rules have met with failure so far.²⁷⁸ Yet, the Spanish Parliament changed the rules that apply to the succession to aristocratic titles in 2006, a change that upset many in the Spanish aristocracy.

In 2011, many Spanish nobles, upset at the news that the rules of inheritance had changed, and that unlike in the United Kingdom,²⁷⁹ the oldest child in the family now inherits the title, mounted concerted objections to the change.²⁸⁰ Such objections result from reactions to a 2006 statute, passed

275. *Id.* at 473, 481-82; see also Case 152/84, *Marshall v. Southampton and South-West Hampshire Area Health Auth.*, 1986 E.C.R. 723, 751.

276. Similarly, it might be difficult to argue that limitations on the religion of the sovereign or the royal family are an impermissible restriction on the liberty of religion of members of the Royal Family. While other citizens of the country may have liberty of religion, if the country has an established religion, as does Sweden, for example, it may serve the purposes of the country for its Head of State and his or her family to be members of that religion.

277. Jerome Socolovsky, *Spain's Pregnant Defense Minister Stirs Controversy* (Apr. 16, 2008), <http://www.npr.org/templates/story/story.php?storyId=89676023>; see also Lisa Abend, *Spain's Pregnant Defense Minister*, TIME (Apr. 15, 2008), <http://www.time.com/time/world/article/0,8599,1730927,00.html>.

278. See DAMÍAN YÁÑEZ NEIRA, *supra* note 254, at 54.

279. See *infra* notes 371-69 and accompanying text.

280. Giles Tremlett, *Inheritance Row Splits Spanish Grandees*, GUARDIAN, Jan. 4, 2011, at 21, available at <http://www.guardian.co.uk/world/2011/jan/03/spanish-nobility-feud-heritage>. These Spanish aristocrats were not the only group to object to measures that attempted to legislate gender equality. See Dale Fuchs, *Spain: Firms Protest at Female Quota for Boardrooms*, GUARDIAN, June 26, 2006, at 14, available at

both in conformity with CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women,²⁸¹ and in response to an adverse ruling from the Spanish Constitutional Court dating from 1997:

Nevertheless, the rules which regulate the inheritance of aristocratic titles come from the historical period in which the titled nobility was consolidated as a privileged social class, and contained rules such as the principle of masculinity or primogeniture without doubt adapted to the values of the Old Regime, but incompatible with contemporary society in which women participate fully in political, economic, cultural, and social life. This full equality of men and women in all legal and social spheres is recognized in the Convention on the Elimination of All Forms of Discrimination Against Women, adopted in New York on the 18 of December, 1979, and ratified by Spain in 1984.²⁸²

The aristocrats who disapprove base their objections not just in law, but in equity, noting that sons who have grown up expecting to succeed their fathers in a title will be supplanted in the succession by their sisters.²⁸³ “‘The law should not be retroactive. There will be fights in all the noble families because of this,’ said Miguel Temboury of the Spanish Nobles Association, a recently created conservative faction within Spain’s 2,500-strong nobility.”²⁸⁴ However, the women and their supporters respond that they have waited much too long for the change, and that the aristocrats who oppose the change are simply petty.²⁸⁵

The fight over female inheritance of aristocratic titles began in the 1990s when twenty noblewomen challenged the existing rules of male pri-

<http://www.guardian.co.uk/world/2006/jun/26/spain.gender?INTCMP=ILCNETT3487>. A 2006 statute that requires “equality in the boardroom” also met with opposition. *Id.*

281. The Convention opened for signature on March 1, 1980 and became effective on September 8, 1981. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. Spain became a signatory on July 17, 1980 and ratified the treaty on January 5, 1984.

282. Translation by C. Corcos. In original:

Sin embargo, las normas que regulan la sucesión en los títulos nobiliarios proceden de la época histórica en que la nobleza titulada se consolidó como un estamento social privilegiado, y contienen reglas como el principio de masculinidad o preferencia del varón sin duda ajustadas a los valores del antiguo regimen, pero incompatibles con la sociedad actual en la cual las mujeres participant plenamente en la vida política, económica, cultural y social.

Esta plena igualdad del hombre y la mujer en todas las esferas jurídicas y sociales se reconoce en la Convención para la Eliminación de Todas las Formas de Discriminación contra la Mujer, adoptada en Nueva York el 18 de diciembre de 1979, y ratificada por España en 1984.

B.O.E. 2006, 18869.

283. Giles Tremlett, *International: Spanish Nobles Rebel over Inheritance Law*, GUARDIAN, July 13, 2009, at 15, available at <http://www.guardian.co.uk/world/2009/jul/12/spanish-inheritance-law-equality-women>.

284. *Id.*

285. *See id.*

mogeniture. The Spanish judiciary, and ultimately its highest court capable of deciding the issue presented, ruled against them.²⁸⁶

The high court cited in its ruling prior law, statutes that pre-dated the Constitution of 1978.²⁸⁷ The plaintiffs' loss before the national court propelled them to seek a more favorable outcome before an international tribunal. Their first choice was the European Court of Human Rights.²⁸⁸ Unlike most international courts, the ECHR allows private citizens to sue their governments.²⁸⁹ In 1998 the European Court of Human Rights heard the case and ruled against the applicants. First, it found that the subject matter did not come within the scope of the European Convention on Human Rights:

286. *Succession to Spanish Titles: The Rights of Males over Females Determined by the Constitutional Tribunal*, 9 July 1997, EUR. NOBILITY, <http://www.chivalricorders.org/nobility/spcntrib.htm> (last visited Feb. 26, 2013):

“Los títulos de nobleza nos sitúan ante un ámbito de relaciones que se circumscribe a aquellas personas que forman parte del linaje del beneficiario de la merced y, por tanto, no poseen una proyección general y definitiva de un estatus . . . la regla de preferencia del varón hoy es un elemento diferencial que no tiene cabida en nuestro ordenamiento respecto a aquellas situaciones que poseen un proyección general. De manera que sólo puede entrañar, al igual que los propios títulos nobiliarios, una referencia o una llamada a la historia, desprovista de todo contenido material. . . . Dicho de otro modo—abundo la sentencia— la diferencia por razón de sexo sólo posee hoy un valor meramente simbólico, dado que el fundamento de la diferenciación ya no se halla vigente en nuestro ordenamiento. Mientras que, por el contrario, los valores sociales y jurídicos contenidos en la Constitución necesariamente han de proyectar sus efectos si estuviésemos ante una diferencia legal que tuviera un contenido material . . . no siendo discriminatorio y, por tanto, inconstitucional el título de nobleza, tampoco puede serlo dicha preferencia [del hombre sobre la mujer], salvo incurrir en una contradicción. . . . Admitida la constitucionalidad de los títulos nobiliarios por su naturaleza meramente honorífica y la finalidad de mantener vivo el recuerdo histórico y la finalidad de mantener vivo el recuerdo histórico al que se debe su otorgamiento, no cabe entender que un determinado elemento de dicha institución—el régimen de su transmisión ‘mortis causa’ haya de apartarse de las determinaciones establecidas en la Real carta de concesión. La voluntad regia que ésta expresa no puede alterarse sin desvirtuar el origen y la naturaleza histórica de la institución.”

Id. (citations omitted).

287. Antonio Aznar Domingo, a law professor at the University of La Laguna, explains the prior jurisprudence at his webpage, *Derecho Civil v. Lección 10. Sucesión De Los Títulos Nobiliarios*, DERECHO CIVIL, <http://docencia.aznar-abogados.com/modules.php?name=News&file=article&sid=375> (last visited April 23, 2013) (discussing inheritance of aristocratic titles in Spain and citing statutes dating back to those of Alfonso el Sabio).

288. For an excellent extensive analysis of several of these cases, see Yofí Tirosh, *A Noble Cause: A Case Study of Symbols, Discrimination, and Reciprocity*, in DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING THE JUDGMENTS OF THE ECHR 121 (Eva Brems ed., 2012).

289. EUR. CONV. ON H.R. art. 34.

The Court observes, firstly, that it has on a number of occasions held that disputes relating to individuals' surnames and first names come within Article 8 of the Convention. Although that provision does not contain any explicit provisions on names, as a means of personal identification and of linking to a family, a person's name nonetheless concerns his or her private and family life. In the instant case, however, the Court notes that the decision in issue did not concern a dispute over the surnames or first names of the applicants; the case-law cited above is thus inapplicable. The fact that a nobiliary title may be entered on the civil register as an item of additional information facilitating the identification of the person concerned cannot suffice to bring the debate within the scope of Article 8.

The Court concludes that the applicant's complaint cannot be regarded as coming within the scope of application of Article 8 of the Convention. It follows that, in accordance with Article 35 §§ 3 and 4 of the Convention, this part of the application must be dismissed as being incompatible *ratione materiae* with the Convention provision relied on.²⁹⁰

The Court also ruled that “that a nobiliary title cannot, as such, be regarded as amounting to a “possession””²⁹¹ within the meaning of Article 1 of the First Protocol of the Convention.

In general, the same applies to a mere hope of being able to exploit such a title commercially, for example, as a trademark. Since in the instant case the applicants are unable to assert the right to use the nobiliary titles concerned, a fortiori, they cannot claim any legitimate expectation concerning the commercial exploitation of those titles. In these circumstances and in accordance with Article 35 § 3 of the Convention, the Court considers that the applicants' complaints under Article 1 of Protocol No. 1 taken alone and under Article 14 of the Convention taken together with Article 1 of Protocol No. 1 must be dismissed as being incompatible *ratione materiae* with those provisions.²⁹²

290. *De la Cierva Osorio de Moscoso v. Spain*, Application, 41127/98 41503/98 41717/98, Decision, Court (Fourth Section) 28/10/1999 (citations omitted).

291. *Id.* Article 1 reads “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.” Member states thus define for themselves the rules of succession and inheritance of property. Sébastien Drooghenbroeck discusses the meaning of the word “possessions” in Article 1 in an article in the European Legal Forum, *The Concept of “Possessions” Within the Meaning of Article (sic) 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EUROPEAN LEGAL FORUM, E(7)7-2000/01, at 437-444 (analyzing the case of the ECHR and finding that it is somewhat diffuse). Also available at <http://www.simons-law.com/library/pdf/e/105.pdf> (last visited April 22, 2013).

292. *Id.*

These plaintiffs submitted their claims to yet another international tribunal, the United Nations Human Rights Committee.²⁹³ In these cases, the same lawyers brought the cases: Carlos Texidor and his colleagues.²⁹⁴

The attorneys argued that Article 14 of the Spanish Constitution should have overturned existing legislation that established male primogeniture. When, according to the Spanish courts, it did not, they argued that the Spanish courts should have applied international law to give effect to their clients' human rights, guaranteed under both the European Convention and the International Covenant on Civil and Political Rights. However, neither the European Court of Human Rights nor the United National Human Rights Committee has as yet agreed with them.

Other Spanish women have since brought separate actions in the Spanish courts, and having lost them, have appealed to international tribunals. In a 2004 decision, the Human Rights Committee ruled inadmissible Isabel Hoyos Martínez de Irujo's petition requesting that it decide that she be entitled to inherit her late father's title of Duke of Almodóvar del Río.²⁹⁵ However, the Committee discussed at length the basis for Hoyos Martínez's request that it hear her case.²⁹⁶

Hoyos Martínez had asked the Spanish King to confirm her right to inherit her father's ducal title, but the King confirmed her younger brother's right to the title in 1996, apparently relying on her prior renunciation in her brother's favor.²⁹⁷ In 1999, she brought suit in a local Spanish court.²⁹⁸ The court dismissed the claim, basing its decision on the Constitutional Court ruling of 1997.²⁹⁹

While Hoyos Martínez agreed that titles of nobility were not material possessions,³⁰⁰ she insisted that to allow male primogeniture in the light of

293. The U. N. Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights by its signatories. *Human Rights Committee: Monitoring Civil and Political Rights*, OFF. UN HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/hrc/> (last visited Feb. 26, 2013). Individuals may present complaints to the Committee against their member states under the procedures outlined in the Optional Protocols. *Id.* Note that the Committee hears only those complaints based in rights guaranteed in the Covenant. *Id.*

294. See *Interview with Carlos Texidor, Spanish Lawyer*, in BRIDGING THE DIVIDE: WOMEN'S ACCESS TO JUSTICE 47 (2002).

295. Human Rights Committee Comm'n 1008/2001, Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, 80th Session, Mar. 15–Apr. 2, 2004, CCPR/C/80/D/1008/2001 (Mar. 30, 2004). Martínez de Irujo's lawyer was José Luis Mazón Costa. He and Carlos Texidor represented Cristina Muñoz-Vargas.

296. *Id.* ¶¶ 4.1–4.11

297. See *id.* ¶ 2.3.

298. *Id.* ¶ 2.4.

299. *Id.* ¶ 2.5.

300. See *id.* ¶ 3.4.

the principles of non-discrimination articulated in the Covenant was clear discrimination against women and a violation of the promise of equality guaranteed by the international agreement:³⁰¹

The author asserts that article 3 of the Covenant has also been violated, in conjunction with article 26, since States parties have the obligation to grant equality to men and women in the enjoyment of civil and political rights. She further claims that the foregoing may be linked to article 17 of the Covenant since, in her opinion, a title of nobility is an element of the private life of the family group of which it forms part. In this regard, she recalls that, in its general comment No. 28 concerning article 3 of the Covenant, the Committee stated: "*Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture . . .*". She also notes that, in paragraph 4 of the same comment, the Committee established that "*Articles 2 and 3 mandate States parties to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights.*"³⁰²

The question of privacy and family life is a crucial one. Further, the case raises important issues for the Spanish government. The Spanish national courts have ruled that titles of nobility are intangible, thus not real property heritable by the first born under rules of absolute primogeniture. Even if the Spanish government is satisfied with this outcome, it still may need to consider Hoyos Martínez's other claim—that the question is one of private life. If that is so, then the Spanish government has the responsibility to intervene under (1) national law; (2) international law; or (3) European Union law to eliminate gender discrimination.

While titles of nobility may be intangible, and may not be recognized as real property heritable by the first born under rules of absolute primogeniture, as the Spanish courts ruled (a question that frankly seem questionable), if Hoyos Martínez is correct that the question is one of private life, then the Spanish government has the responsibility to intervene, under (1) national law; (2) international law; or (3) European Union law to eliminate discrimination between the genders.

Similarly, if the Spanish government is correct in its assertion that if "the use of a title of nobility is merely *nomen honoris*, devoid of any legal or material content," and that it is not a human right,³⁰³ then what are we to make of the law of 2006, which legislates the equality of inheritance of such titles? Further, the Spanish government argues that titles, if they had

material substance . . . would be inherited by all the children, without discrimination on the ground of primogeniture or sex, as in the case of the property of the deceased in the institution of inheritance, which is regulated by the Civil Code. It adds that it would be unconstitutional for titles to have material content, since that

301. *Id.* ¶¶ 3.1-3.3.

302. *Id.* ¶ 3.3 (emphasis added).

303. *Id.* ¶ 4.4.

would be the expression of “the most odious discrimination, that of birth, which for many centuries prevented human beings from being born free and equal in dignity and in rights.”³⁰⁴

The Spanish government also argued that the case was inadmissible, since Hoyos Martínez did not “claim a possible inequality before the law or that there is a violation of articles 3 and 17 of the Covenant,”³⁰⁵ further pointing out that she voluntarily renounced the title which she was now contesting.³⁰⁶ For the government, the original grant of title came at a time when “men and women were not yet considered to be born equal in dignity,” and that nobility itself represents the concept of inequality.³⁰⁷ Oddly enough, the government made the argument that the Spanish Civil Code does not determine the laws of succession to a title,³⁰⁸ a contradiction of the Spanish Supreme Court’s decision in the Munoz case.³⁰⁹

It also appears that Hoyos Martínez and her brother originally treated the family titles as property belonging to the estate. “[S]he had agreed to renounce the title under an agreement she had made with her brothers on the distribution of their father’s titles of nobility.”³¹⁰ She explained this agreement by arguing that at the time the Spanish Supreme Court’s judgment of 1987 was then in force, and suggests that it would have been futile for her to demand that all the titles were hers by right.³¹¹ Thus, the suggestion is that the siblings simply allocated the titles among themselves. She argues, however, that later her brothers tried to take all the titles from her.³¹²

In 2001, Mercedes Carrión Barcaiztegui filed a similar complaint before the U.N. Human Rights Committee, alleging that Spain had violated Articles 3, 17, and 26 of the International Covenant on Civil and Political Rights in refusing her application to inherit the title of Marquis of Talabases.³¹³ The Madrid Court of First Instance denied her claim based on the Constitutional Court’s decision of 1997.³¹⁴ Barcaiztegui argued before the

304. *Id.*

305. *Id.*

306. *Id.* ¶ 4.6.

307. *Id.* ¶ 4.7.

308. *Id.* ¶ 4.8.

309. Case C-208/09, Sayn-Wittgenstein v. Landeshauptmann von Wien, 2010 E.C.R. I-13693, ¶ 2.3.

310. Human Rights Comm., Isabel Hoyos Martinez De Irujo v. Spain, 1008/2001, ¶ 2.3, U.N. Doc. CCPR/C/80/D/1008/2001 (Mar. 30, 2004), available at http://www.worldcourts.com/hrc/eng/decisions/2004.03.30_Hoyos_y_Martinez_de_Irujo_v_Spain.htm.

311. *Id.*

312. *Id.*

313. Human Rights Comm., Mercedes Carrión Barcaiztegui v. Spain, 1019/2001, ¶ 1, 2.2, U.N. Doc. CCPR/C/80/D/1019/2001 (Mar. 30, 2004), at http://www.worldcourts.com/hrc/eng/decisions/2004.03.30_Carrion_Barcaiztegui_v_Spain.htm.

314. *Id.* ¶ 2.4.

Human Rights Committee that if it found in her favor, the Spanish High Court might reverse the lower court.³¹⁵

Barcaiztegui raised slightly different issues from those in the Hoyos Martínez case. Barcaiztegui was, for one thing, not the daughter of the deceased titleholder; she was the granddaughter of the deceased titleholder, the daughter of the younger daughter of the deceased Marquis of Talabases.³¹⁶ The dispute was between her and her cousin, the son of the third child and only son of the deceased aristocrat.³¹⁷ She claimed that “inequality in the enjoyment of rights by women, . . . deeply embedded in tradition, history and culture, including religious attitudes” in Spain violated Article 3 of the Covenant and that the Committee itself had recognized this inequality.³¹⁸ The Spanish government argued that she had not exhausted her domestic remedies,³¹⁹ that a title of nobility is not property, that thus her claim did not fall within the matters covered by the International Covenant,³²⁰ and that her claim also did not fall within the European Covenant on Human Rights.³²¹ The government also argued that when the title was originally granted:

[I]t was not the case that men and women were considered to be born equal in dignity and rights. [It is argued] that nobility is a historical institution, defined by inequality in rank and rights owing to the “divine design” of birth, and claims that a title of nobility is not property, but simply an honour of which use may be made but over which no one has ownership. Accordingly, succession to the title is by the law of bloodline, outside the law of inheritance, since the holder succeeding to the title of nobility does not succeed to the holder most recently deceased, but to the first holder, the person who attained the honour, with the result that the applicable rules of succession to use of the title are those existing in 1775.³²²

This defense suggests that the Spanish government itself admits to the inequality Barcaiztegui complained of in her submission.

Like other women in her situation, Barcaiztegui responded that further appeal to the domestic courts would be of no use to her.³²³ However, she denied that prior cases disposed of her case:

[S]he was not a party to the proceedings brought by four Spanish women regarding succession to titles of nobility before the European Court of Human Rights. The author recalls the Committee’s decision in *Antonio Sánchez López v. Spain* that

315. *Id.* ¶ 2.5.

316. *Id.* ¶ 2.2.

317. *Id.* ¶ 2.1 n.1, ¶ 2.2.

318. *Id.* ¶ 3.2.

319. *Id.* ¶ 4.1.

320. *Id.* ¶ 4.9.

321. *Id.* ¶ 4.4.

322. *Id.* ¶ 4.5.

323. *Id.* ¶ 5.1.

the concept of “the same case” should be understood as including the same claim and the same person.³²⁴

[T]he author asserts that the Spanish legal system regulates the use, possession and enjoyment of titles of nobility as a genuine individual right. While succession to the title occurs with respect to the founder, succession to concessions of nobility does not arise until the death of the last holder, and that as a result the laws current at that time are applicable. The author maintains that while titles of nobility are governed by special civil norms based on bloodline, that is, outside the Civil Code with regard to succession, that does not mean that succession to titles falls outside the law of inheritance by blood relatives.³²⁵

She also insisted that Article 26 of the Covenant proclaimed the equality of persons, and that the Article prohibited any discrimination, which necessarily included discrimination in the succession to noble titles,³²⁶ and pointed out that if discrimination by birth with regard to titles was permissible, then “inheritance as a general concept was discriminatory, and that allegation of discrimination in terms of descendants was also erroneous, since that allegation referred to a situation other than that raised by the communication.”³²⁷ Absolute primogeniture in itself could not be discriminatory if it was used to pass on something that itself could not be divided.³²⁸ If an inheritance can only be passed on as a unity (it cannot be divided) and can only be inherited by one individual, then a rule that holds that the individual who inherits it is the oldest child cannot be discriminatory.³²⁹

The majority of the members of the Human Rights Committee hearing the application ruled once again that under Article 3 of the Optional Protocol, the matter was inadmissible, because Article 26 could not “be invoked in support of claiming a hereditary title of nobility.”³³⁰ Thus, the Committee did not reach the merits of the case. However, it did state that Spain recognized the existence of aristocratic titles, suggesting strongly to the Spanish government that its position that aristocratic titles had no real existence was somewhat disingenuous.³³¹ Three members of the Committee filed dissents, in which they stated that they thought that Barcaiztegui stated claims under the Optional Protocol that the Committee should have heard.³³²

A later complainant, Cristina Muñoz-Vargas y Sainz de Vicuña, whose application the ECHR dismissed as essentially similar to the applica-

324. *Id.* ¶ 5.2 (footnote omitted).

325. *Id.* ¶ 5.4.

326. *Id.* ¶ 5.6.

327. *Id.* ¶ 5.7.

328. *Id.*

329. *Id.*

330. *Id.* ¶ 6.4.

331. *Id.*

332. *Id.* at Annex (individual dissenting opinions by Committee members Rafael Rivas Posada, Hipólito Solari-Yrigoyen, and Ruth Wedgwood).

tion previously deemed inadmissible,³³³ attempted to bring a claim under a new theory. She argued that allowing males to succeed was discriminatory under CEDAW, to which Spain was a party.³³⁴ The Spanish court dismissed her claim under the current law, citing current rules of succession that allowed for male primogeniture.³³⁵ Interestingly, the Spanish Supreme Court, which eventually heard her appeal, found that the Spanish Civil Code regulates the inheritance of noble titles.³³⁶ It also found that the title had been awarded to her brother before the Spanish Constitution went into effect.³³⁷ She then appealed to the U.N. Human Rights Committee, alleging that “male primacy in the order of succession to titles of nobility” constituted discrimination on the basis of sex, in violation of the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) in general, and Articles 2(c) and 2(f) in particular.³³⁸ She further claimed that Spain was required by CEDAW to amend or revise its laws establishing “male primacy in the order of succession to titles of nobility.”³³⁹

Munoz argued that CEDAW was not limited to political and civil rights but was enacted with the intention of eradicating discrimination in all facets of life.³⁴⁰

A majority of the Committee found her application inadmissible because CEDAW had not yet entered into force at the time that her brother was confirmed in his title.³⁴¹ However, it noted: “The Committee sees no reason to find the communication inadmissible on any other grounds.”³⁴² Thus, one could imagine that a female aristocrat might bring a similar case today and that the Committee could under certain circumstances find in her favor.

One member of the Committee found the communication admissible:

What needs to be noted in all of this is that when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment, it is a violation, in principle, of women’s right to equality. Such exceptions serve to subvert social progress towards the elimination of discrimination against

333. Committee on the Elimination of Discrimination Against Women Communication No. 7/2005, Decision of the Committee on the Elimination of Discrimination Against Women Under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 39th Sess. (Aug. 9, 2007), available at http://www.iwraw-ap.org/protocol/doc/Cristina_Munoz_Vargas_v_Spain.pdf.

334. *Id.* ¶ 2.4.

335. *Id.* ¶ 2.5.

336. *Id.* ¶ 2.10.

337. *Id.* ¶ 2.5.

338. *Id.* ¶¶ 2.4, 3.1.

339. *Id.* ¶ 3.1.

340. *Id.* ¶ 5.1.

341. *Id.* ¶ 11.5.

342. *Id.* ¶ 11.6.

women using the very legal processes meant to bring about this progress, reinforce male superiority and maintain the status quo. This should neither be tolerated nor condoned on the basis of culture and history. Such attempts do not recognize the inalienable right to non-discrimination on the basis of sex which is a stand-alone right. If this right is not recognized in principle regardless of its material consequences, it serves to maintain an ideology and a norm entrenching the inferiority of women that could lead to the denial of other rights that are much more substantive and material.³⁴³

A 2010 Report prepared by the Office of the U.N. High Commissioner for Human Rights commended the Spanish government for the passage of the 2006 law on the equality of the inheritance of titles but noted that work still needed to be done regarding equality of succession to the throne:

The Committee on the Elimination of Discrimination [A]gainst Women (CEDAW) commended the adoption of Organic Law 3/2007 on effective equality for men and women, which includes a definition of discrimination against women in line with the Convention, Organic Law 1/2004 on integral protection measures against gender violence, and Law 33/2006 on the equality of men and women in the order of succession to titles of nobility. It also noted that the constitutional reform necessary to guarantee equality before the law for women and men in the succession to the Crown has not yet taken place owing to other pending constitutional reform proposals.³⁴⁴

Those EU member states that do not recognize titles of nobility do recognize those titles as part of a surname.³⁴⁵ But they can place limits on the composition of the surname if the surname includes parts that suggest inequality (e.g., “von”), as long as “the measures adopted by those authorities in that context are justified on public policy grounds, that is to say, they are necessary for the protection of the interests which they are intended to secure and are proportionate to the legitimate aim pursued.”³⁴⁶

What undeniably exacerbates the Spanish situation is the appearance of inequality with regard to succession rules as they apply to the crown.

The Constitution provides that “The Spanish Crown shall be inherited by the successors of H. M. Juan Carlos I de Borbón, the legitimate dynastic heir. Succession to the throne shall follow ordinary principles of first-born and representation, with the first line always having preference over subsequent lines; within the same line, the closer grade over the more remote; within the same grade, male over female, and if of the same sex, the elder over the younger.” That is the historical order of

343. *Id.* ¶ 13.7 (individual dissenting opinion by Committee member Mary Shanthi Dairiam).

344. Compilation Prepared by the Office of the High Comm’r for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1: Spain, Human Rights Council Working Grp. on the Universal Periodic Review, 8th Sess., May 3-4, 2010, ¶ 5, U.N. Doc. A/HRC/WG.6/8/ESP/2 (Feb. 22, 2010) (footnotes omitted).

345. Case C-353/06, Grunkin & Paul, 2008 E.C.R. I-07639, ¶ 39.

346. Case C-208/09, Sayn-Wittgenstein v. Landeshauptmann von Wien, 2010 E.C.R. I-13693, ¶ 95.

succession, without excluding women from the throne, but where men have preference over women.³⁴⁷

Article 58 provides that “[t]he Queen consort, or the consort of the Queen, may not assume any constitutional functions, except in accordance with the provisions for the Regency.”³⁴⁸ The text implies without stating that the sovereign could be female, and that her partner would take the designation of “consort,” although it does not indicate whether that individual’s title would be “King Consort,” “Prince Consort,” or something else.

Article 56 reads:

The King is the Head of State, the symbol of its unity and permanence. He arbitrates and moderates the regular functioning of the institutions, assumes the highest representation of the Spanish State in international relations, especially with the nations of its historical community, and exercises the functions expressly conferred on him by the Constitution and the laws.

His title is that of King of Spain and he may use the other titles appertaining to the Crown.³⁴⁹

In the Hoyos case, one dissenting member of the Human Rights Committee noted that while the “nature and scope of titles of nobility” as well as the form of government before the Committee, were not matters before the Committee, the Spanish King, under Article 62(f), has the power to award titles of nobility.³⁵⁰ Article 62 provides that: “It is incumbent upon the King . . . [t]o issue the decrees approved in the Council of Ministers, to confer civilian and military positions and award honours and distinctions in conformity with the law.”³⁵¹

To suggest, therefore, that the Spanish King is not bound by the 2006 law, prospectively, at a minimum, seems disingenuous. In the *Hoyos* case, the petitioner did come to an accommodation with her brothers that seems to have undercut her claim to the titles she sought to reclaim.³⁵² However, other claimants may have, on different facts, much better arguments to make before international tribunals, if not Spanish courts. For example, a female firstborn claimant who might bring a case before a domestic Spanish court today should be able to plead that she has the right to succeed to a title held by her parent or other relative, based on the criteria set forth in the

347. Ascención Elvira, *The Monarchy in Spain*, INDRET, Jan. 2010, at 4, available at http://www.indret.com/pdf/689_en.pdf (citation omitted). This rule of succession describes traditional male primogeniture.

348. CONSTITUCIÓN ESPAÑOLA, art. 58, B.O.E. n. 311, Dec. 27, 1978 (Spain).

349. *Id.* art. 56.

350. Human Rights Comm., *Isabel Hoyos Martinez De Irujo v. Spain*, 1008/2001, at Annex, U.N. Doc. CCPR/C/80/D/1008/2001 (Mar. 30, 2004), available at http://www.worldcourts.com/hrc/eng/decisions/2004.03.30_Hoyos_y_Martinez_de_Irujo_v_Spain.htm (individual dissenting opinion by Committee member Hipólito Solari-Yrigoyen).

351. C.E., art. 62, B.O.E. n. 311, Dec. 27, 1978 (Spain).

352. *Hoyos*, 1008/2001, ¶ 2.3.

2006 law. If her claim were to be denied, she should be able to pursue it elsewhere—for example, before an international tribunal—because, unlike *Barcaiztegui*, *Hoyos Martínez*, and *Muñoz-Vargas*, her case would postdate the 2006 law, CEDAW, the Treaty of Lisbon, the Charter, and consequently the incorporation of ECHR jurisprudence into EU law.

B. The Situation in the United Kingdom

1. *The Succession to the Throne*

Prior to the change in succession rules, the UK followed male primogeniture. The clearest and most recent working of this rule comes with the example of the present monarch, Elizabeth II. Prior to 1936 and the abdication of her uncle Edward VIII, Elizabeth as the older daughter of the Duke of York did not expect to succeed to the throne.³⁵³ After the succession of her father as George VI, she was technically “heiress presumptive,” even though she was the older daughter of the King and very likely to become queen.³⁵⁴ Her parents might still become the parents of a boy; if so, he would displace her in the line of succession. For that reason, George VI always refused to create Elizabeth “Princess of Wales,” maintaining that that title was properly the title of the wife of the heir to the throne.³⁵⁵ On George VI’s death in 1952 Elizabeth, still only “Princess Elizabeth,” became Elizabeth II.³⁵⁶

The Queen’s experiences as heiress presumptive rather than heiress apparent might have colored her reaction to the notion that the time was ripe to move to absolute primogeniture. Over the past few years a number of Members of Parliament have attempted to change the rules of succession.

353. See MARION CRAWFORD, *THE LITTLE PRINCESSES* (1950).

354. *Id.* at 153.

355. The new King took a great interest in the regalia of his daughters, decreeing that they be dressed alike except for Elizabeth’s train, even permitting Margaret to wear a coronet equivalent to Elizabeth’s during the coronation ceremony in 1937 in order to prevent jealousy. *Id.* at 94. Six-year-old Margaret spotted the train, however, and wanted the equivalent; when told that only the heiress presumptive was entitled to wear something so fine, she understandably pitched a royal fit. *Id.* Note, however, that Henry VIII had actually created his daughter by Catherine of Aragon “Princess of Wales” at a time when he and Catherine got along rather better than they did later. Mary had her own court at Ludlow and was treated as heiress apparent for some time, and Henry’s advisors searched out a royal match for her, but Henry had another candidate for his throne: his illegitimate son by Elizabeth Blount, Henry Fitzroy, Duke of Richmond (1519-1536). Miles F. Shore, *Henry VIII and the Crisis of Generativity*, 2 J. INTERDISC. HIST. 359, 380 (1972).

356. Other examples include the other two queens regnant of European countries, Queen Beatrix of the Netherlands (third in a string that includes her grandmother Queen Wilhelmina and her mother Queen Juliana) and Queen Margarethe II of Denmark. These women could have been displaced by brothers; each only had younger sisters. Interestingly, both Beatrix and Margarethe have sons but no daughters.

While the Queen does not make her political opinions known, on this issue at least, she seems to have indicated her approval.

In 2004, Labour MP Lord Dubs introduced the Succession to the Crown Bill, which would have ended male primogeniture, the ban on marriage to Catholics, and repealed the 1772 Marriages Act, which requires the heir to the throne to obtain the sovereign's permission to marry if he or she is younger than twenty-five.³⁵⁷

Lord Dubs said: "The idea that a female first-born heir should be passed over in favour of a younger brother is surely offensive to the vast majority of Britons, following the great social revolution in the position of women in recent decades."

The Labour peer said the ban on the monarch or heir marrying a Catholic was an outdated piece of religious bigotry. "At present, Prince William could live with a Catholic girlfriend without forfeiting the right to be king, but the moment they were married he would be instantly disqualified. Indeed, while the heir is barred from marrying a Catholic, it is surely absurd that the spouse could later convert to Catholicism without this being a problem," he said.³⁵⁸

According to Andrew Grice of *The Independent*, the Royal Family favored the end of male primogeniture.³⁵⁹ Queen Elizabeth II seemed to support a change in the rules, although she did not say so publicly.³⁶⁰ If these reports were true, then the natural implication of their position would favor placing Princess Anne and her children ahead of the Duke of York in the line of succession, unless a change took effect only with regard to the new sovereign and his heirs, either Charles as Charles III, or William as William V. As we now know, the new rules will affect the descendants of the current Prince of Wales, leaving the succession order of the present members of the Royal Family unaltered.

In 2005, another MP attempted to change the succession rules with regard to marriage. Evan Harris, a Liberal Democrat, introduced a bill to alter

357. Andrew Grice, *A Generation After Sexual Equality, Bill Could See the End of Royal Family's Male Preference*, *INDEPENDENT*, Dec. 9, 2004, at 9; Royal Marriages Act, 12 Geo. 3, c. 11, § 1 (1772) (U.K.).

358. Grice, *supra* note 357. Indeed, the heir to the throne, or anyone in the line of succession, could marry a Muslim, a Wiccan, a member of the Church of the Flying Spaghetti Monster, or an atheist, and retain his or her rights to inherit the throne. Only marriage to a Roman Catholic would cause loss of that individual's rights under the Act. Act of Settlement, 12 & 13 Will. 3, c. 2, § 1 (1700) (Eng.). Note also that when Ernest August, Prince of Hanover, who is in line for the British throne, announced plans to marry Caroline of Monaco, he requested permission from Queen Elizabeth II. However, Ernest is descended from a British princess who married abroad; the Royal Marriages Act exempts the descendants of such princesses from the requirement to request permission to marry from the British sovereign. The likelihood that Ernest would inherit the British throne is remote in any case. In any case, the Queen granted permission. *See* Royal Marriages Act, c. 11, § 1.

359. Grice, *supra* note 357, at 9.

360. Chris Game, Op-Ed., *Crowning Absurdity of the British System*, *BIRMINGHAM POST*, Jan. 14, 2005, at 10.

the 1701 Act of Settlement,³⁶¹ one of the pieces of legislation that created the present succession rules, which create male primogeniture and forbid marriage of anyone in the line of succession to a Catholic.³⁶² However, Gordon Brown's government did not support the bill, or any change to the existing rules of succession.

In his influential book, *The Monarchy and the Constitution*, Vernon Bogdanor writes:

The fundamental weakness of the [Royal Marriages] Act . . . is that it applies to many who are quite remote from the throne and who are never likely to succeed. Conversely, someone who may well succeed—for example, an heir presumptive whose mother has married into a foreign family—would fall outside the provisions of the Act. An obvious reform would be to make provision for the sovereign's approval to be required for the marriages, of the descendants not of George II, but of George VI, or, better still, simply for the first five people in the line of succession. Any member of the royal family to whom it applied would still, of course, have the right to renounce his or her rights of succession and contract a civil marriage, as Princess Margaret could have done in 1955. The second route provided for in the Royal Marriages Act, the declaration at the age of 25, is otiose and should be removed.³⁶³

Both popular opinion and opinion in Parliament had changed sufficiently by the summer of 2011 to allow Prime Minister David Cameron to broach the subject of a change in the succession rules with Parliament once again, and then with the heads of the Commonwealth countries. The image of the spectacularly popular Prince William and his chosen bride Kate Middleton, married in a beautiful ceremony on April 29, 2011 at Westminster Abbey,³⁶⁴ cemented what had been a long public relations campaign for the Wales family. In October of 2011 Cameron presented the question to the heads of the other Commonwealth countries, all of whom accepted in principle the notion that absolute primogeniture should be the rule. Said Australian Prime Minister Julia Gillard, "I'm very enthusiastic about it. You would expect the first Australian woman prime minister to be very enthusiastic about a change which equals equality for women in a new area."³⁶⁵ The UK will create and pass its own succession legislation first, followed by nations of the Commonwealth.³⁶⁶ Even though Parliament and the Prime Minister have agreed to make these changes, some Members of Parliament are apparently still concerned that the legislation may not be passed until

361. See *Ending Patriarchy in the Monarchy*, NPR (Mar. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=102481031>.

362. Act of Settlement, c. 2, § 1.

363. BOGDANOR, *supra* note 34, at 60.

364. Caroline Davies, *Royal Wedding: A Stylish Marriage for William and Kate*, GUARDIAN (Apr. 29, 2011), <http://www.guardian.co.uk/uk/2011/apr/29/royal-wedding-william-kate-marriage>.

365. *Girls Equal in Succession to British Throne*, *supra* note 5.

366. *Id.*

after the Duke and Duchess of Cambridge have a child, and that child may be female, and they are also concerned that the legislation may not clearly be retroactive. In early 2012 MP Keith Vaz introduced a motion to congratulate Crown Princess Viktoria of Sweden on the birth of her daughter, but also to express his concern that “that the working group agreed on at the Commonwealth Heads of Government meeting in Perth in October 2011 to change the rules of succession appears to have made little progress; and calls on the Government in Commonwealth Week to agree on a roadmap for change.”³⁶⁷ He is not the only MP to be anxious about the future. MPs of all parties were posing questions this spring about the lack of progress. Conservative MP Helen Grant also wondered about retroactivity; Deputy Prime Minister Nick Clegg attempted to reassure her by saying that “the rules are de facto in place, even though de jure they still need to be implemented through legislation in the way I have described.”³⁶⁸

Interestingly, historian Robert Blackburn propounded the notion that “[u]nder the old, feudal law, the then Princess Elizabeth should not have ruled alone, since the crown should have been shared with her sister Margaret as ‘that is how mediaeval property law worked.’”³⁶⁹ Blackburn’s idea is a bit odd, since England has had female rulers before, and those female rulers have had sisters before—Mary Tudor and Elizabeth Tudor, for example, and Mary Stuart and Anne Stuart, and no one has suggested that they should have shared the throne.³⁷⁰

2. Titles of Nobility

In the UK, in contrast to the recent decision to make the change to full primogeniture, males still succeed to titles of nobility in preference to females, unless no male heir exists.³⁷¹ Then the title passes to the oldest (or

367. *Early Day Motion 2859: Succession to the Crown*, WWW.PARLIAMENT.UK (Mar. 13, 2012), <http://www.parliament.uk/edm/2010-12/2859>.

368. Mark Hennessy, *To William and Kate, a Daughter—But Will She Be Queen One Day?*, IRISH TIMES (May 25, 2012), <http://www.irishtimes.com/newspaper/world/2012/0525/1224316662777.html>.

369. *Id.*

370. Why should medieval property law apply to the twentieth century throne? Mary Stuart did share the throne with her husband William III, but they reigned at the invitation of Parliament. See *supra* note 169 and accompanying text. Blackburn is correct, however, that females shared inheritances while the eldest male almost always inherited everything from the deceased parent. See, e.g., John J. Prendergast, *An Ancient Record Relating to the Families into Which Were Married the Co-Heiresses of Thomas Fitz Anthony, Seneschal of Leinster*, 5 J. KILKENNY ARCHAEOLOGICAL SOC’Y 139, 148-49 (1864). On the ability of the female to succeed and thus to “alienate” property from the family (by marrying “a stranger”), see generally Eileen Spring, *The Heiress-at-Law: English Real Property Law from a New Point of View*, 8 LAW & HIST. REV. 273 (1990).

371. See Inheritance Act, 1833, 3 & 4 Will. 4, c. 106, § 7 (1833) (U.K.).

only) female, unless the title cannot pass to a woman. In some cases, some real property passes to the male heir as well, because it is linked to the title and supports both the title and the estate.³⁷²

None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.³⁷³

The argument over male primogeniture, and indeed in some cases of the exclusion of women altogether, is one that should be familiar to the public, since it appears regularly in popular culture. Literature, for example, offers us many examples of the inequities of agnatic primogeniture, and of primogeniture generally. Jane Austen's *Sense and Sensibility*³⁷⁴ depends for its plot on the unfairness of an entail in which the property will devolve upon the son of the deceased, leaving the second wife and the daughters without recourse. Austen uses the same device in her later novel *Pride and Prejudice*,³⁷⁵ which suggests that such an entail, or "fee tail male,"³⁷⁶ was if not common, at least common enough that it required little explanation to her readers. Similarly, she seems to have expected that her readers would agree with her that such a device was unfair, or at least, unfair to her main characters. Readers know quite well the scene in which Jane and Elizabeth Bennet attempt to explain the entail to their mother, who refuses to understand, and only rails against a system that deprives her beloved daughters of what she believes should rightfully be theirs:

"About a month ago I received this letter; and about a fortnight ago I answered it, for I thought it a case of some delicacy, and requiring early attention. It is from my cousin, Mr. Collins, who, when I am dead, may turn you all out of this house as soon as he pleases."

"Oh! my dear," cried his wife, "I cannot bear to hear that mentioned. Pray do not talk of that odious man. I do think it is the hardest thing in the world, that your estate should be entailed away from your own children; and I am sure, if I had been you, I should have tried long ago to do something or other about it."

372. See *Id.* §§ 3-4; Law of Property (Amendment) Act, 1924, 15 & 16 Geo. 5, c. 5, sch. 9 (Eng. & Wales); see also Administration of Estates Act, 1925, 15 & 16 Geo. 5, c. 23, § 51(2) (Eng. & Wales). Words of enactment have been repealed by Statute Law Revision (No. 2) Act, 1888, 51 & 52 Vict., c. 57, and Statute Law (Repeals) Act, 1998, c.43.

373. Inheritance Act, c. 106, § 7.

374. JANE AUSTEN, *SENSE AND SENSIBILITY* (1811).

375. JANE AUSTEN, *PRIDE AND PREJUDICE* (1813).

376. For an entertaining (if such things can be entertaining) explanation of fee tails, see Sandra MacPherson, *Rent to Own: Or, What's Entailed in Pride and Prejudice*, 82 REPRESENTATIONS 1 (2003).

Jane and Elizabeth tried to explain to her the nature of an entail. They had often attempted to do it before, but it was a subject on which Mrs. Bennet was beyond the reach of reason; and she continued to rail bitterly against the cruelty of settling an estate away from a family of five daughters, in favour of a man whom nobody cared anything about.³⁷⁷

The older Bennet girls may understand contemporary English law, and we may agree with them and Mr. Bennet that Mrs. Bennet is somewhat deficient in “understanding,” but she may be on to something—that the law is profoundly unfair.³⁷⁸

Other authors, including playwright Pierre Corneille, examine the issue of male primogeniture and the pressures that it puts upon younger sons to make their way into the world, as well as the conflicts that it creates within the family unit.³⁷⁹ Given the number of times that *Pride and Prejudice* has been filmed in the past,³⁸⁰ one may assume that English speaking viewers understand and some at least sympathize with the dispossession of the Bennet girls.

But some British women are taking the rule of male inheritance to court, just as female Spanish aristocrats have done. In the case of the Lambton will, the late 6th Earl of Lambton left his entire fortune of nearly twelve million pounds (net) to his son, the 7th Earl.³⁸¹ The 6th Earl’s five daughters claim that, because he spent so much of his life in Italy, that country’s law, not UK law, should govern the disposition of his estate.³⁸² Italian law requires that all children should share in the partition of property.³⁸³

377. JANE AUSTEN, *PRIDE AND PREJUDICE: AN ANNOTATED EDITION* 98-99 (Patricia Meyer Spacks ed., 2010).

378. Zouheir Jamoussi discusses the theme of primogeniture in Austen and other authors in his work *PRIMOGENITURE AND ENTAIL IN ENGLAND: A SURVEY OF THEIR HISTORY AND REPRESENTATION IN LITERATURE* (Cambridge Scholars Publishing 2011) (1999).

379. See generally RICHARD E. GOODKIN, *BIRTH MARKS: THE TRAGEDY OF PRIMOGENITURE IN PIERRE CORNEILLE, THOMAS CORNEILLE, AND JEAN RACINE* (2000); Linda Kane Scott, *The Inheritance Novel: The Power of Strict Settlement Language in Clarissa, Evelina, and Pride and Prejudice* (Aug. 2003) (unpublished Ph.D. thesis, University of Maine) (arguing that in the eighteenth century, the law of primogeniture no longer served the interests of the up and coming merchant classes and that writers reflected this change in their novels).

380. IMDb.com lists at least ten versions in English since 1938. [IMDb.COM, www.imdb.com/find?q=pride+and+prejudice&s=all](http://www.imdb.com/find?q=pride+and+prejudice&s=all) (last visited Mar. 16, 2013).

381. *Lambton Daughters Left Out of £12m Will*, TELEGRAPH (Mar. 5, 2007), <http://www.telegraph.co.uk/news/uknews/1544591/Lambton-daughters-left-out-of-12m-will.html>.

382. Richard Kay, *Earl’s Girls ‘to Challenge’ Lambton Will*, MAIL ONLINE (May 2, 2012), <http://www.dailymail.co.uk/news/article-2138261/RICHARD-KAY-Earls-girls-challenge-Lambton-will.html>.

383. “The patrimonial unity of the Italian family, protected through the above mentioned forced heirship provisions, is regulated in Book 2 of the Italian Civil Code. The Italian legal system reserves absolute succession rights to a limited group of individuals within the family, which include the surviving spouse, legitimate and illegitimate children, and, in the

In 1996, the Barclay brothers, owners of the Channel island of Brecqhou, challenged the succession rules that prohibited them from leaving their property to their four children (including one daughter) under the rules in effect on the island of Guernsey, rather than those in effect under the island of Sark. Brecqhou had traditionally been associated with Sark, but the Barclay brothers argued that Sark had no real legal claim to dominate Brecqhou.³⁸⁴ The fight led them to try to change the ruling structure on Sark.³⁸⁵ They sued for legal recognition and the right to leave their property as they preferred to do.³⁸⁶ Ultimately the case ended before the UK's Supreme Court, which, after examining Sark's newly passed Reform Law 2008, decided in favor of the Lord Chancellor, the Secretary of State and others, representing the Island of Sark.³⁸⁷

On June 6, 2012, Lord Lucas introduced a private bill that would allow females to inherit those peerages which have traditionally passed only to males, and which have fallen vacant when the family has no male heir.³⁸⁸ For females to succeed to peerages they must and the incumbent holders of the titles must meet the following conditions:

The requirements of this section are that—

- (a) the incumbent of an hereditary peerage (“the incumbent”) has, in accordance with the requirements of section 3, petitioned the Lord Chancellor in writing for a certificate establishing future succession;
- (b) a certificate has been issued in accordance with section 4; and
- (c) any female heir succeeding to that hereditary peerage —
 - (i) has attained the age of 21 years; and
 - (ii) has satisfied the Lord Chancellor that she is the oldest surviving child legitimately born to the incumbent.³⁸⁹

absence of children, lawful ascendants.” Francesco Parisi & Giampaolo Frezza, *The Evolving Principles of Italian Family Law*, 9 DIGEST 1, 19 (2001) (citation omitted).

384. According to the official website of the States of Guernsey, Brecqhou is part of Sark, and Sark is one of the regions of Guernsey. See *States of Guernsey*, <http://www.gov.gg/article/1891/Guernsey-and-the-Bailiwick> (last visited April 19, 2013).

385. *Billionaires Offer to End Dispute*, BBC NEWS (Mar. 31, 2006), <http://news.bbc.co.uk/2/hi/europe/guernsey/4863604.stm>.

386. *Twins Challenge Feudal Customs*, REGISTER-GUARD, Aug. 10, 1996, at 14A. The brothers also owned about one-third of the island of Sark. In 2008, apparently angry over the island's decision to change its governmental organization, the brothers pulled their business out of Sark. Will Smale, *Profile: The Barclay Brothers*, BBC NEWS (Dec. 11, 2008), <http://news.bbc.co.uk/2/hi/business/7778670.stm>.

387. *R v. Secretary of State for Justice*, [209] UKSC 9, [2010] 1 A.C. 464 (appeal taken from Eng.).

388. Hereditary Peerages (Succession) Bill, 2012-13, H.L. Bill [29] cl. 1. (U.K.).

389. *Id.* cl. 2.

The incumbent must also notify any other legitimate children he or she has, including male children, that he or she wishes the female eldest child to succeed him or her.³⁹⁰

Lord Lucas's bill, which is the latest of a number of bills addressing the female succession issue, follows on a bitter fight last summer sparked by Lord Fellowes (Julian Fellowes), the creator of the television show *Downton Abbey*,³⁹¹ who has a personal stake in changing the succession rules.³⁹² His wife Emma cannot inherit the family title from her uncle.³⁹³ One newspaper quoted Lord Fellowes as saying:

If you're asking me if I find it ridiculous that, in 2011, a perfectly sentient adult woman has no rights of inheritance whatsoever when it comes to a hereditary title I think it's outrageous, actually . . . Either you've got to get rid of the system or you've got to let women into it.³⁹⁴

The House of Commons' December 7, 2011 report on the effects of changes in the royal succession rules noted that the continuance of the rule of male primogeniture is becoming an anomaly.³⁹⁵ The report seems to suggest that in this case, male primogeniture and/or the bar to female succession needs an overhaul:

15. The proposal to end the preferential treatment of men in the line of succession has been widely welcomed, and with good reason. It does, however, cast the spotlight on the hereditary aristocracy, to which women are for the most part ineligible to succeed, and, where they are eligible, male heirs take preference.

16. The Crowns of many other European monarchies, including Belgium, the Netherlands and Sweden, succeed without any male preference, while aristocratic titles in these countries continue to be inherited through the male line. In Spain, in contrast, the Crown for the moment continues to be inherited through male-preference primogeniture, while since 2006, succession within the Spanish nobility has become gender-blind.

17. In countries in which aristocratic titles no longer confer any particular rights, duties or privileges, there may be no compelling reason to alter an historic system of inheritance. In the United Kingdom, however, 92 seats in the House of Lords continue for now to be reserved to holders of hereditary aristocratic titles. Only two

390. *Id.* cl. 3.

391. *Downton Abbey* (PBS television broadcast 2010).

392. Robert Winnett, *Ministers Bar Hereditary Peerages from Passing to Women*, TELEGRAPH (Oct. 20, 2011), <http://www.telegraph.co.uk/news/uknews/theroyalfamily/8840016/Ministers-bar-hereditary-peerages-from-passing-to-women.html>.

393. Anita Singh, *Julian Fellowes: Inheritance Laws Denying My Wife a Title Are Outrageous*, TELEGRAPH (Sept. 13, 2011), <http://www.telegraph.co.uk/news/picturegalleries/celebritynews/8757793/Julian-Fellowes-inheritance-laws-denying-my-wife-a-title-are-outrageous.html>.

394. *Id.*

395. HOUSE OF COMMONS, POLITICAL & CONSTITUTIONAL REFORM COMM., RULES OF ROYAL SUCCESSION, 2010-12, H.C. 1615, at 7 (2011) (U.K.), available at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmpolcon/1615/1615.pdf>.

of these 92 seats are currently occupied by women. While the holders of hereditary peerages continue to be eligible for membership of the House of Lords, the way in which their titles are inherited, and its effect on the gender balance in Parliament, remain matters of public interest.³⁹⁶

With regard to other property, the Administration of Estates Act 1925 changed inheritance law, but the rule concerning the inheritance of titles remained in place.³⁹⁷ The UK inheritance scheme treats titles as property and different from other types of real and personal property, unlike the Spanish inheritance regime. Like Spain, the UK is a member of the EU, and the Council of Europe, and has ratified CEDAW.³⁹⁸

C. European Union Directives, Gender Discrimination, and Absolute Primogeniture in the Matter of the Inheritance of Titles

For either female members of a royal house or female aristocrats who think they have been discriminated against by succession rules, an appeal to the European Court of Justice (ECJ) is not beyond the realm of possibility. However, such an appeal would have to be based, for example, on some principle of European Union law enunciated in Treaty articles or other fundamental principles, e.g., some notion of the unity of family or privacy (as the Spanish claimants raised in their cases before CEDAW and the UN Human Rights Committee) or on EU directives that provide for gender equality and prohibit sex discrimination.³⁹⁹ Individuals could not file such a case directly; it would need to be filed either by an intermediate national court or by the highest national court⁴⁰⁰ and would need to present a question of EU law. For example, a high court in a member state that recognizes male primogeniture might ask the ECJ to resolve the question of whether denial of a woman's right to succeed to a title violates either the principles of equality enunciated in the Charter or the European Convention on Human

396. *Id.* at 7-8 (emphasis omitted) (footnote omitted).

397. Administration of Estates Act, 1925, 15 & 16 Geo. 5, c. 23 (Eng. & Wales).

398. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, *available at* <http://treaties.un.org/doc/Publication/MTDGS/Volume%20I/Chapter%20IV/IV-8.en.pdf>.

399. *See, e.g.*, Council Directive 2004/113, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, 2004 O.J. (L 373) (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0113:EN:HTML>.

400. Information Note on References from National Courts for a Preliminary Ruling, 2011 O.J. (C 160) 9, 10 (EU) [hereinafter Information Note], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:160:0001:0005:EN:PDF>; Consolidated Version of the Treaty of the Functioning of the European Union, 2008 O.J. (C 115) 47, 164, art. 267(b), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF>.

Rights and the ECHR jurisprudence decided under it incorporated explicitly in the Charter.⁴⁰¹

The argument could come in the form that the Spanish legal regime, in refusing to enforce a female's right to her father's title, has interfered with a right that is enforceable under an EU directive. The ECJ will pronounce only on matters affecting EU law and on matters in which EU law and member state law are in conflict.⁴⁰² If this were the argument, a woman might argue, *not* that a noble title is property, but that the right to inherit such a title, if it exists, is a right to which Spanish law should give effect under the principles expressed in the Spanish Constitution, re-expressed in Spain's validation when it became a member state of the EU, and when it signed the Charter of Fundamental Rights.⁴⁰³

The Charter went into effect in 2000.⁴⁰⁴ Article 21, clause one reads: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."⁴⁰⁵ Article 23 requires gender equality.⁴⁰⁶ The EU's general principles require equal treatment of member citizens. However, the EU defers to member states in matters of national law, as long as that national law does not conflict with principles of EU law. With regard to the inheritance of titles, if the member state does not recognize titles of nobility, the EU treaties have nothing to say on the matter. That issue would be for a member state to decide.

Thus, should a national court refer the matter to the EU for a preliminary ruling under, for example, Article 21 or Article 23, the EU would look to some kind of conflict between national and EU law. What might that

401. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, 8 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:364:0001:0022:EN:PDF>.

402. The ECJ has issued guidelines to the member state courts to assist them when to request a preliminary ruling. See Information Note, *supra* note 400, at 7 (pointing out that the ECJ does not address questions of national law).

403. While this issue is beyond the scope of this Article, exploring the notion that aristocratic titles are property, particularly in constitutional monarchies, is an interesting one. While various international tribunals take the position that there is no "human right" to a title, if the nation itself recognizes them, grants them, and guarantees their inheritance, it would seem that at least within that nation's borders the government recognizes some kind of "right" to them, once it grants them, even though we recognize that titles of any kind are inherently unequal. See generally Tirosh, *supra* note 288 (offering an approach for plaintiffs in this area).

404. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:364:0001:0022:EN:PDF>.

405. *Id.* art. 21, cl. 1.

406. *Id.* art. 23.

conflict be? One would assume that, once again, the conflict might be an assertion of gender discrimination against the female who, as the first born, claims the right to hold a title by right of primogeniture.

The ECJ would then examine the member state's law on the issue to see if, for example, the issue is one that is addressed by the Charter of Fundamental Rights. In the case of Spain, the Spanish government argues that noble titles are not property and fall outside the ambit of the Spanish Civil Code. The highest national court with jurisdiction has agreed. Two international tribunals have ruled that the issue falls outside their jurisdiction.

The ECJ has decided one case touching on the use of an aristocratic name. In the *Sayn-Wittgenstein* case, the applicant alleged that the member state's law interfered with her right to use her adoptive name, which included "the nobiliary particle 'von.'"⁴⁰⁷ As the ECJ put the issue,

By its question, the referring court asks, in essence, whether Article 21 TFEU must be interpreted as precluding the authorities of a Member State, in circumstances such as those in the main proceedings, from refusing to recognise all the elements of the surname of a national of that State, as determined in another Member State—in which that national resides—at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law.
408

The ECJ's response was no. The Court recognized that EU citizens have a fundamental right to travel under Article 21(1) that might be limited by the member state refusal to recognize titles of nobility.⁴⁰⁹ Further, the Court acknowledged that names form part of an individual's identity and and private life, which Article 7 of the European Charter of Fundamental Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms protect.⁴¹⁰ However, when balancing EU law and member state law, the Court may take into account a legitimate state objective that would prohibit the recognition of noble rank in a personal name, for example, if the member state does not itself does so in law.⁴¹¹ Thus, the Court said,

The answer to the question referred is that Article 21 TFEU must be interpreted as not precluding the authorities of a Member State, in circumstances such as those in the main proceedings, from refusing to recognise all the elements of the surname of a national of that State, as determined in another Member State—in which that national resides—at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not

407. Case C-208/09, *Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693, ¶¶ 7.1, 22, 25-27.

408. *Id.* at paragraph 36.

409. *Id.* at paragraph 53-54.

410. *Id.* at paragraph 52.

411. *Id.* at paragraphs 84-94.

permitted in the first Member State under its constitutional law, provided that the measures adopted by those authorities in that context are justified on public policy grounds, that is to say, they are necessary for the protection of the interests which they are intended to secure and are proportionate to the legitimate aim pursued.⁴¹²

Note that the Sayn-Wittgenstein case occurs in the context of two member states (Austria and Germany) which are not monarchies and which do not recognize aristocratic titles. Consider a case in which the ECJ were asked to balance Article 21, which prohibits discrimination on the basis of sex, a member state's law, such as Spain's nobility law, which recognizes absolute primogeniture, and another, conflicting, law from the member state, which promotes male primogeniture.

This conflict presents a troubling issue, if we concede that we should spend the time to sort out the answer to the problem. The Law of 2006 requires that the oldest child inherit the title without respect to gender. In civil law, if a special law speaks on an issue, and the code is silent, the law should control. While the Spanish government argues in the *Hoyos* case that titles are *not* property, it also, through the 2006 law, has acknowledged that the oldest child, regardless of gender, should take the title.⁴¹³ This position is in line with Articles 21 and 23 of the Charter.

The issue for female litigants in such suits is the same as with the applicants in the Spanish nobiliary lawsuits. They must demonstrate that titles, either hereditary titles or titles to thrones, are heritable, therefore possessory, under the laws of their member states. Or, they must demonstrate that a denial of succession to such titles is a denial of a right that is guaranteed either under member state law or under an article of the EU treaties or of the EU Charter. At least two member states present a contrast in treatment. The Spanish Constitution speaks to the question of gender equality⁴¹⁴ and the succession to the crown, which is vested specifically in the prince (male primogeniture).⁴¹⁵ Interestingly, since the UK seems to treat titles as proper-

412. *Id.* at paragraph 95.

413. See Human Rights Comm., *Isabel Hoyos Martinez De Irujo v. Spain*, 1008/2001, ¶¶ 4.8, 4.10, U.N. Doc. CCPR/C/80/D/1008/2001 (Mar. 30, 2004), http://www.worldcourts.com/hrc/eng/decisions/2004.03.30_Hoyos_y_Martinez_de_Irujo_v_Spain.htm.

414. CONSTITUCIÓN ESPAÑOLA, art. 14, B.O.E. n. 311, Dec. 29, 1978 (Spain) (“Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance.”).

415. *Id.* art. 57:

(1) The Crown of Spain is hereditary for the successors of *H.M. Don Juan Carlos I of Borbon*, legitimate heir of the historic dynasty. Succession to the throne will follow the regular order of primogeniture and representation, the first line always having preference over subsequent lines; within the same line, the closer grade over the more remote; in the same grade, the male over the female; and in the same sex, the elder over the younger.

ty, and is currently resolving the issue of gender blind succession to the crown, we may yet see the ECJ take up the question.

Unaddressed as yet is the role of Article 167 Treaty on the Functioning of the European Union (TFEU) which reads in part, “The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.”⁴¹⁶ One could argue that aristocratic and monarchic heritage, whether or not one agrees with it, is part of the historical and cultural makeup of Europe and of the EU member states. One could also, of course argue that democratic principles require that the EU urge Member States to begin to put aside any tradition that gives the appearance that they treat their citizens unequally. However, in those member states that recognize aristocratic titles, such as the UK, Sweden, Belgium, Norway, Denmark, Spain, and Luxemburg, one might suggest that those who hold noble titles should at least expect that the member state would protect (counter intuitively) the right of the first-born to inherit, regardless of that person’s gender, based on principles of gender equality.

D. Undecided and Unresolved Problems

1. *The Spouse’s Title*

Similarly, taking the example of Sweden once again, the notion that equality is achieved here is not quite true. It is not clear that when Viktoria becomes queen, her husband will be named “King.” He may receive the title of Prince Consort, as did Prince Albert, or simply keep his current title of Prince. Yet, when a man takes the throne, his wife becomes queen, barring some extraordinary circumstance. Why the difference in title for the male partner of the female monarch and the female partner of the male monarch? These customs track the customs that have prevailed in society for centuries. The female partner takes the title that accompanies the title of her husband. When a male sovereign becomes king, his wife becomes queen—the word “consort” in her title is understood although not usually articulated. Since women have understood for centuries that the formal exercise of political power is not their role, and royal consorts do not exercise power, the term “consort” is not an issue. When a male becomes a duke, the title for his wife is “duchess,” and so on. The male naming for the individual who inher-

(2) The hereditary Prince, from his birth or from the time he acquires the claim, will have the title of Prince of Asturias and the other titles traditionally linked to the successor to the Crown of Spain.

(3) If all the lines entitled by law become extinct, the Parliament shall provide for the succession to the crown in the manner which is best for the interests of Spain.

416. TFEU Article 167, §1.

its the title sets the norm for both partners. Because females are the exception rather than the rule, the title for a male partner, should a female become the sovereign, becomes problematic, and becomes not simply a knotty issue for etiquette, but a political conundrum.⁴¹⁷ For example, one properly addresses a man who holds a dukedom, the Duke of X, as “Your Grace,” and his wife, the Duchess of X, as “Your Grace.” However, one properly addresses a woman who holds a ducal peerage in her own right as “Your Grace,” but one does not address her husband as the Duke of X,⁴¹⁸ or as “Your Grace,” unless he is individually entitled to that form of address. Wives may benefit from their husbands’ titles; they may, in that sense, “marry up.” Husbands may not. They may not obtain that kind of “free ride.”

Interestingly, the difference in style and title leads to assumption about the amount of power and status that queens regnant wield. Consider the following comment posted to a recent BBC article about the change to the UK succession law:

Think about it. If we have a King we can also have a Queen, the King being the superior monarch. The problem is having a Queen means her husband will not be a King but a Prince Consort because a queen is never equal to a King in stature. I think it is right that the monarchy should try [to] have a King on the [throne] because he brings with him a Queen.⁴¹⁹

This commentator does not understand that a female who reigns in her own right has the same amount of power as a male.⁴²⁰ The title her spouse carries does not dictate the amount of power she has. The commentator’s lack of knowledge of history and awareness of social and political norms hampers him or her in understanding why, for example, the Duke of Edinburgh does not carry the title of King Consort.

417. Should a gay or lesbian monarch take the throne, and should he or she enter into a same sex union, assuming the country’s laws recognize them, which could certainly happen in some of the countries I am discussing, we could have an even more interesting discussion about by what title the royal partner should be addressed.

418. Peerage Act, 1963, c. 48, § 6 (U.K.); see also *Forms of Address: Duke and Duchess*, DEBRETTS, <http://www.debretts.com/forms-of-address/titles/duke-and-duchess.aspx> (last visited Mar. 16, 2013).

419. hizento, Comment to *Girls Equal in British Throne Succession*, *supra* note 5.

420. That she might not may be the function of political forces, but by law she ought to have the same power. See Peerage Act § 6. Interestingly, in the interests of gender equality, two British law professors have considered the question of whether “compassing” (imagining) the death of the consort of the sovereign, if that sovereign is female, is high treason. The reverse, under the current laws of the UK, seems to be true. See generally Michael Gunn and Ann Lyon, *Compassing the Death of the Queen’s Consort: Would It Be High Treason?* 16 NOTTINGHAM L.J. 34 (1998) (arguing that excluding the male consort based on prior practice would be to allow decisions based on political exigency and or sex stereotyping to rule in situations in which such politics no longer have a place). This article serves primarily as an entertaining exercise in the interpretation of statutes.

The commentator who posted the following has the right idea:

I don't have a problem with this but in the interests of complete equality surely the husband of any Queen should be a King not a Prince? I haven't seen anything confirming this will be the case. If not why not as this would continue the discrimination against male spouses.⁴²¹

As Vernon Bogdanor writes:

While, however, the wife of the king automatically becomes the queen, the husband of the queen has not, since the reign of William III . . . been the king, and he is not crowned and anointed with the queen. There are no rules defining the position of the husband of the sovereign and it has varied with each incumbent. Queen Victoria complained on marrying Albert in 1840 that "It is a strange omission in the Constitution that while the wife of a King has the highest rank and dignity in the Realm assigned to her by law, the husband of a Queen regnant is entirely ignored"⁴²²

Bogdanor also notes that the husband of Queen Elizabeth II has no constitutional position, "neither attends audiences nor receives state papers, and holds no formal position in the structure of government."⁴²³

Men did, centuries ago, benefit from their wives' titles. A number of husbands, particularly royal husbands, used their wives' descent to assert claims to various thrones or fiefdoms. John of Gaunt attempted to claim the throne of Castile "in right of his wife," Constance of Castile. The ambitious Gaunt, the third son of Edward III, wanted a crown of his own, and attempted to claim the Castilian kingdom *jure uxoris*. He set in motion an alliance between England and Portugal against the Castilian King, and raised an army. He was ultimately unsuccessful, but did obtain the marriage of his daughter by Constance, Catherine, to Henry III of Castile. The sort of claim that Gaunt made⁴²⁴ is exactly the sort that governments which sent their princesses to foreign courts feared: the claim that a prince might make to rule a country "in right of his wife."

It seems that even in 2013, some have not yet shed their suspicion that a woman cannot reign and govern without yielding to the authority of her husband. Regardless of changes in the laws of succession that allow absolute primogeniture, any rule that does not also provide that the partner of the monarch receives a title that is equivalent in rank to that of the monarch suggests that gender equality has not yet arrived. If only female partners obtain such a rank, then gender equality does not yet exist.

421. Battolite, Comment to *Girls Equal in British Throne Succession*, *supra* note 5.

422. BOGDANOR, *supra* note 34, at 51 (footnote omitted).

423. *Id.* at 52.

424. This particular foray was part of the Hundred Years' War. See generally FERNÃO LOPES, *THE ENGLISH IN PORTUGAL: 1367--87* (1988).

Today, when royals divorce, the ex-spouses lose the title of “Royal Highness” bestowed by the monarch when they entered the family.⁴²⁵ One would expect this outcome. Just as when an average couple divorces, and the woman may decide to revert to her maiden name, so too does the woman in a royal marriage lose the designation of “Royal Highness.”⁴²⁶ When Diana Spencer and the Prince of Wales divorced, she lost the right to be addressed as “Your Royal Highness” because it was the style by which his wife should be addressed.⁴²⁷ She did, however, receive joint custody of the couple’s two children, a substantial monetary settlement, and the use of jewelry for her lifetime as well as other perquisites.⁴²⁸ However, divorce does not always result in the total loss of style and title. When Queen Margrethe’s second son divorced his first wife Princess Alexandra, the Queen granted her ex-daughter-in-law the title and style of “Her Highness Princess Alexandra.”⁴²⁹ One commentator, Steffen Heiberg, speculated that the divorce “could be a consequence of commoners marrying into the royal family. . . . [B]ack when royals only married other royals, it was often for political reasons, and couples stayed together, at least in appearance, even if their marriages did not work.”⁴³⁰

425. See, e.g., *Diana to Lose Title but Get Millions in Royal Divorce*, L.A. TIMES (July 13, 1996), http://articles.latimes.com/1996-07-13/news/mn-23656_1_royal-title. See also *Divorce: Status and Role of the Princess of Wales*, PR NEWSWIRE, <http://www.prnewswire.co.uk/news-releases/divorce-status-and-role-of-the-princess-of-wales-156790955.html> (issued by the Press Secretary to the Queen, Buckingham Palace and discussing the title, precedence, and residence of Diana, noting that she would continue to be included as part of the Royal Family). Camilla, Duchess of Rothesay, the Prince of Wales’ second wife, has to allow people to address her as Princess of Wales, although she is certainly entitled to use it. Of course, the loss in such divorces obtains only when the spouse receives the grant of the title solely through the marriage. A divorced spouse who comes into a marriage with a royal or princely style would of course keep that style. Consider the example of Caroline of Monaco: as wife of the Prince of Hanover, she takes the style “Her Royal Highness.” See *Biography*, PRINCE’S PALACE MONACO, <http://www.palais.mc/monaco/palais-princier/english/h.r.h.-the-princess-of-hanover/biography/biography.388.html> (last visited April 8, 2013). Otherwise, like her sister and her sister-in-law she would take the style “Her Serene Highness” (H.S.H.). *Id.* Should she divorce, she would retain her style as H.S.H.

426. *Id.*

427. *Id.*

428. *Id.*

429. *Denmark’s Prince Joachim Completes Divorce*, USA TODAY (Apr. 8, 2005), http://www.usatoday.com/news/world/2005-04-08-denmark-royal-divorce_x.htm. She lost her title of “Highness” when she remarried in 2007, but she kept her title of Countess of Frederiksborg. *Danish Princess Remarries, Loses Title*, BOSTON GLOBE (Mar. 3, 2007), http://www.boston.com/news/world/europe/articles/2007/03/03/danish_princess_remarries_1oses_title/. Alexandra was the first person of Asian descent to marry into the Danish royal family.

430. *Danish Royals Finalize Divorce*, ASSOCIATED PRESS (Apr. 9, 2005), http://www.sptimes.com/2005/04/09/Worldandnation/Danish_royals_finaliz.shtml.

2. Finances and Divorces

Divorce among royals has always been a possibility, but until recently royals usually married royals, or at least members of semi-royal families. Thus, the fight over resource allocation in the event of the dissolution of marriage could be brutal. Each side had normally powerful allies.⁴³¹ The discarded spouse almost always came from a class equivalent to that of her husband and her marriage contract would have specified that she was entitled to a home and to assets at the dissolution of the marriage, although the male royal spouse might make the argument that she had forfeited that consideration through some fault of her own. Certainly failure to pay a royal wife's dowry could have other consequences. The Spanish Infanta Maria Teresa, then possibly heiress to the throne, married Louis XIV of France, but the Spanish were worried about the joining of the two thrones under one government.⁴³² The French demanded the payment of 500,000 écus in return for the renunciation of her rights of succession.⁴³³ The Spanish, bankrupted by war, never paid, and her grandson Philip of Anjou (Philip V) eventually successfully claimed the Spanish throne after the War of the Spanish Succession.⁴³⁴

Today's royal-commoner marriages raise somewhat new issues, particular in the case of heiresses apparent. We are familiar with the traditional image of the marriage in which the male works and the female supports him in his career, even if we are also accustomed to two-career marriages. Transferring this model to a royal marriage in which the male sovereign "works" (that is—works at the business of running the country) and his female spouse supports him at this career is not terribly difficult. It is a model that we recognize. But the model in which the sovereign is female and in which the spouse is male and supports her at her career is not so familiar. The male who assists these females does exist and has for about a century and a half, but he comes from a small group that understands such duties. Even so, this very select group of men has had some complaints about their role. Famously, Prince Albert the Prince Consort, husband of Queen Victoria of Great Britain, was known to have been dissatisfied with the role his

431. Even if the woman were accused of adultery or worse, she still might call on champions in the medieval or Renaissance period, or on lawyers or politicians later on. See, e.g., Stuart Airlie, *Private Bodies and the Body Politic in the Divorce Case of Lothar II*, 161 PAST & PRESENT 3, 3 (1998) (discussing Lothar's wish to set aside his wife to marry his mistress); FLORA FRASER, *THE UNRULY QUEEN: THE LIFE OF QUEEN CAROLINE* (discussing the marriage and trial for adultery of Queen Caroline, wife of George IV of Great Britain).

432. Enid M.G. Routh, *The Attempts to Establish a Balance of Power in Europe During the Second Half of the Seventeenth Century (1648-1702)*, 18 TRANSACTIONS ROYAL HIST. SOC'Y 33, 39-40 (1904).

433. *Id.* at 40.

434. *Id.*

wife Victoria first tried to carve out for him and desired more influence in government and politics.⁴³⁵ The Duke of Edinburgh has faithfully assisted Queen Elizabeth II since their marriage in 1947, a relationship documented in articles and books, but he comes from the Greek and Danish royal families and understands what is expected of him.⁴³⁶ He had, however, indicated that he has not been happy about being unable to pass his adopted surname (Mountbatten) on to his children; the Royal Family's last name, when and if it uses one, is Windsor.⁴³⁷ The Queen has addressed this concern by announcing that the couple's own children carry the family name of Mountbatten-Windsor.⁴³⁸

Henrik of Denmark, the Danish Prince Consort, born Henri de Monpezat, who is the husband of Margrethe II, is less sanguine, and left the country in a snit after he lost precedence to his son, the Crown Prince, at an official event in 2002. He noted, "Every father wants to be master in his own house, but there are people in our house, and in the press, who have tried to say that it is Prince Frederik who is the host, while really he is his father's guest."⁴³⁹ He also differentiated his situation from that of the Duke of Edinburgh and the late Prince Claus of the Netherlands, saying that they receive their own money from their respective governments, whereas he receives money from his wife.⁴⁴⁰

Philip, Henrik, and Claus all left behind their careers to assist their royal wives. Likewise, none of the female spouses of the next generation have pursued careers, at least not successfully. Sophie Rhys-Jones attempted to continue her public relations firm after her marriage to Edward, the third son of Queen Elizabeth, but abandoned her career after bad publicity

435. It was, after all, for him that Victoria created the title of Prince Consort, a title that up to now only he has held. He was eventually happy with his role as her trusted advisor. See GILLIAN GILL, *WE TWO: VICTORIA AND ALBERT: RULERS, PARTNERS, RIVALS* (2009); STANLEY WEINTRAUB, *UNCROWNED KING: THE LIFE OF PRINCE ALBERT* (1997).

436. See Andrew Pierce, *60 Years: Man Behind the Queen*, *STANDARD* (Nov. 19, 2007), http://www.thestandard.com.hk/news_detail.asp?pp_cat=20&art_id=57095&sid=16365094&con_type=3.

437. Caroline Davies, *Philip Shares Frustrations of Being the Man Behind the Throne*, *TELEGRAPH* (Feb. 5, 2002), <http://www.telegraph.co.uk/news/worldnews/europe/denmark/1383761/Philip-shares-frustrations-of-being-the-man-behind-the-throne.html>.

438. The Official Website of the British Monarchy. The Royal Family Name. <http://www.royal.gov.uk/ThecurrentRoyalFamily/TheRoyalFamilyname/Overview.aspx> (visited April 7, 2013).

439. Caroline Davies, *Prince of Denmark Goes Home to Sulk*, *TELEGRAPH* (Feb. 5, 2002), <http://www.telegraph.co.uk/news/worldnews/europe/denmark/1383835/Prince-of-Denmark-goes-home-to-sulk.html>.

440. *Id.*

and allegations that she had tried to sell access to the royal family forced her to try to sell it.⁴⁴¹

How then might spouses of queens regnant or heiresses apparent who come from middle class homes cope with these situations? Interestingly, Crown Princess Viktoria of Sweden and her (then) fiancé Daniel Westling entered into a prenuptial agreement,⁴⁴² which specifies that after their marriage Daniel cannot continue to work at the gym where he and Viktoria met, that most of the property they will accumulate during their marriage will be hers (because it will be royal property), and that he will not have many opportunities to accumulate any kind of income.⁴⁴³ Said one Swedish domestic relations attorney:

It seems as if he could be in a bad situation if they divorce, especially after a long marriage However, it may be that he has an agreement to get an allowance from the court, one that has not been made public. I hope that Daniel has advisers who have explained all this to him.⁴⁴⁴

CONCLUSION

King Farouk's famous prediction that "[s]oon there will be only five Kings left—the King of England, the King of Spades, the King of Clubs, the King of Hearts, and the King of Diamonds"⁴⁴⁵ has not yet come true. To the contrary, for a period in the late 1980s and early 1990s, some suggested that the British monarchy itself might be headed for oblivion. Certainly the reactions of the public to the seeming indifference of the British royal family in the wake of Princess Diana's death suggested that the Queen herself was not as popular as she once had been, and was perhaps out of touch. Was it time for her to step aside for a younger generation? Newly elected Prime Minis-

441. Laura Collins, *Sophie Wessex, Her £1.7m Business Debt—and Why She Won't Pay*, DAILY MAIL (July 18, 2009), <http://www.dailymail.co.uk/femail/article-1200621/Sophie-Wessex-1-7m-business-debt--won-t-pay.html>. Other royals have had successful careers but they are farther removed from the throne. For instance, David Armstrong Jones, the son of Princess Margaret, is a successful furniture designer and chairman of Christie's UK. See Press Release, Christie's Press Office, David Linley Appointed Chairman of Christie's UK (Nov. 3, 2006).

442. *Victoria to Keep Her Wealth After Divorce*, LOCAL (Sweden) (July 5, 2010), <http://www.thelocal.se/27614/20100705/>.

443. *Id.*

444. *Id.*

445. Farouk I, *Remark to Lord Boyd-Orr, Cairo, 1948*, in THE YALE BOOK OF QUOTATIONS 251 (Fred R. Shapiro ed., 2006). Given slightly differently in William H. Attwood, *Farouk is a Bewildered, Moody Monarch Who Vacillates Between Self-Indulgence and a Sincere Desire to Help His People*, LIFE, Apr. 10, 1950, at 103 ("In a few years . . . there will be only five kings in the world—the king of England and the four kings in a pack of cards") and in *Morocco: The Cracked Façade*, TIME, Jul. 26, 1971, at 27, as: "Some day there will be only five Kings in the world—the King of England and the four in the deck of cards."

ter Tony Blair, obviously more media savvy than some members of the House of Windsor, swooped in to assist with polishing up the Royal Family's image.⁴⁴⁶ His suggestions, however they were received, have helped to stave off criticism, and the Windsors seem sure to continue in their position for some time to come, barring any unforeseen circumstances or miscalculations.

Many commentators on the new succession law seem pleased with the change, noting that the historical reasons for male primogeniture have long disappeared:

I think that it is a good idea to let the first born be the future monarch whatever the gender. The Anti [C]atholic stance is now obsolete. It was in place when Popes supported enemies of this realm and encouraged them to invade and overthrow the protestant monarchy. The Scots were in Alliance with France, Spain and the Pope. French armies were in [S]cotland and Ireland.⁴⁴⁷

Others noted that a failure to secure absolute succession to aristocratic titles as well means that the battle is only begun, not won:

I live in Jersey, here the Queen is not "The Queen" she is Duke of Normandy. To make this change meaningful to modern society all titles should be given equal succession to women as well as men so first born woman [sic] can inherit an estate & title. Limiting this change to the Monarchy alone is elitist and snubs any woman who misses out on inheriting property/land because she's seen as sloppy seconds.⁴⁴⁸

Some noted that a monarchy itself contradicts the idea of equality.

Equality is about being equal among everyone in society, yet from birth we are unequal to the monarchy. We pay for them with taxes and we have no say in who represents us as a nation. If it wasn't for Wallace Simpson we would have had a nazi sympathiser as our monarch during the war. As a 17 year old girl, I'm happy to see gender equality but the monarchy is built upon inequality in our society.⁴⁴⁹

But even without a Tony Blair to assist them, other European royal families and their Parliaments seem to have been able to discern the necessity to move toward a much more modern monarchy, motivated in part, no doubt, by the realization that many people today see the notion of monarchy itself as politically and socially outdated. After all, in the twenty-first century, why should people continue to pay, through their taxes, for a hereditary

446. On the use of the media and political savvy in the new political age to alter public opinion, see JONATHAN POWELL, *THE NEW MACHIAVELLI: HOW TO WIELD POWER IN THE MODERN WORLD* 39-41 (2010) (arguing that Tony Blair was responsible for altering the Royal Family's attitude toward the handling of Diana's funeral rites, and thus the public's attitude toward the Royal Family).

447. Mad Max & Satan Dog Paddy, Comment to *Girls Equal in British Throne Succession*, *supra* note 5.

448. Becky May, Comment to *Girls Equal in British Throne Succession*, *supra* note 5.

449. Sammy, Comment to *Girls Equal in British Throne Succession*, *supra* note 5.

group to receive certain privileges, titles, and incomes? Especially among a group of nations which has adopted a series of treaties which trumpets fundamental principles that speak of the equality of each individual, the notion that some individuals are more equal than others, and that one individual among all should be the most honored because of an accident of birth seems especially odd. Assuming, however, that among the nations of the European Union that the majority of the people wish to retain the form of constitutional monarchies, the idea that "the most honored" status should fall to the firstborn of the country's sovereign, and not to the firstborn surviving son, or worse yet, only to the males of the family, seems an enormous, and overdue, step in the right direction.

Is the right to succeed to a noble title, or to the throne, ultimately a matter that falls within the jurisdiction of a court? Is it a political matter? If political, should it be decided by the sovereign, or by the legislature, or by the people? Denmark submitted the issue of the throne to its legislature and then to its citizens to decide. Spain seems to be of two minds on the question of the throne and the nobility, and for the moment seems unable to move forward. In the matter of noble titles, the law of 2006, which should have settled the matter, seems only to have caused more confusion and dissent. The question of succession to the throne is both symbolic, and because of the sovereign's very real political power, important constitutionally. In the case of the UK, Parliament has not moved ahead on the question of absolute primogeniture, or on the exclusion of women from the right to succeed to some titles at all, even though absolute primogeniture on the matter of the throne is now the law in the UK and the Commonwealth. Noble titles may not be property, and the question of the right to succeed to the throne may not be an issue decided by European Union law or international agreements that form part of EU or Member State law. But gender discrimination *is* a matter addressed by the EU treaties and international agreements. As long as succession to the crown and noble titles continue to discriminate against women, it sends the message that women and men are not equal in society. Whether or not citizens of EU member states support constitutional monarchies or republics, they might well object to such obvious examples of gender and birth-order discrimination.