The State of the European Union's Monarchies

The EU and Its Monarchies: Influences and Frictions

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Monarchies in Europe – Monarchs as embodiments of sovereignty – Implications for monarchy of the EU as a limitation of sovereignty – Effects of Union law on the prerogatives of monarchs – Monarchs as heads of state in the Union

Introduction

Jeremy Paxman, the famous BBC anchorman, tells us in his entertaining book *On Royalty* the story of King Farouk of Egypt, nicknamed by his people 'the Thief of Cairo', who was deposed in 1952.[1] It was this 'pampered, kleptomaniac lard mountain' (Jeremy Paxman's words) who 'predicted that by the end of the twentieth century there would be only five monarchies left in the world: the king of hearts, diamonds, clubs and spades and the King of England.' Predicting is, as we can see, a hazardous business, especially when it concerns the future.

We all know now that even in Europe the presence of monarchies is still more extensive than Farouk, at the time smugly exiled in the principality of Monaco, had dreamt about, or feared. In the European Union of 27 member states, seven monarchies still exist: the kingdoms of Belgium, Denmark, Spain, The Netherlands, the United Kingdom of Great Britain and Northern Ireland, the kingdom of Sweden and finally the grand duchy of Luxembourg. Of those seven countries with hereditary monarchs, three were among the founding states of the European Communities: the Benelux countries. The other monarchies acceded later. So, originally three out of six member states were monarchies, whereas they nowadays represent only a minority of 7 out of 27. Roughly three quarters of the member states are republics, and as the European Union expands, this proportion will grow even more, with all candidates and potential candidates being republics.

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[1] Jeremy Paxman, *On Royalty* (Viking 2006) p. 7.

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The purpose of this essay is to explore the relationships of these monarchies with the European Union. More specifically: it seems worthwhile to identify areas where the EU influences the constitutional architecture of its monarchies and to indicate dynamics of frictions and tensions between the two. This is, as far as I am aware, a neglected topic, but nevertheless worth studying.

On the surface, the existence of monarchies within the framework of the Union seems to be unproblematic. But if one scratches this surface a bit, questions come up that suggest that the coexistence of the Union and its monarchies is not without tensions. Furthermore, studying the relationship between them may reveal something about their respective natures. This is especially important and interesting as far as the European Union is concerned, of which the avatars over time escape description and definition (deliberately, one might think).

Let me dwell for a moment on the characterisation of the European Union. If one consults the English version of Wikipedia (and why not?), one finds the formula that the EU is '*a sui generis* supranational union,' qualified a few lines later by its description as 'both a supranational and an intergovernmental body'. Jacques Delors, as well as his successor as President of the Commission, Barroso, have conceded that the EU is a UPO, an unidentified political object.[2] The joke covers the shame. The Union, like its predecessor the European Community, is continuously under construction, a dynamic and hybrid concept, heading for a future that has yet to be unveiled. Still, in its elusiveness, the emerging shape of the EU is relevant to our debate. The more supranational elements the European Union displays, i.e., the more it acts as a sovereign power on the international scene, ever more independently from the member states, the less the member states can be characterised as independent and sovereign. And internally, in the relationship between the Union and its member states, the latter lose control and are subjected in a practical sense to the impetus of the Union institutions and agencies and the superiority of Union law as interpreted by the European Court. I am well aware of the declining usefulness of the concept of sovereignty, but still am inclined to think that the sovereignty of the European Union as a subject of international law and that of its constitutive elements, the member states, are a kind of communicating vessels or even have a relationship of inverse proportionality. The late advocate-general to the European Court of Justice Geelhoed already called the Netherlands 'a semi-sovereign state' in 1990[3] and Barents and Brinkhorst borrowed this characterisation.[4] It would equally be the correct description for the other 26 member states. Sovereignty is shared by the EU and its member states.

[2] *See* J.A. Hoeksma, 'De EU als Unie van burgers en lidstaten' [The EU as a Union of Citizens and Member States], *Nederlands Juristenblad* (2007) p. 330.

[3] L.A. Geelhoed, 'De semi-soevereine staat' [The Semi-Sovereign State], 47 *Socialisme* en *Democratie* (1990) p. 40-47.

[4] Barents-Brinkhorst, *Grondlijnen van Europees Recht* [Fundamentals of European Law], 10th edn. (Kluwer 2001) p. 561; *see also* L.J. Brinkhorst, 'Europese Unie en Nationale Soevereiniteit'

Why is this diminished sovereignty of member states by the transfer of a number of essential powers and competences to the EU relevant for our subject? Well, this is quite simple. Semi-sovereign states are headed by semi-sovereigns. Monarchs are usually considered as the embodiment of the sovereignty of the states of which they are the hereditary heads. In 1813 the Great Powers offered the Dutch Prince of Orange in so many words 'sovereignty' over the Netherlands, an offer he misunderstood or interpreted on purpose as concerning royalty and a kingdom. The prince upgraded himself and was inaugurated as king. With the increasing supranationality and the federalisation of the European Union, the monarchs are being gradually and almost imperceptibly stripped of this symbolic role of representing the sovereignty of their country. Although it is generally acknowledged that statehood of the member states is subject to evaporation through the heated transfer of important competences and powers to the EU, the implication is politely overlooked that monarchs by the same token lose a very significant part of what it is to be a sovereign, including a number of their regalia, In short: without sovereignty, no embodiment of sovereignty.

Turning the argument round: it is highly improbable that a future head of the European Union will be a hereditary monarch. The President of the European Council, which consists of the Heads of State or Government will, in all probability not be recruited from the crowned Heads of State.[5] Any (con)federal arrangement will smack of republican flavours and is unlikely to be crowned by crowned heads, as the examples of Germany, Switzerland or the United States show, as well as, for that matter, the Republic of the United Seven Low Countries in the late sixteenth century.

If it is decided in future to formally and explicitly acknowledge the existence of, or to constitute a federated European Union, this subject of international law will undoubtedly take a republican form.

The idea of a European Republic is not new. Since the Enlightenment, the concept and idea of a European republic has been put into circulation, but this republic is predominantly a 'republic of letters'. As Federico Chabod, the Italian historian and mountaineer has put it in his series of lectures on the *Storia dell'Idea d'Europa*, this use of the term Europe concerns primarily and exclusively a moral and cultural region, with varied political forms of organisation. It is neither a geographical term nor an indication of its political structure.

That there exists a covert tension between constituent monarchies and the republican construct of Europe is illustrated by an event that took place in 1993,

[European Union and National Sovereignty], Inaugural lecture at the University of Leiden, 2008, p. 10.

[5] According to the Lisbon Treaty, Art. 9B. Indeed, the first president, Van Rompuy, was a head of government, selected through the parliamentary system.

when the current Belgian king Albert II took the oath in the presence of parliament. Jean Pierre van Rossum, one of the more flamboyant members of parliament, shouted at the *moment suprême* '*Leve de republiek, Vive la république européenne, Vive Lahaut*.'[6] This manifestation of republican sentiment at the central ceremony to celebrate the Belgian royal continuity – *le roi est mort, vive le roi* – is becoming a ritual that takes its cue from the European model.

The devaluation of national sovereignty of member states as symbolised by their monarchs encroaches upon the status of the heads of states of the member republics as well. But this last *capitis deminutio* is less visible and less detrimental to their functioning. Crowned heads, surrounded by their folklore and romantic myths about their being chosen by higher powers, are more vulnerable to loss of status in a hierarchy than elected presidents are.

Formally and emphatically the European Union pretends, more and more explicitly, not to touch the organisation and the identity of the member states. According to the Treaty amending the Treaty on European Union and the Treaty Establishing the European Community, dated 5 October 2007, presented by the Portuguese Presidency to the IGC 2007 (the Lisbon Treaty)[7] a new Article 4(2), reads as follows:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular national security remains the sole responsibility of each member state.

It has been stressed by the Council that the changes in the existing treaties 'will not have a constitutional character,' but to my mind such an assertion is primarily a soothing nursery rhyme, not at all decisive for determining the real character of the formally complex tissue of the amended treaties. The Lisbon Treaty as a whole is a fair example of *Etikettenschwindel*.[8]

[6] Julien Lahaut was a communist member of parliament who was taken to have shouted 'Vive la république' at the inauguration, in 1950, of King Baudouin. A week later he was murdered in the front door of his house, in all probability by persons related to Gladio, an anti-communist undercover organisation with connections to the CIA and the papacy.

[7] This text dwelled for a while in limbo after the rejection of ratification by a referendum in Ireland and the hesitations of some other countries; it was adopted after much ado by all member states and entered into force by 1 Dec. 2009.

[8] In the same vein, e.g., A.T.J.M. Jacobs, 'Het Verdrag van Lissabon en de Europese Grondwet. Is er een "overtuigend onderscheid"?' [The Lisbon Treaty and the European Constitution. Is There a 'Convincing Difference'?], *Nederlands Juristenblad* (2008) p. 320-329.

Are we really to believe that the Union respects the 'fundamental structures' and the 'essential state functions' of the member states?[9] And are monarchical institutions included in these fundamental structures and functions? On both counts one is tempted to offer some doubts.

As to the first question: most of the new member states had to accommodate their constitutions and laws to the exigencies of the EU even before their accession. The anterooms of the EU show febrile and painful activities in changing fundamental structures of candidate member states. But even after sometimes painful admission procedures full members do not escape scot-free.

Major institutional changes have been and are imposed on states that aspire to become a member of the Union. And what about the territorial integrity of the member states in view of the abolition of internal borders? One of the aspects of sovereignty and statehood has been the exclusive authority over territory, and this authority has been heavily eroded by the Union. The four fundamental freedoms of the EU have encroached heavily upon the exclusive power of the member states to exercise control over their borders over what happens on their territory.

A recent example may suggest the EU is gradually eroding the existence of borders of the member states, and thereby the territorial integrity of the states. Without internal or external borders no territorial integrity. In *Metock and others* the Grand Chamber of the European Court of Justice decided on July 25th 2008[10] that Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states precludes legislation of a member state which requires a national of a non-member country who is the spouse of a Union citizen residing in that member state but not possessing its nationality to have previously been lawfully resident in another member state before arriving in the host member state, in order to benefit from the provisions of that directive. No less than ten governments had submitted their observations, a clear sign that an important decision was looming over the member states.

[9] In the Netherlands a committee has been established in view of a revision of its Constitution. One item of its remit concerns 'the relationship between essential Dutch constitutional values and decisions of international organisations or provisions of international treaties' (letter of 26 Jan. 2009). The Thomassen Committee handed in its report on 11 Nov. 2010. It recommended to supplement Art. 90 of the Constitution ('The Government promotes the development of the international legal order') with the promotion of the European legal order. The government, in its response of 24 Nov. 2011, did away with this proposal, as with nearly all other recommendations.

[10] Case C-127/08, *Metock (and nine others)* v. *Minister for Justice, Equality and Law Reform (Ireland)* 25 July 2008 (n.y.r.). *See* S. Peers, 'Free Movement, Immigration Control and Constitutional Conflict', 5 *EuConst* (2009) p. 173, and *cf.,* generally, Anja Wiesbrock, *Legal Migration to the European Union. Ten Years after Tampere* (diss. Maastricht University 2009), S.R.M.C. Guèvremont, *Vers un traitement équitable des étrangers extracommunautaires en séjour regulier* (diss. Nimègue 2009), Pieter Boeles et al., *European Migration Law* (Intersentia 2009).

A large number of these member states argued that they still retained exclusive competence to regulate the first access to Community territory by third-country nationals who are family members of a European citizen. They pointed out that in the context of strong pressure of migration, allowing third-country family members into the Union would undermine the ability of member states to control immigration at their external frontiers, which would result in a great increase in the number of persons able to benefit from a right of residence in the Community. The court was adamant in stretching this right of residence, as it was directly connected with one of the four fundamental freedoms: the freedom of movement of Union citizens. It even used the term 'Community territory', a concept which tends to blur the borders of the member states even further. All this, of course, on the basis of interpretation of the treaty and directives which had been ratified or accepted by the member states.

Boosting the identity of regions internal to the nation states, as in Belgium and Germany, and trans-frontier regions such as the Euro regions, the Union forms a contribution to the dismantling of fundamental structures of member states as well. Such developments do not amount to formal abolition of the borders of member states, but they greatly diminish their functions and importance.

Nationals of the member states are not only citizens of their respective countries, but also citizens of the Union, with a number of citizen's rights in the other member states, and sometimes even more rights than they held or would hold originally in their own state. The monopoly of the Crown over its subjects and their allegiance has broken down. Allegiance to a member state and its head of state is not exclusive anymore, although the path to a European nationality is still long, and in my opinion not worth following.

Reverse discrimination, i.e. the freedom of member states to treat their own nationals in a way that gives them less rights than nationals of other member states enjoy in that member state on the basis of Union law, is a manifestation of the unshared sovereignty of that member state. This reverse discrimination in the area of the freedom of movement and services finds its theoretical foundation in the distinction between activities that have no connection whatsoever with situations that are covered by Union law and of which all relevant elements are wholly situated in the internal sphere of one single member state at the one hand, and (trans-frontier) situations that are covered by Union law on the other hand.[11] Because the European Court of Justice is systematically expanding in its case-law the scope

[11] This is standing case-law. *See* the recent ECJ 1 April 2008, Government of the French Community and the Wallon Government, C-212/06, n.y.p. *Cf.* Hans Ulrich Jessurun d'Oliveira, 'Is Reverse Discrimination Still Permissible under the Single European Act?', in *Forty Years On: The Evolution of Postwar Private International Law in Europe* (Kluwer 1990) p. 71-86. *See also* ECJ 8 March 2011, C-34/09, *Ruiz Zambrano*, with comments, e.g., by H.U. Jessurun d'Oliveira in *Asiel & Migratierecht* [Asylum and Migration Law] (2011) p. 78 and Ankersmit and Geursen, *ibidem*,

of the fundamental freedoms, the room for reverse discrimination by member states is diminished. This means that the exclusive competence of the member states to regulate the activities of their nationals is formally reduced by the extensive interpretation by the ECJ of the scope of the fundamental freedoms in the Union. This concerns not only freedom of movement, but also the other freedoms.[12] The negative differences in treatment between nationals of the home state and nationals of other member states create pressure on governments to abolish these forms of discrimination by awarding their own citizens the same freedoms as nationals of other member states and their own nationals who fall under the regime of Union law. Such equal treatment tends to blur the difference between the two regimes, and in this way the internal frontiers between the member states fade away or become irrelevant.

Human rights, incorporated in the EU legal order, affect the organisation of venerable state institutions. Without the case-law of the European Court of Human Rights (Procola,[13] Kleyn[14]) no changes would have been made in the functioning and remit of the Dutch Council of State and no bills would have been introduced to reorganise this time-honoured body.

It has been suggested that under the influence of the European Human Rights Convention, embodied in the legal order of the European Union as part of its general principles, the Belgian *lex salica* (male primogeniture inherits the throne) was abolished in 1991 as untenable under the principle of gender equality as upheld by the EU.[15] According to the Charter of Fundamental Rights of the EU (Article 23) 'Equality between men and women must be ensured in all areas (…).' Under this provision the constitutional arrangement (Article 57) for the succession to the Spanish throne, under which male successors take precedence over their (older) sisters does not hold water. Or is the hereditary monarchy not an 'area'?

Is the Charter, now part of the Lisbon Treaty, applicable to the issue of the order of succession to the thrones of member states? Given the fact that heads of state and heads of government, whether chosen or hereditary, form an institution of the EU, the European Council, the Charter is, according to Article II 51, directly applicable *ratione materiae et personae*: 'The provisions of this Charter are

p. 158, and ECJ 5 May 2011, C-434/09, *Shirley McCarthy* v. *Secretary of State for the Home Department*, with comments, e.g., by Peter van Elsuwege, 2 *EuConst* (2011) p. 309.

[12] *Cf.* Miguel Poiares Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', in Philip Alston et al. (eds.), *The EU and Human Rights* (Oxford UP 1999) ch. 13.

[13] ECtHR 28 Sept. 1995, Case No. A.326, *Procola* v. *Luxembourg*.

[14] ECHR 6 May 2003, Case Nos. 39343/98, 39651/98, 43147/98, 46664/99, *Kleyn and others* v. *The Netherlands*, 2003 VI.

[15] Schopenhauer, in his *Parerga und Paralipomena*, para. 382 considers the *lex salica* as obvious: 'Das Salische Gesetz müsste, als ein überflüssiger *truism*, gar nicht nötig sein.'

addressed to the institutions and bodies of the Union (…).' In Article II 52 (s.1) of the Charter, the availability of restrictions to the rights and freedoms enumerated in the text is laid down:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

It is my contention that constitutional arrangements in the member states which discriminate against female successors to the throne, whether totally as under the *lex salica* or more restrictedly, as under the *lex castiliana* are not covered by this exception. They are neither proportional nor are they at all necessary, nor do I see any objectives of a general interest in excluding female successors from being recognised by the Union. Rights and freedoms of others are not at stake. It is furthermore irrelevant whether member states choose to send their head of state or their head of government to the European Council; according to EU law, both dignitaries are entitled to take part in the meetings of this institution. The crowned heads, moreover, are present at meetings to highlight the importance of new treaties to be signed and other symbolic occasions.

Is Article 8 A as laid down by the Lisbon Treaty an impediment?[16] Crowned heads of state are not normally directly accountable to parliaments or citizens. The political responsibility for their acts rests with accountable ministers, and in this way their accountability is guaranteed. Furthermore, the phrase in this provision seems to have no normative impact, but gives a description of the state of affairs in the member States. To interpret it as a prescription would violate the principle of inviolability of national identities as laid down in Article 3a mentioned before.

The European Convention for the Protection of Human Rights and Fundamental Freedoms forms part and parcel of the general principles of the European Union and is binding upon the member states.[17] It does not contain, however, a general provision prohibiting discrimination based on sex in all areas of life.[18] But Protocol No. 12 (2000) does contain such a general prohibition of discrimination for member states that have ratified this protocol. Likewise, under the International Covenant on Civil and Political Rights (1966) 'the law shall prohibit any

[16] 'Member states are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.'

[17] Art. 6 TEU.

[18] Spain has made a reservation in respect of the system of hereditary succession to the throne to the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women.

discrimination and guarantee to all persons equal and effective protection against discrimination based on any ground, such as (…) sex, religion (…) birth or other status', Article 26). I submit that the Salic and Castilian systems of succession to the throne are contrary to this unconditional Article 26 as well.

Let us have a look at the UN Convention on the Elimination of All Forms of Discrimination against Women (New York, 1979). This convention has been ratified by all EU member states and may be considered to form part of 'the fundamental human rights enshrined in the general principles of Community law and protected by the Court.'[19] Articles 1 and 2 of this Convention condemn in general terms 'any distinction, exclusion or restriction made on the basis of sex' and state parties undertake *inter alia* 'to take all appropriate measures, including legislation to modify or abolish existing laws (…) which constitute discrimination against women.' More specifically, Article 7 obliges state parties 'to take all appropriate measures to eliminate discrimination against women in the political and public life of the country (…).' Non-discrimination against women does not only cover the institutions of political and public life themselves, such as the crown, but also access to these bodies or functions.

It is worth noting that a number of the 185 state parties to the Convention have made reservations concerning their constitutional arrangements on the rules of succession to the throne. I mention by way of example Lesotho, Monaco, and Morocco. As to the monarchical member states of the EU, the reservation made by Spain reads: 'The ratification of the Convention by Spain shall not affect the constitutional provisions concerning succession to the throne.' This is not a theoretical question: Felipe de Borbón y Grecia, prince of Asturias has taken priority before his two elder sisters.

Luxembourg made a reservation in this respect as well:

> The application of article 7 shall not affect the validity of our Constitution concerning the hereditary transmission of the Crown of the Grand Duchy of Luxembourg in accordance with the family compact of the house of Nassau of 30 June 1783, maintained by art. 71 of the Treaty of Vienna of 9 June 1815 and expressly maintained by art. 1 of the Treaty of London of 11 May 1887.

[19] ECJ 12 Nov. 1969, Case No. 29/69, *Stauder* [1969] ECR 419. *See also* ECJ 14 May 1974, *Nold* (1974) ECR 491 stating that 'fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures that are incompatible with the fundamental rights recognized by the constitutional traditions of those Sates are unacceptable in the Community; and that, similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.' *See* now Art. 6(3) of the Treaty of Lisbon.

It is clear from the wording of this reservation that Luxembourg interprets Article 7 of the Convention as including succession to the throne in 'the political and public life of the country.'

The United Kingdom, which adheres to the Castilian mode of succession (for now, although a change is afoot[20]), where sons take precedence over (elder) daughters, made the following reservation:

> (…) in the light of the definition contained in art.1 the United Kingdom's ratification is subject to the understanding that none of its obligations under this Convention shall be treated as extending to the succession and enjoyment of the Throne, the peerage, titles of honour, social precedence or armorial bearings (…)

Belgium withdrew its reservation as to Article 7, without however referring to the rules of succession which it had changed in 1991. The Netherlands, where no discrimination based on sex among heirs of the throne exists anymore since 1983, made no reservations as to succession to the throne. Neither did Denmark, where, until recently, sons took precedence above daughters. In a referendum on June 7, 2009 77.7% of the Danish voters agreed to end this discrimination; as the eldest child of the Crown Prince is a son, the matter will presumably not make any difference in the next two generations. Sweden, which preceded Denmark in introducing gender-neutral primogeniture in its Act of Succession, made no reservations on the monarchical gender issue either.

The question arises whether these reservations by Luxembourg, Spain and the UK to the UN Convention of 1979 can be maintained in the sphere of application of the legal order of the EU. A guiding principle here is Article 30 of the Vienna Treaty on Treaties which specifies (s. 3 *juncto* s. 4a) that between parties to earlier and later treaties relating to the same subject matter, the earlier treaty 'applies only to the extent that its provisions are compatible with those of the later treaty.'[21] By agreeing to Article 21 s.1 of the Charter, the EU member states among themselves

[20] 'On October 2011, during the Commonwealth Heads of Government Meeting in Perth, Australia, it was announced that British Prime Minister David Cameron's proposed changes to the royal succession laws in the 16 Commonwealth realms had received unanimous support of the other realm's prime ministers. The alterations would replace male preference primogeniture – under which sons take precedence over daughters in the lines of succession- with absolute primogeniture for descendants of the current Prince of Wales; end the ban on marriage of dynasts to Catholics; and limit the requirement for those in line to the throne to acquire permission of the sovereign to marry. However, the requirement for the sovereign to be in communion with the Church of England would remain, as would the exclusion of Catholics from the line of succession. The Queen, Elizabeth II, is understood to support the proposed changes' (Wikipedia English, entry '2011 proposals to change the rules of royal succession in the Commonwealth realms', visited 7 Nov. 2011).

[21] *Cf.* J.B. Mus, *Verdragsconflicten voor de Nederlandse rechter* [Treaty Conflicts before Dutch Courts] (Kluwer 1996).

have relinquished their reservations under the older treaty in favour of the much more narrowly described availability of exceptions to the principle of sexual equality under the Charter. Ultimately, it is the ECJ that has to decide the issue on the basis of the Charter and the general principles of EU law, including the principle of sexual equality. It is not self-evident that constitutional arrangements in the member states that discriminate against women in the order of succession to the throne will prevail upon these provisions and principles of the EU legal order. Whether such a case will ever arrive at the Luxembourg Court is quite another matter.

Other human rights prevailing in the EU militate against a number of restrictions under which monarchs and their house have to live, such as on their freedom of religion, freedom of speech, freedom of association and right to a private life to name but a few. Some of these restrictions may be explained by the public functions they perform, but not all.

According to Article 4 of the Swedish Act of Succession 'the King shall always profess the pure evangelical faith, as adopted and explained in the unaltered Confession of Augsburg[22] and in the Resolution of the Uppsala Meeting of the year 1593' and 'princes and princesses of the Royal House shall he brought up in that same faith and within the Realm. Any member of the Royal Family not professing this faith shall be excluded from all rights of succession.' This provision is clearly in breach of Article 9 of the ECHR, which guarantees the right to freedom of religion. It is furthermore in breach of Article 8, which guarantees the right to respect for private and family life, i.e., without interference by a public authority with the exercise of this right. The clause of the second paragraph of these articles of the ECHR that exceptions to these freedoms are allowed 'if necessary in a democratic society' cannot save the encroachment upon these freedoms, already because monarchical systems are phenomena that are opposite to democratic societies. The Charter of Fundamental Rights of the European Union contains similar provisions in Articles 7 (right to private and family life), 10 (freedom of religion) and Article 52 (exceptions to the principles). Article 18 of the International Covenant on Civil and Political Rights, 1966, guarantees the right to freedom of religion, including the liberty of parents to ensure the religious education of their children. In the same vein is Article 14 of the UN Convention on the Rights of the Child. Where is the crown prince(ss) who has become an atheist and protests against losing his right to succession to the throne?

[22] The unaltered Confession of Augsburg 1530, drafted by Melanchton for a number of German princes and cities at the occasion of the Reichstag under Charles V in that city, forms a digest of the Lutheran faith. The document pronounces curses against, Muslims, Anabaptists and a large number of other denominations, possibly including Jews: all anti-trinitarian denominations and sects. The provision not only denies freedom of religion to the Swedish Royal family, but is blatantly discriminatory in its reference to the Confession of Augsburg as well.

The United Kingdom is another example where the royal family is prohibited from enjoying freedom of religion. According to the Act of Settlement (1701) the King shall adhere to the Anglican faith. Marrying a person belonging to the Catholic faith (the abominable crime of papacy) leads to exclusion from succession to the throne, as in practice has occurred to Prince Michael of Kent in 1978, George Philip Nicholas Windsor, the Earl of St. Andrews in 1988, and his son Lord Downpatrick, who converted to the Roman Catholic faith in 2003 and barred himself from the throne.[23]

More important than the order of succession to the throne is the impact of the general prohibition of discrimination on the grounds of birth in Article 21 of the Charter. This should make thrones available to all citizens insofar as monarchs are heads of state or government and by that token (potential) members of the European Council. Already the Universal Declaration of Human Rights declares in Article 21(1): 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives', and it adds, for good measure in s.2: 'Everyone has the right to equal access to public service in his country.' This fundamental freedom is repeated in various other international instruments. I mention the UN International Covenant on Civil and Political Rights that declares (Article 25):

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in art.2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (…)
> (c) To have access, on general terms of equality, to public service in his country.[24]

The TEU states in Article 10: 'Every citizen shall have the right to participate in the democratic life of the Union (…).' The categorical exclusion of all nationals of monarchical member states, citizens of the Union, from participation in one of the institutions of the Union, if they lack the quality of monarch, contravenes this unconditional fundamental right accorded to Union citizens. Here again, a tension becomes visible between the institution of monarchy and the provisions of the EU, connected as they are through the European Council and Union citizenship. 'Citizenship of the Union, which is an additional supranational citizenship con-

[23] This prohibition apparently does not only apply to the throne. Prime Minister Tony Blair, who had a voice in appointing Anglican bishops, felt constrained to profess the Anglican faith during his time in office, and converted only afterwards officially to the Roman Catholic faith. His Presbyterian successor Brown chose to abstain from the right to appoint Anglican clergy.

[24] *Cf.* P. Ingelse, 'Koninklijke sollicitatie' [Royal Job Application], *Nederlands Juristenblad* (1997) p. 586.

ferred on all nationals of the EU Member States, is built on the splintered national concepts of citizenship.'[25] The two citizenships are not only complementary but are potentially antagonistic. At the very least, Union citizenship breaches the monopoly of national sovereigns on the allegiance of their subjects. What citizens contrive in their capacity as Union citizens escapes the grip of national authorities and crowns. Members of EU institutions such as members of the European Parliament, members of the European Commission, judges in the EU Court of Justice and their staff are supposed to serve the purposes of the EU, even if their actions go against the grain or are contrary to interests of their home states.

One problem concerning the prohibition of discrimination or provisions in municipal constitutional texts or other legislative instruments restricting fundamental rights of monarchs (and members of their Houses) must be discussed here. Is it not the case that we have to differentiate between natural persons and those who exercise an office, and distinguish between the person of the king and the office of Head of State? The first being the bearer of these unrestricted fundamental rights, whereas the official may be curtailed in the exercise of these rights?

In my opinion, the dichotomy, the distinction between the two bodies of the king, is not that absolute. On the one hand natural persons are subjected to various restrictions that are considered to be allowed under the exception clauses in treaty provisions. These restrictions must generally be prescribed by law, necessary in a democratic society, and serve an acceptable purpose. Some human rights are absolute, such as the right not to be held in slavery or servitude, or the right to life, or the right not to be subjected to degrading or inhuman treatment. These rights belong to 'everyone', including (most) officials.

On the other hand, one finds in the Convention for the Protection of Human Rights (1950) exceptions to certain rights for specific groups of officials. The right to freedom of association, for instance, may be curtailed for 'members of the armed forces, of the police, or of the administration of the State' (Article 11). Specific exceptions such as these imply that both natural persons and persons in their official capacities are entitled to enjoy fundamental rights, unless exceptions are explicitly allowed.

We must, furthermore, distinguish between discrimination in access to a public function, and restrictions laid upon officials once they are instated in office. Article 8 of the UN Convention on the Elimination of All Forms of Discrimination Against Women requires states to take 'all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportu-

[25] U. Bernitz and H. Lokrantz Bernitz, 'Human Rights and European Identity: The Debate about European Citizenship', in Philip Alston (ed.), *The EU and Human Rights* (Oxford UP 1999) ch. 15, p. 523.

nity to represent their Governments at the international level and to participate in the work of international organisations.' In the same vein, Article 7 of the same Convention charges states with the task of ensuring 'to women, on equal terms with men, the right (…) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.' The design of the office or institution itself must be free from discrimination. Once in office, the dignitaries may be subjected to some restrictions on their fundamental rights under well-defined conditions.

Not only the sovereignty of the sovereign has waned, but the attributes of the Crown and the State are dwindling as well through the workings of the EU. Take one element of the traditional regal power: the privilege of coining money. The European Central Bank has taken over a number of powers of the adhering national currency systems, but even the remnants of the national pride of monarchies on the Euro coins, the effigies of the monarch, are fading away. Of the twenty-four coins I find in my pocket today nine show the Dutch queen's countenance; four Belgian King Albert II coins, two German eagles and one oak twig, three Spanish cathedrals, four adorable French Mariannes and one sowing lady from the same country complete my pocket money. These figures do not deviate much from regular but unofficial soundings: on 1 September 2008, the contents of Dutch purses consisted for 33% of Dutch coins, followed by 23% German coins, 13% Belgian coins, 10% French coins and 6% Spanish.[26] Only one third of the coins of the Euro currency circulating in the Netherlands are minted in Utrecht. In the Euro territory, the queen lost her exclusivity with the withdrawal of the sovereign attribute of the right of coining money. Where have the regalia gone? Or must we rejoice that the effigy of our queen is now an export product in 24 other member states?

The Royal Mail is another example. In many European countries, the organisation of the postal service has developed from a prerogative of princes into a state monopoly. This transition took place without the loss of the royal element in the name of this public service. Although the Royal Mail in the United Kingdom was privatised in 1969 (with the state as owner of the company), it did not change its name. Under the influence of the fundamental principles of the EU, the next step taken was the loss of its monopoly, which took place in the United Kingdom in 2002. Again, the notion that it had to do with the monarchy was preserved in this service. Similar developments took place in other member states. In this domain

[26] *See* <www.eurodiffusie.nl/results/overview/NL>. The figures for Luxembourg are even worse: only 13% has a Luxembourg origin as against 52% German coins and 13% Belgian coins. The larger the country, the larger the proportion of its own coins.

too, the erosion of a royal privilege was induced by the liberal policies and rules of the EU.[27]

After this intermezzo about the stripping of monarchs of their regalia and privileges I return to the central question: are there tensions between the (republican) thrust of the European Union and its monarchic member states, and are there indeed influences noticeable upon the latter? Let me indicate a number of spots where the action is.

Article 10 of the Lisbon Treaty states that citizens are directly represented at Union level in the European Parliament, and that 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments (…).' The European Council, – promoted to the status of institution of the Union – which consists furthermore of its president and the president of the European Commission, has the task 'to provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof' (Article 15 s.1). It is up to the member states to decide whether they wish to be represented by the head of state or by the head of government. As matter of fact, no crowned heads appear at the normal meetings of the European Council although a few heads of state make their appearance there. The president of France and his Finnish counterpart take their seats in these meetings. These are heads of state with real power and competences in their home country. Sometimes, as in the case of Poland, president and prime minister jostle for a seat in the European Council. The Netherlands and many other countries have decided in their fathomable wisdom that it is the prime minister who represents the state in the European Council. This institution, which has grown over the years in importance and may even today be considered as the primary actor within the Union, is far too important to leave it in the hands of mostly non-political heads of state, and certainly monarchs are not dearly missed there. They are not in a position to provide the political impetus needed, not only because most of them are not politically responsible, but also because more often than not they lack the necessary skills, being hereditary heads of state.

In this way the manifestations of the monarch are reduced to ceremonial epiphanies. At the same time, the position of the prime minister in some monarchies is reinforced.

In the Netherlands, for instance, the prime minister is considered to be a *primus inter pares*, not endowed with more powers than any other minister in his cabinet, but with the special function of organising and coordinating the activities of his colleagues. Europe's institutional framework, however, endows him with more control over the rest of the government. In an advisory report requested by the

[27] *See* Postal Directive 97/67/EC, as amended by Dir. 2002/39/EC and the Third Postal Dir. 2008/06/EC. *See also* the bi-annual Report of the Commission to the Council on the liberalisation of the postal market.

government, in distress after the referendum about the Constitutional Treaty, the Council of State recommended that the prime minister take more initiative in putting topics on the Agenda of the European Council, and that he should be able to overrule the ministers concerned in his cabinet.[28] Indeed, the government decided to change the organisational rules for the working of the cabinet and gave the prime minister the freedom to table topics unfettered by the rest of the cabinet.[29] This subtle switch in the position of the prime minister in European organisations (and elsewhere[30]) has been described as resulting in a prime minister (in Dutch, *minister-president)* who has become 'less minister and more president.'[31] In the Dutch Senate, these slight changes are frowned upon as being unconstitutional, as was shown by a debate about a recent Act endowing the prime minister with decisional power to ratify expenditure of departments on behalf of the crown.[32] Previously this power lay with the ministers concerned. Constitutional structures, although left unscathed by the treaties, are under pressure from the Union arrangements.

Although I have submitted that these tensions exist, and that indeed sovereignty, connected in various forms with these monarchies, is being sucked away by the EU, we must acknowledge that there are some powerful arguments against this last proposition.

One may put forth in the first place that the erosion of monarchical systems may not be brought about by the development of the European Union as such or heading towards a federation of some sort, but that this is an autonomous development over the last two centuries in which the EU only plays a minor role in the last decades. It has been demonstrated by the historian Roobol[33] that after the Congress of Vienna in 1815, Europe as it was conceived at the time consisted of 64 more or less sovereign states, of which 57 monarchies and seven republics.

In the year 2001, the number of European states was reduced to 48, of which 11 monarchies, including the three small Benelux countries, Monaco, Liechten-

[28] Raad van State, Advisory Report on the consequences of the European arrangements for the position and the functioning of the national state organs and institutions, 15 Sept. 2005. No. W.04.05.0338/I.

[29] *See* Cabinet report, 23 May 2006.

[30] It is only rarely that one sees crowned heads attending the yearly opening meetings of the United Nations GA.

[31] D.J. Eppink, 'De minister-president in Europa: minder minister, meer president [The Prime Minister in Europe: More President than Minister]', 4 *Bestuurswetenschappen* (2005). *See also*, in a more deprecatory vein, I.C. van der Vlies, 'Mee in de EU' [Going along in the EU], *Nederlands Juristenblad* (2006) p. 1351.

[32] Wet Financieel Statuut Koninklijk Huis. [*Act on the Financial Charter of the Royal House*] Senate discussions 23 Sept. 2008.

[33] W.H. Roobol, 'De avondschemer van de Europese monarchie' [The Twilight of European Monarchy], in Prakke/Nieuwenhuis (eds.), *Monarchie en republiek* (Tjeenk Willink 2000) p. 101-114, reproduced in this series in a slightly adapted form, 7 *EuConst* (2011) p. 272.

stein, Andorra, and the non-hereditary monarchy of the Vatican State. Not only in number but also in other respects the twilight of European monarchies is undeniable: in terms of reduced territory, waning intensity of support, and above all in terms of constitutional powers, monarchs have become mostly symbolic figures with ceremonial tasks. This suggests that there are other powerful and inexorable factors at work than the uneasy relationship between the EU and its monarchical member states. These include secularisation, the concept of sovereignty of the people, democratic principles, the development of human rights – not only in the European region but on a worldwide scale – and many more. Each monarchy has its own sad history in these respects. Modernisation of monarchies means their marginalisation.

A second objection concerns the transfer of ever more powers to the EU which has generated, together with other factors such as mass migration into Europe, fear of terrorism, economic instability, globalisation and so on, counter-movements which in their search for continuity and identity, rally with renewed force around the still-available thrones. These become the symbol of the nation in peril of dissolving in a globalised world full of threats. Among those threats is the perceived bureaucratic glutton in Brussels (and Strasbourg), gnawing away at the legislative, executive and judicial powers of the member states. In this paradoxical way, the EU even contributes to the survival and indeed revival of the endangered species of monarchies, indeed because the Union generates awe and anxiety and alienation. Rallying around the throne is a well-tried reaction against encroachment upon the conceived identity of the nation in times of uncertainty.

Strangely enough, royal families are as cosmopolitan as they come, and abound in multiple nationalities. They think they cannot marry their subjects and thus have to look abroad for suitable candidates, and are liable, in this way, to possess plural nationalities. This, one might be inclined to think, makes them unfit for representing 'the nation', especially when ethnic overtones dominate the definition of this waning concept – just as unfit as soccer players and other athletes, where instant naturalisation is extremely common, and equally questionable.

The Dutch royal family provides a fair example of both proclivities. Queen Wilhelmina (1880-1962), Queen Juliana (1909-2004) and Queen Beatrix (1938-) possess British nationality alongside Dutch nationality, a fact which is hidden in vain from the public eye. They all descend in the direct line from Sophie, Electress of Hannover, the mother of George I, who was naturalised in 1705 'with the issue of her body,' i.e., 'with all persons lineally descending from her.' This Act was only abrogated in 1948 with the introduction of the British Nationality Act.[34]

[34] *See* H.U. Jessurun d'Oliveira, 'Nationaliteit en Koninklijk Huis: het symbool van een meervoudige samenleving', [Nationality and Royal House: The Symbol of a Plural Society] *Nederlands Juristenblad* (1988) p. 554-558; idem, 'Beatrix is ook Brits', [Beatrix is Also British] *HP/de Tijd*

The successive reigning Queens each married lower German nobility who upon marriage became naturalised Dutch, thereby losing their German nationality. Beatrix' children all married *simple roturières*, among whom daughters of former ministers. The crown prince William Alexander fancied the daughter of an Argentinian Secretary of State under the cruel Videla dictatorship, the popular Princess Máxima, who retained her Argentine nationality, and thus opened the way for their three daughters to opt for Argentine nationality (and thus to lose Dutch nationality and at the same time their expectations for succession to the throne). These marriage customs at European courts contribute to the loss of symbolic mysticism of the crowned heads in Europe: they become commoners and dilute their blue blood to homoeopathic proportions. Adhesion to the monarchy in troubled times, then, is impeded by these cosmopolitan and socially downward plunging procreational strategies: an internal factor determining the waning popularity of monarchy.

This cosmopolitan culture among royal families in Europe may be responsible for the enthusiasm with which monarchs, in their public utterances, profess their belief in and adherence to the idea of European cooperation in the framework of the EU.[35] Aren't they digging their own graves? Assuming that Europe forms a danger for the position of Europe's crowned heads, it seems suicidal to embrace this Leviathan. Is there a strategy, say, 'if you can't beat them, join them', or something of the sort behind this stance?

Not necessarily. One must not forget that public and official speeches by monarchs are written, controlled or approved by those politically responsible. To utter explicit opinions on political questions brings monarchs in troubled waters and endangers their role as neutral heads of state above the turmoil of the political arena. But inasmuch as they themselves adhere to the unification of Europe, the crowned heads follow a different policy: they stoop to conquer. In the development towards more democracy in the last two centuries, in which subjects have become citizens, monarchies had to give way. According to the political scientist Wilterdink it is only where monarchies changed drastically that they could survive:

> Only where the monarchy became much less significant in the factual political power relations and its purely ceremonial and legitimising functions became much

16 Dec. 2005; A. Walmsley, 'British Nationality and the Act of 1705', *Aan de grenzen van het Nederlanderschap* [On the Borders of Dutch Nationality], liber amicorum F. Zilverentant (1998): 'This means that more than 400 members of various European Royal Families will today be British citizens other than by descent, and their children born abroad will be citizens by descent.' This includes the present Dutch crown prince William Alexander.

[35] For example, on the occasion of a state visit to Spain on 8 Oct. 1985, Queen Beatrix of the Netherlands stated that her country had supported Spain's accession to Europe wholeheartedly and endorsed the idea of the unification of Europe. Carla van Baalen et al., *Koningin Beatrix aan het woord* [Queen Beatrix' Turn to Speak] (Sdu Uitgevers 2005) p. 336 et seq.

> more important could it be reconciled with a development in the democratic direction. This appeared to be possible in countries where the democratisation process developed relatively gradually and non-violently: in Great Britain, The Netherlands and the Scandinavian countries. On the contrary, the monarchy was overthrown in countries where democratisation failed for a long time to materialise, where it passed off slowly, bumpily or capriciously: France, Germany, Italy, Austria, Russia (…).[36]

The paradox is clear: only by accommodation to the increase of democracy may monarchies be able to survive. At the cost of diminishing power, reduction of their role to primarily symbolic and ceremonial functions and handing in the trappings of royalty, monarchies have a chance to survive in meritocratic and democratic surroundings. Europe is such an infertile biotope.

A third factor eroding the royal paraphernalia is the prevailing privatisation and liberalisation of institutions that traditionally have been considered to belong to royal prerogatives and later to the state. The British Royal Mail is a good example. Henry VIII created in 1516 a dignitary called Master of the Post, who was granted a monopoly in 1654 by Oliver Cromwell. The Royal Mail continued to be a government department until 1969, when it became a nationalised limited company. In 2006, Royal Mail PLC lost its monopoly and became vulnerable to competition. The privileged monopoly of the Royal Mail was one of the most conspicuous regalia in the daily life of the subjects of the realm; so much that rumour had it that to place a postage stamp bearing the effigy of the British monarch upside down constituted an act of high treason. Although the Royal Mail kept – with a short interval – its traditional name, colours, and logo suggesting the previous link with the monarchy, the company is disciplined by the market, not by the Crown.

Analogous developments have taken place in other member states, republics and monarchies alike. Changing views on essential state functions and the role of the market have triggered these privatisations. The EU, with its ideology of liberal markets and free competition, has been instrumental in removing the mail from the state. The contribution of the EU to the attrition of its monarchies may not be exclusive, and may be the result of other, global, economic and ideological movements, but is still visible and inexorable.

[36] Nico Wilterdink, 'Leve de Republiek [Long Live the Republic]: Antimonarchism in the Netherlands', 16(2) *Amsterdams Sociologisch Tijdschrift* (1989) p. 133 et seq. (at p. 153). *Cf.* H.J. Schoo, *Republiek van vrije burgers* [Republic of Free Citizens] (Bert Bakker 2008) p. 138-173.