

Gender and Comparative Forms of Government. A Possible Crypto-Type?

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Abstract

Even today, even in the most modern Western democracies, female Heads of State are very rare. Many of these democracies, such as Germany, Portugal, Italy, and France, have indeed never had a woman in such an institutional role. How can this be explained? And why do European monarchies seem to be more successful than Republics in achieving gender equality in this apex role? Cultural machismo is a perhaps too easy way of dismissing these questions. This paper will argue that the gender inequality that we see today in the role of the Head of State in European Republics actually depends on an implicit and submerged legal element – a legal crypto-type – that our modern Republics have silently inherited from their monarchical past; as such, it is not part of the official constitutional order, but it still implicitly affects the gender life of this apex institution. Only the unveiling of such a silent legal element will make gender equality effective in this apex institution.

*«De terra vero nulla in muliere
hereditas non pertinebit,
sed ad virilem sexum qui fratres
fuerint tota terra pertineat»*
Lex Salica, 59.5

I. Introduction

Today's world is undoubtedly changing very rapidly. The beginning of the 21st century is indeed a far cry from previous centuries, both in terms of technology and rights. We are witnessing the dematerialisation of markets, we are seeing new opportunities arising from artificial intelligence and, more generally, from such undeniable scientific breakthroughs. At the same time, new challenges such as the recognition of gender identity independent of biological data, surrogacy and assisted dying are rapidly reshaping the legal framework. Despite these changes, however, some struggles seem to have yet to find their final vindication. The

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achievement of gender equality in the highest institutional role is one such battle that has yet to be won.

In its thousand years of history, France has never had a woman as Head of State. The same goes for the centuries-long histories of Germany, Italy, Portugal, Bulgaria, Romania, Poland, Hungary, Montenegro, Macedonia, and the Czech Republic. With the notable exceptions of Catherine, Isabella, and Maria Theresa – where these ‘exceptions’ were paid for dearly – Russia, Spain and Austria have also never had a woman as Head of State. Not far behind are Latvia, Estonia, Lithuania, Finland, Slovakia, Greece, and the Republics that emerged from the break-up of Yugoslavia, where few women have been Heads of State until almost the last decade.

The two main exceptions to this European picture are the United Kingdom – enough to think of the long reigns of Elizabeth I, Queen Victoria and, more recently, Elizabeth II – and the Netherlands, where no king reigned for the entire 20th century, while three women succeeded each other as Head of State: first Queen Wilhelmina, then Juliana and finally Beatrice. How can we explain such a big difference between European countries? Why have some European countries achieved gender parity in this role while others have not?

In order to answer these questions, this research will work on the basis of distinguishing two different ways of understanding the form of government within the group of European states: Monarchies and Republics. Comparison is, in fact, always an exercise in measuring diversity, whatever it may be. It measures ‘what changes in what looks the same’ or ‘what remains the same in what looks different’.¹

In our case, although both institutional formulas represent valid ways of structuring the public life of a national community, they embody two different and opposing logics. In monarchies, hereditary transmission is indeed central, and for this reason the gender of the successor is an unavoidable focus; in Republics, on the other hand, descent is irrelevant, to the point where it is possible to say that Republics are precisely the negation of any dynastic logic.

Comparing these two forms of government in the history of some major European countries will allow us to show how, in moving from one form to the other, certain elements have shifted from an explicit and formalised legal level to a subliminal and invisible one, which is nevertheless capable of producing effects.²

Of the existing monarchies in Europe today, only Liechtenstein formally

¹ H. Rosenthal and E. Voeten, ‘Measuring legal systems’ 35 *Journal of Comparative Economics*, 711-728 (2007); A. Gambaro, ‘Misurare il diritto?’ *Annuario di diritto comparato e di studi legislativi*, 17-48 (2012); D. di Micco, ‘La comparazione alla prova del mondo che cambia’ *Diritto pubblico comparato ed europeo*, 3-25 (2020).

² R. Sacco, ‘Legal formants: a dynamic approach to comparative law (Installment I of II)’ 39 *American Journal of Comparative Law*, 1-34 (1991); Id, ‘Legal formants: a dynamic approach to comparative law (Installment II of II)’ 39 *American Journal of Comparative Law*, 343-401 (1991); A. Watson, ‘From legal transplants to legal formants’ 43 *American Journal of Comparative Law*, 469 (1995); A. Gambaro and M. Graziadei, ‘Legal Formants’, in J Smits et al eds, *Elgar Encyclopedia of Comparative Law* (Cheltenham: Elgar publishing, 2nd ed, 2023).

reserves the succession to the throne exclusively for the male line. The Netherlands and the United Kingdom, which historically had no such express reservation for the male sex, have now adopted the rule of absolute primogeniture: the firstborn will be king or queen, regardless of sex. All the others have, more or less recently, changed the traditionally male reservation. Women are now eligible to succeed to the throne, although in many cases only in the absence of a male heir.

Unlike monarchies, European Republics formally proclaim the equality of all citizens, including gender equality, but in practice reserve the position of Head of State for men. France, Italy, Germany, Austria, and Portugal are probably the most visible examples of how Republics seem to be more reluctant than monarchies to close this gender gap.

How is it possible that monarchies, supposedly conservative by nature, have overcome the male reserve in the role of Head of State, while Republics, on the contrary, supposedly affirming the principle of equality of all citizens, elect only men to the office of Head of State? Is it perhaps a coincidence that all these ‘reluctant Republics’, when they were monarchies, reserved the office of monarch for men?

II. Two Opposing Logics for Being the Head of State

The Head of State may be a monarch or a president. Thus, in Europe today, the United Kingdom, the Netherlands, Belgium, Denmark, Norway, Spain, Sweden, Andorra, Lichtenstein, Monaco, and Luxembourg are monarchies, while all the other European states are currently Republics, born from the collapse of a previous monarchical structure.

It must be said at once that these two constitutional formulas – monarchy and republic – can today be equally effective in guaranteeing the highest values of our modern democracies. Nevertheless, the difference in their sources of legitimacy is far from irrelevant. To simplify as much as possible, a king is such because ‘he is different from us’, while a president is such because ‘he is one of us’. In other words, the legitimacy of a king lies in his ‘otherness’ from his people, whereas the legitimacy of a president lies in his being one of the people. They are therefore the expression of two opposing logics.

This fundamental difference has repercussions on the rules governing the succession of the Head of State, depending on whether he is a monarch or a president. It is precisely because of the specific nature of the monarchy that the new Head of State is usually the blood relative of the previous one, so that monarchs succeed each other in the same family with reasonable and timely foresight.³ At

³ A. Kokkonen et al, *The Politics of Succession: Forging Stable Monarchies in Europe, AD 1000-1800* (Oxford: Oxford University Press, 2022); J. Gerring et al, ‘Why monarchy? The rise and demise of a regime type’ *Comparative Political Studies*, 585-622 (2021); M. Tunick, ‘Hegel’s justification of hereditary monarchy’ *12 History of Political Thought*, 481-496 (1991); J.H. Elliott, ‘A Europe of composite monarchies’ *137 Past & present*, 48-71 (1992); A. Lawrence, ‘Why Monarchies

the other extreme are Republics, where the Head of State is elected by the people according to more or less similar rules and criteria, in open rejection of any dynastic privilege or criteria.

Monarchies and Republics thus follow very different and even opposite logics when it comes to the succession of the Head of State: monarchies proclaim the continuity, predictability, and stability of the succession to the point of making it a genuine constitutional element, whereas Republics profess variance as a direct consequence of the general principle of equality, without which they would have no reason to exist.⁴

From this point of view at least, we are thus faced with two opposing visions of how and what makes the role of the Head of State effective. The Head of State – guardian of the supreme values on which the State is founded and of the constitutional balance between the various powers – can thus be imagined from two opposing perspectives: continuity and predictability, on the one hand, and change and unpredictability, on the other. In the first case, lineage is relevant; in the second, it is not. From this point of view, no other institutional office can be as contradictory as that of Head of State.

In the name of diversity and civic equality, the above would seem to favour Republics in their efforts to achieve equal representation of men and women at the Head of State, and to put monarchies at a disadvantage. So why is this not happening? Why is the opposite happening?

In order to answer these questions, it is necessary to look at how and why, throughout European history, monarchies have always had a preference for male line succession to the throne.

III. Three Reasons why Ancient Monarchies Preferred ‘Blue’ to ‘Pink’

Throughout human history, kings have become such in at least four ways: by appointment, by acclamation, by election or by descent. Throughout human history, these forms have often alternated and succeeded each other.

Kings by appointment are perhaps the rarest and oldest. The Bible, for example, tells us how the prophet Samuel himself, at the instigation of the elders of Israel, appointed Saul king of Israel.⁵

A king can also be made by acclamation of the army. This happened to Odoacer, who was proclaimed king of Italy by the troops in 476 AD.⁶

Still Reign’ 34 *Journal of Democracy*, 47-61 (2023).

⁴ N. Cox and R. Miller, ‘Monarchy or Republic’ *New Zealand government and politics*, 130-144 (2010); F. Burt, ‘Monarchy or Republic-It’s All in the Mind’ 24 *University of Western Australia Law Review* (1994).

⁵ Samuel, II, 1-7.

⁶ A. Jones and M. Hugh, ‘The constitutional position of Odoacer and Theoderic’ 52 *The Journal of Roman Studies*, 126-130 (1962); R. Reynolds and R.S. Lopez, ‘Odoacer: German or Hun?’ 52 *The American Historical Review*, 36-53 (1946).

It can also happen that the king is elected. This is what happened to George I of Greece, son of King Christian IX of Denmark, who was elected King by the Greek Constituent Assembly in 1863; to Amadeus of Aosta, elected King of Spain;⁷ and even Popes, however sovereign, are elected in a circle of equals.⁸

Of all these forms, however, that of descent predominates: a king is such because he is the son of a deceased king. On closer inspection, however, this last formula, which is certainly the most familiar to us, has not always been so obvious, even in European history. At the time of the fall of the Roman Empire, the Frankish and Germanic peoples tended to elect their kings by an assembly of peers belonging to the military aristocracy.⁹ It was only with Charlemagne that the legitimacy of the sovereign changed from being based on the consensus of the military class to being based on the sacred character of the king. It is precisely the bond that Charlemagne strengthens with the Church that will lead to a new sacredness of the sovereign, who from that moment on is so by the will of God.¹⁰

In this perspective, the sovereign's legitimacy was based on his difference from the people and even from the nobility. And it is in this perspective that his lineage begins to assume the importance that we are used to seeing in all European dynasties.¹¹

The sovereign's descendants, blessed by God, thus become the key element in the king's succession. And it is from this perspective that the question of gender becomes crucial.¹²

What has worked against women on the throne throughout European history?

I would argue that the explanation we seek is a mixture of almost three different causes, which have influenced each other in different ways throughout history.

It must be said that the history of Europe has long been the history of its kings and queens. Even if today's historiography tends to downplay their role in order to emphasise other aspects, such as social, economic and gender – and this essay

⁷ E. Higuera Castañeda and S. Sánchez Collantes, 'Amedeo I. The Republican King?', in D. San Narciso et al eds, *Monarchy and Liberalism in Spain: The Building of the Nation-State, 1780-1931* (Abingdon: Routledge, 2020); W.A. Smith, 'Napoleon III and the Spanish Revolution of 1868' 25 *The Journal of Modern History*, 211-233 (1953).

⁸ F. Baumgartner, *Behind locked doors: a history of the papal elections* (London: Palgrave Macmillan, 2003).

⁹ S. Painter, *The Germanic Kingdoms. A History of the Middle Ages 284-1500* (London: Palgrave, 1979); D.N. Dumville, 'The ætheling: a study in Anglo-Saxon constitutional history' 8 *Anglo-Saxon England*, 1-33 (1979); R. Bendix, *Kings or people: Power and the mandate to rule* (Oakland: CA, University of California Press, 1978).

¹⁰ R. Schieffer, 'Charlemagne and Rome', in J.M.H. Smith ed, *Early Medieval Rome and the Christian West* (Leiden, Brill, 2000); J.M. Wallace-Hadrill, *The Frankish Church* (Oxford: Oxford University Press, 1983).

¹¹ E.M. Hallam, *Capetian France 987-1328* (Abingdon: Routledge, 2014).

¹² C.B. Bouchard, 'The Carolingian Creation of a Model of Patrilineage', in C. Chazelle and F. Lifshitz eds, *Paradigms and Methods in Early Medieval Studies* (New York: Palgrave Macmillan US, 2007), 135-151; Id, *Those of my blood: creating Noble families in Medieval Francia* (Philadelphia: University of Pennsylvania Press, 2001).

is no exception – the fact remains that kings and queens have long determined the fate of Europe and the world, for better or for worse, by starting wars, signing peace treaties, forming dynastic and political alliances that coincided with the fortunes of their kingdoms.

Today, there is no king or queen who rules directly in Europe; on the contrary, almost everywhere a sovereign is almost entirely disengaged from domestic and foreign policy decisions, confined to the role of representing the nation and providing constitutional guarantees.¹³ In this contemporary logic, the continuation of the dynasty and the succession to the throne indeed lose much of their centrality in the political life of the country.

It should be noted, however, that the current constitutional prerogatives of European monarchs are the result of the more or less traumatic compression of the absolute royal prerogatives of past centuries.¹⁴ And it is in this historical perspective, rather than in the present one, that the importance of the preservation of the dynastic line and the consequent certainty of the line of succession to the throne becomes clear, since in the sovereign resided the power of government and national sovereignty itself.¹⁵ It was therefore a question of power, and it was for this reason that one sex imposed itself on the other.

The first element was certainly the attitude, still prevalent in European cultures, of establishing descent in the paternal line at the expense of the maternal one.¹⁶ Since antiquity, the peoples of the European continent and the Mediterranean basin have always made a clear choice in this regard: to fix the mark of descent in the continuity of the paternal line, and the Roman idea of the *gens* is perhaps the best-known example of this.¹⁷

Because of this widespread patriarchal conception of descent, some might argue that this is evidence of an obvious underlying cultural machismo, sufficient in itself to obviate any need for further investigation. Personally, I think this is a valid argument, but not a sufficient one.

¹³ D.M. Craig, 'The crowned republic? Monarchy and anti-monarchy in Britain, 1760–1901' 46 *The Historical Journal*, 167–185 (2003); W. Kuhn, *Democratic royalism: The transformation of the British monarchy, 1861–1914* (Abingdon: Springer-Palgrave Macmillan, 1996).

¹⁴ S. Gordon, *Controlling the state: Constitutionalism from ancient Athens to today* (Boston: Harvard University Press, 2009).

¹⁵ R. Brown and A. Michael, 'Sovereignty in the Modern Age' 20 *Canada-United States Law Journal*, 273 (1994); J. Bartelson, *A genealogy of sovereignty* (Cambridge: Cambridge University Press, 1995); J.P. Trachtman, 'Reflections on the Nature of the State: Sovereignty, Power and Responsibility' 20 *Canada-United States Law Journal*, 399 (1994); E.L. Santner, *The royal remains: The people's two bodies and the endgames of sovereignty* (Chicago: University of Chicago Press, 2012).

¹⁶ F. Boas, 'The origin of totemism' 18 *American Anthropologist*, 319–326 (1916).

¹⁷ P. Carus, 'Hammurabi and the Salic Law' 10 *The Open Court* (1912); C.J. Smith, *The Roman clan: the gens from ancient ideology to modern anthropology* (Cambridge: Cambridge University Press, 2006); M. Radin, 'Gens, familia, stirps' 9 *Classical Philology*, 235–247 (1914); H.W. Goetz et al eds, *Regna and gentes: the relationship between late antique and early medieval peoples and kingdoms in the transformation of the Roman world* (Leiden: Brill, 2003).

On closer examination, the affirmation of this principle does not automatically lead to the exclusion of women from the succession to the throne, just as it does not lead to the exclusion of women from inheriting property in private law. Even in ancient Rome, where descent was through the male line, women inherited property on an equal footing with their male brothers, at least since the laws of the Twelve Tables.¹⁸

Similarly, we see that the United Kingdom and the Netherlands, which, like all other European peoples, mark the male line, have had several queens as Heads of State. In itself, therefore, this cannot be the justification we seek.

Nevertheless, there is no doubt that if we look only to the patrilineal lines for proof of descent, we automatically deny the same relevance to the matrilineal lines, which do not have the same public importance and must be virtually 'disappeared' in order to give maximum importance to the patrilineal lines. In other words, one line must be favoured at the expense of the other, in the name of certainty.

And this is the point: if we choose one line of descent to the detriment of the other, the one we choose will take on almost sacred characteristics, because it wants to be certain, unbroken, and possibly infinite. And it is here that women have suffered the indirect consequences of marking their descent in the male line, in terms of the possibility of ascending the throne.

In fact, the monarch usually marries someone of his own rank. This is, of course, both to maintain the prestige that distinguishes him from all others, and because marriage policy is one of the best tools in the game of domestic and international alliances. Political and military alliances can be forged, and, above all, peace can be hoped for. The monarch's marriage is therefore always a matter of State. The proof of this is that every monarchy has always strictly regulated the consent to the marriage of the heir to the throne by means of a rule of public law.

From this point of view, it does not matter whether the monarch is male or female because, as we have seen, the line of descent is patrilineal.

If the monarch is male, for the reasons given above, he will marry a foreign princess. Their children will then take their father's surname. In this way, the succession to the throne takes place within the same royal line. If, on the other hand, the monarch is a woman, she will marry a foreign prince and her children will take their father's surname and thus that of a foreign line. Within a generation, the throne will pass to a foreign royal family. This is the first element on which the male preference is built.

It must be said that this detail was not always given the same weight, but it was certainly never without importance. Especially with the birth of the nation and the spirit of identity and belonging it created, it ended up being quite central.

Queen Victoria married a German prince, Albert of Saxe-Coburg-Gotha, with

¹⁸ J. Gerken and R. Vigneron, 'The emancipation of women in ancient Rome' 47 *Revue internationale des droits de l'Antiquité* (2000); S. Dixon, 'Polybius on Roman women and property' 106 *The American Journal of Philology*, 147-170 (1985).

whom she had nine children.¹⁹ The children took their father's surname. When Victoria died, her second son Edward succeeded to the throne. The new king was Edward VII of Saxe-Coburg and Gotha, who was to be succeeded by his son George V in 1910.

Although the change of dynasty did not mean a loss of national sovereignty for England, an obvious problem of expediency and national identity would soon arise. In 1917, during the First World War, London was bombed by the German Luftwaffe using Gotha bombers. In fact, the same surname as that of the British King. The embarrassment for the royal family was considerable and George V quickly changed his surname to the much more British Windsor. This seemed to solve the problem once and for all.²⁰

As is well known, George V was succeeded in 1936 by Edward VIII, who abdicated for the love of Wallis Simpson in favour of his brother Albert, who ascended the throne as George VI. George VI had two daughters, Elizabeth, and Margaret, so it was clear that England would have a Queen again on his death. Elizabeth would have to marry someone of her own rank, and therefore most likely a foreign prince, with all the problems of changing royal blood on the English throne that we already know about. The foreign prince did not take long to arrive, and it was Philip of Schleswig-Holstein-Sonderburg-Glücksburg-Greece, who would thus restore a German surname to the English throne within a generation.

George VI and the British government took certain precautions against this risk.²¹ Philip was forced to renounce all his titles before marriage and to change his surname, taking that of his maternal uncle Mountbatten (itself an Anglicisation of the German Battenberg). It was also stipulated that descendants in the direct line of succession would continue to bear the surname Windsor, while only those not in the direct line would bear the surname Mountbatten-Windsor. The royal house is therefore still Windsor.

Although it is true that this has not always been the case throughout history, another fact has been working against women since ancient times and in a much more specific way: pregnancy.

Throughout the long history of mankind, pregnancy has undoubtedly been one of the main risks of death for women, due to the lack of medical knowledge, pregnancy practices and, of course, poor hygiene and the almost total absence of medicines in case of need.

It is true that this applied to all pregnancies, but it is also true that in the case of a queen, the consequences of death were certainly more serious: the death of the ruler, the opening of a dynastic succession (perhaps a war), political instability, not to mention the dilemma of whether to save the mother (the ruler) or the

¹⁹ C.V. Reed, 'Albert of Saxe-Coburg and Gotha: Prince Consort of the World', in A. Norrie et al eds, *Hanoverian to Windsor Consorts: Power, Influence, and Dynasty* (Leiden: Springer International Publishing, 2023), 111-131.

²⁰ The London Gazette. Official Public Record, Tuesday, 17 July 1917.

²¹ V. Bogdanor, *The Monarchy and the Constitution* (Oxford: Oxford University Press, 1995).

unborn child (the future of the dynasty) in the event of difficulties in childbirth. I therefore believe that this second element also played heavily against women's chances of ascending the throne.

Then there is a third element, which I mention last, certainly not to diminish it, but rather to enhance it. There is no doubt that men have always resented the idea of having to submit to a woman, partly because of a widespread religious and social model that, from antiquity to recent times, has subordinated women to men. This last factor has certainly worked to the disadvantage of women on the throne.

All rulers, male or female, faced the risk of poisoning, assassination, or death in battle. But only queens ran the additional risk of allowing a foreigner and a new dynasty to take the throne, or of dying in childbirth. And, in any case, only queens overturned the theological and social order of the ancient world, which required women to be subservient to men. So, all this weighed heavily against women.

To sum up, in the history of European monarchies it was a mixture of these factors that made 'blue better than pink' for the throne. And this explains why most European monarchies have explicitly reserved the throne for the male sex; while those that have not, have admitted women to this role only in the absence of male candidates.

IV. The Salic Law: A Legal Screen for Specious Purposes

On the basis and because of the mix of the evidence mentioned in the previous paragraph, all ancient European monarchies favoured male succession. This was considered so much a given that no doubt arose that the throne was meant to be inherited from one man to another.

The Capetians knew this well. Hugh Capet became king of France in 987 AD, and with him began the Capetian dynasty, which, together with the Valois and Bourbon cadet branches, held the French throne until the 19th century, by a very long succession in the male line only.²²

Since the death of Hugh Capet, and for many centuries, no king of France has died without at least one male child, and consequently no one has ever raised the question of who among the king's sons and daughters should ascend the throne.

Succession was *de facto* in the male line, thanks to its constant application and to the general perception of its 'obviousness'. Thus, we see here how a rule can be such because it is perceived as such and thus legitimised by its use, even though it lacks a positive normative element. For more than three hundred years, the rule of succession in the male line functioned without any formal, verbalised rule.

The problem first arose in 1316, when Louis X became the first French king to die without a male heir. He had a daughter by his first wife, Joanna II of

²² J. Bradbury, *The Capetians: Kings of France 987-1328*, (London: Bloomsbury Publishing, 2007); S. Hanley, *The lit de justice of the kings of France: constitutional ideology in legend, ritual, and discourse*, 680 (Princeton: Princeton University Press, 2014).

Navarre, and died when his second wife was expecting a son, who died in the first days of his life. Joanna of Navarre was therefore the only direct heir to the throne.

It is only the absence of a male heir that opens up other possible scenarios. And it was precisely this uncertainty that allowed the implicit rule to be discussed. It was in fact in this context that Philip, the king's brother, convened the States General in 1317, which decided that the succession to the throne could only be in the male line and thus approved his coronation as Philip V of France. At that moment, for the first time, a political-legal act explicitly stated the exclusion of female succession to the throne.

Philip V also died without male heirs, and in 1322 his younger brother Charles IV succeeded to the throne, bypassing the king's daughters. Again, the succession was through the male line to prevent a foreigner marrying the widowed queen and ruling the country.

However, Charles IV also died without a male heir, and it was during this period that the Valois and Plantagenets clashed over the application of the Salic Law.²³ On one side was the future Philip VI of Valois, son of Philip the Fair's brother Charles of Valois, and on the other was King Edward III of England, son of Isabella of France and therefore a direct female descendant of Philip the Fair himself.

Philip VI based his claims precisely on the application of Salic law, thus denying the right of succession to Edward III of England, who was indeed the grandson of Philip IV, but through his mother – a woman – and as such ineligible to inherit the throne by virtue of Salic law. Eventually, thanks to the support of the great feudal lords of France, the Salic law was enforced, and Philip of Valois succeeded to the throne by application of the Salic law. The precedent was now established and operated as a formal rule. The English ruler responded by declaring war on Philip and starting the Hundred Years' War.

Thus, the problem of whether, or not, there should be an explicit rule of law to legitimise the de facto male succession arose only to legitimise the exclusion of women from the succession. In other words, the formal rule only came to create the restriction. In doing so, it did not create a new practice, it simply protected the existing one.

However, in order to legitimise a ban, a formal rule has to be found somewhere. For this purpose, since ancient times, jurists have been well aware of the power of recourse to an ancient law. Indeed, the past – the rule that comes from the past – always carries with it a great deal of authority, because it is a bit like saying: 'we have always done it this way'.

Thus, in order to justify the exclusion of women from the succession to the throne, the reasons given in the previous paragraph were not formally invoked, but a legal screen – legitimised by the psychological power of precedent – was found to justify this exclusion.

²³ R. Knecht, *The Valois: Kings of France 1328-1589* (London: A&C Black, 2007); C. Taylor, 'The Salic Law and the Valois succession to the French crown' 15 *French History*, 358-377 (2001).

This screen – or pretext – was found in an ancient law of the Frankish people,²⁴ and it certainly found solid approval in the theological and religious framework that pervaded the Middle Ages and modernity up to the Enlightenment.

This legislation is commonly referred to as Salic law. It is, actually, a set of laws of the Salian Franks, written down at the behest of Clovis I, King of the Franks, around 503 AD. They were, actually, pre-existing rules, passed down orally, designed to prevent the use of feud and revenge as a means of settling disputes. If we wanted to place them in a family of ancient law or in a model, we would have to note that they bear neither the visible sign of ancient Roman law nor the more recent sign of Christianisation, so in any case we would have to place them in the group of laws of the so-called Latin-Germanic kingdoms.

However, the real reason why we still remember Salic law today is that almost all the royal families of Europe excluded women from the succession to the throne, justifying it under the name of Salic law. This was made possible, in particular, by the specious reference to Title 59.5 of the Salic Laws, which reads: *‘De terra vero nulla in muliere hereditas non pertinebit, sed ad virilem sexum qui fratres fuerint tota terra pertineat’*.

This ancient text was considered sufficient to legitimise the exclusion of women from the succession to the throne almost everywhere in Europe. This ancient text acted as an external legitimising factor for the rule we were looking for, and it did so on the basis of the authority that people usually recognised in the past.

On closer inspection, however, this provision does not speak at all of the succession to the throne. It simply establishes the principle that the land – the Salish land – can only be inherited by the male descendants of the deceased. In that sense, it is more like a rule of private law than a rule of public law in today’s terms.

Moreover, while it is true that it reserves the inheritance of Salic lands to male descendants, it is equally true that it in no way excludes women from inheriting other types of property, including non-Salic lands. So only Salic lands are subject to such a reservation of inheritance to the male sex. How can this be explained?

Personally, I believe that the reservation of Salic lands to the male sex appears only as a form of defence of the integrity of the kingdom, which is what we came to call national sovereignty many centuries later. The extension of this exclusion of women to the mechanism of succession to the throne is therefore obviously an extension by analogy, which takes shape through a semantic forcing of the idea of land.

It should also be noted that this was done in a rather flimsy way, in other words, without any real continuity between the world of the Salian Franks and the numerous monarchies that attributed the legitimacy of the rule of hereditary succession to

²⁴ J.M. Potter, ‘The development and significance of the Salic Law of the French’ 52 *The English Historical Review*, 235-253 (1937); D. Whaley, ‘From a Salic law to the Salic law: The creation and re-creation of the royal succession system of France’ *The Routledge History of Monarchy*, I, 443-464 (2019).

this principle. In short, it was a complete and spurious legal resignification.

In this perspective, the Salic law worked as a legal pretext to prevent women from ascending the throne. To this end, the original Salic law was pretextually re-signified in order to confirm – through the authority of such a legal precedent – a pre-existing rule and social sentiment: better blue than pink.²⁵

Here we can see the true function of this new ‘Salic law’: it was not to confirm the male line succession to the throne, which was already the case, but rather to exclude women, their husbands, and their descendants from it, from dynasty, land, and power, which were obviously very closely linked. So, the purpose of the Salic law was not so much to confirm the primacy of men as to eliminate the possibility of women succeeding to the throne, with all the ‘problems’ that this would entail. From this perspective, this re-signification of Salic law functioned as an instrument of dynastic control over the throne, and thus as an anticipatory instrument of national sovereignty.

It was Salic law – or at least its content – that was inherited by the French royal dynasties. In fact, the application of Salic law was also responsible for the last change of dynasties on the French throne, with the accession of Henry IV of Bourbon, who belonged to the last remaining Capetian branch after the extinction of the Valois branch.²⁶

We can therefore say that all the French royal dynasties, both within and between them, have always followed the Salic law. As long as France was a monarchy, the Salic law governed the succession to the throne. Since it became a Republic, only men have held the office of president, as if the Salic law had implicitly continued to operate in republican times.

V. No Male Heir Determines Salic Law Softer Versions

We have seen, then, that the real reasons which led monarchies over time to favour male succession to the throne, that is, to deny it to women, lived as common sense for a long time before being formalised behind the flimsy precedent of Salic law in its innovative and creative reinterpretation.

It is now worth noting that the rule known as Salic law took various forms and degrees of rigidity in reserving the succession to the throne to male heirs, such as the possibility of admitting women in the absence of male siblings, or that women did not inherit but passed the right to the throne to their sons.

However, even these ‘softer’ versions of Salic law do not deny the clear preference for the male line that we have just described. On the contrary, they represent the adaptations that such a clear rule has required throughout history, the arrangements adopted by the various European crowns in the absence of

²⁵ J.M. Potter, *ibid*

²⁶ R. Knecht, *The Valois* n 23 above; C. Taylor, ‘The Salic Law’ n 23 above.

male heirs. When a king has no male heirs, considerations may indeed change: ‘blue is better than pink, but pink would be better than nothing’.

In other words, these softer versions of Salic law are the result of very specific and very contingent needs. The most striking case is probably that of the Habsburg crown, which until 1713 had always been governed by a purely Salic law.²⁷

In 1703, however, Emperor Leopold I issued the *Pactum mutae successonis*, which regulated the succession to the throne after his death. Specifically, the pact stipulated that on Leopold’s death the throne would pass to his son Joseph I and, if he had no sons, to his brother Charles VI. This is what happened.

This first part of Leopold’s provision did not change the meaning of the previous Salic law: one man would succeed another on the throne. But on closer inspection, the second part of the provision went on to say that even if Charles hadn’t had children, the throne would have passed to Joseph I’s daughters. Here was the new rule: in the absence of men, women would be allowed to ascend to the throne so as not to lose it. In fact, the throne would revert to the daughters of the penultimate emperor. We can see, then, that the admission of women to the throne is decidedly residual, dictated here by the absence of any other male heir. It’s like saying: ‘Better a woman than no heir at all’.

Charles VI, who became emperor on the death of his brother, did not like this rule, which favoured his brother’s daughters over his own. So, in 1713 he issued an imperial decree, the Pragmatic Sanction,²⁸ which modified the *Pactum Mutuae Successionis* by stipulating that in the absence of male heirs to the throne, the succession would go to the daughters of the last reigning emperor in order of birth. In this way, Charles VI ensured that his daughter Maria Theresa would inherit the Habsburg lands on his death, rather than his brother’s daughters.

Of course, even Charles VI could not be sure that this arrangement would be recognised as valid by all the Habsburg states, let alone the other European powers. He therefore had to negotiate this recognition at great length and made certain political arrangements. Austria had to enter into an alliance with the King of Poland and Russia, which led to two wars: the War of the Polish Succession (1733-1738) against France and Spain, which cost the Habsburgs Naples and Sicily in exchange for the Duchy of Parma and Piacenza, and a war against the Turks (1735-1739) on the side of Russia, which cost Austria Wallachia and Serbia. France accepted in exchange for the cession of the Duchy of Lorraine under the terms of the Treaty of Vienna of 1738. Spain accepted on the above terms in relation to the War of the Polish Succession. Great Britain obtained the cessation of the activities of the Ostend Company, whose business was highly competitive with that of the English East India Company.

²⁷ C.W. Ingrao, *The Habsburg Monarchy, 1618-1815* (Cambridge: Cambridge University Press, 2019).

²⁸ K.A. Roeder, ‘The Pragmatic Sanction’ 8 *Austrian History Yearbook*, 153-158 (1972); R. Lesaffer, *The pragmatic sanction of 1713 and the Austro-Hispanic treaties of 1725* (Oxford: Oxford University Press, 2021).

But despite these generous concessions, after the death of Charles VI, many ignored the Pragmatic Sanction. The first to do so were the two husbands of Joseph I's daughters, Charles Albert of Bavaria and Frederick Augustus of Saxony, who challenged the validity of the law, which effectively penalised their wives in the succession.

As a result, Maria Theresa ascended the throne only thanks to the absence of a male heir and a very high price paid first by her father and later by herself. The War of the Austrian Succession broke out, which would only end after eight years and with major compromises for Austria.²⁹

It should be noted, however, that although Maria Theresa succeeded in becoming Archduchess of Austria and Queen of Hungary, she was prevented from becoming Emperor of the Holy Roman Empire, where the Salic law remained unchanged. It would therefore be her husband, Francis of Lorraine, who would be formally crowned Emperor of the Holy Roman Empire. And so, after centuries of substantial Habsburg inheritance, the imperial crown passed to the House of Lorraine, which became Habsburg-Lorraine.³⁰

The Maria Teresa affair therefore tells us at least three things. The question of changing the Salic law only arose because of the lack of male heirs, otherwise it would not have arisen.

There was a price to be paid for such an 'exception to the rule' to take place and become a reality, and that price is a heavy one. There was also a change in the royal dynasty that became the Habsburgs-Lorraine.

In the House of Austria, this episode would remain an exception. After Maria Theresa, until 1918, only men succeeded each other at the head of the House of Austria, even bypassing some women. Like France, Austria has had only male presidents since it became a Republic.

The Pragmatic Sanction was also responsible for another major exception to Salic law, this time in Spain. It was precisely because of the Pragmatic Sanction that in 1830 Isabella was chosen as heir to the throne by her father, Ferdinand VII. This provoked a revolt by Isabella's uncle, the Infante Carlo Maria Isidoro, who, with the support of absolutist groups, the so-call Carlists, had already tried to proclaim himself king during the agony of his brother Ferdinand VII. The Carlist attempt failed, and Isabella reigned from 1833, the year of her parents' death, until 1868, when she was exiled.³¹

Once again, the exception to the rule came at a high price.

The present Constitution establishes that the Crown is hereditary among the successors of Juan Carlos.³² This succession follows – by virtue of the Pragmatic

²⁹ M.S. Anderson, *The War of Austrian Succession 1740-1748* (Abingdon: Routledge, 2014).

³⁰ E. Crankshaw, *Maria Theresa* (London: A&C Black, 2011).

³¹ I. Burdiel, 'The queen, the woman and the middle class. The symbolic failure of Isabel II of Spain' 29 *Social History*, 301-319 (2004); M. Lawrence, *Spain's First Carlist War, 1833-40* (Basingstoke: Springer-Palgrave Macmillan, 2014).

³² Constitución Española, Art 57.1.

Sanction – a semi-Salic order of primogeniture, that means with precedence of males over females in the same degree of descent, even if the male is younger than the female.

The problem of a constitutional amendment to avoid this gender discrimination will not arise in the near future, as Felipe VI has two daughters.

In conclusion, having seen in the previous paragraph how the Salic law – in its flimsy reinterpretation – was used as a formalised rule of law solely to exclude women, since the succession to the throne was already *de facto* in the male line, we have now seen how the less rigid versions of Salic law have come down through history solely to avoid the absence of male descendants, and how they have always come at a high price. The War of the Austrian Succession and Carlism are two good examples.

VI. Reformist Monarchies and Conservative Republics? Verbalized vs Unspoken Rules

So far, we have reconstructed the requirements that have led to the male line being favoured throughout history. We have also seen how this rule was for a long time experienced as common sense, before it was formally recognised under the pretext of ancient Salic law to exclude women from the throne, and then became an element of positive constitutional law. As a result, we have seen how corrections and exceptions to Salic law were made not because a gender equality issue but solely for dynastic needs and often paid dearly in history. In other words, the ancient European monarchies always preferred blue to pink, except in the case of dynastic extinction.

For while it is true that many of these monarchies still sit on their thrones, it is also true that in many other cases the monarchy has given way to a Republic. This is certainly the case in Italy, France, Portugal, and Germany.

We thus see in Europe the coexistence of monarchies inherited from the past and Republics forged by a clean break with the past. In the first case, we therefore expect a continuity of rules; in the second, a discontinuity of rules, that means a change so clear with respect to the monarchical paradigm as to constitute a new model, untethered to the past.

How much truth is there in this view? Or rather, how much continuity is there where we think there will be a drastic cut?

In this respect, however, a distinction must be made between rules that are formally laid down and rules that are silent and latent. The latter exist and operate not because they are explicitly laid down in the legal system, but because they are ingrained in the mindset of the legal practitioner or directly in the mindset of a nation.³³

³³ R. Sacco, n 2 above.

The theory of legal formants and cryptotypes comes to our rescue in this dutiful distinction. Indeed, every legal system is made up of legal formants acting and interfering with each other. However, comparative law scholars also know that not all formants are expressed verbally and consciously. Among those that are expressed, we certainly find the work of the legislator, who makes the rule, the work of the judge, who interprets and applies it, often redefining it, and finally the work of doctrine, which seeks to reflect on the work of the first two. However, in addition to these expressed formants, there are many other formants that work in law not because they're verbalised, which is, actually, lacking, but because they live unspoken in legal culture and common sense.

This is, in fact, the necessary premise that we have been in search of. In fact, I believe that the clear cut made in the institutional transition from monarchy to republic is valid only at the level of verbalised rules, and not at all, or much less so, at the level of tacit rules. Moreover, I believe that some of the verbalised rules of the monarchical era somehow survived into the republican era by being submerged under official law, just as karst rivers are submerged and seem to disappear but still flow. Where monarchies exist, the succession rule is still formal law, a formal constitutional norm. To intervene in this rule is therefore only a matter of political will.

In fact, a quick survey shows how many European monarchies have reformed their succession rule in recent decades. Norway, Sweden, Denmark, Belgium, the Netherlands, the United Kingdom, and Luxembourg have moved from the traditional male reserve to the current rule of equal primogeniture, whereby the eldest son of the king, male or female, ascends the throne.

For example, the Dutch Constitution states:

‘On the death of the King, the title to the Throne shall pass by hereditary succession to the King’s legitimate descendants in order of seniority, the same rule governing succession by the issue of descendants who predecease the King’.³⁴

In other words, the sovereign’s eldest son, male or female, succeeds, provided he is a legitimate child.

There are also more cautious openings, along the lines of what we have already seen in the Pragmatic Sanction affair. In fact, the Constitution of the Principality of Monaco states:

*‘La succession au Trône, ouverte par suite de décès ou d’abdication, s’opère dans la descendance directe et légitime du Prince régnant, par ordre de primogéniture avec priorité masculine au même degré de parenté’.*³⁵

³⁴ Dutch Constitution 2018, Art 25, Official English Version.

³⁵ Constitution de la Principauté de Monaco, 17 December, Art 10 (*modifiée par la loi n° 1.249*)

In other words, the throne can be inherited by women, but the male child, if there is one, takes precedence, even if he is younger. In fact, Albert II, the current reigning prince, bypassed his sister Caroline, who was the eldest.

In essence, many monarchies are adapting to changing sensibilities and making formal corrections to a rule, that of male-only succession, that they have rigidly applied for so long.

It is not known how much of this change is due to a genuine desire to be open to change, and how much is dictated instead – much more pragmatically – by the fact, or fear, of having no male heirs in the current or next generation. Just think of Spain, for instance, where the current king, Philip VI, has two daughters.

Alongside this process of innovation in the European monarchies, however, we find the dismal reality of many European Republics that have never had a female Head of State. We have already mentioned the cases of France, Germany, Portugal and Italy.

The fact is, however, that these republics have no real reason to pass on the functions of President of the Republic exclusively in the male line, since they proclaim variance rather than continuity. The formal rule does not discipline gender. In the absence of an explicit rule to this effect, what does this actually mean?

All this confirms that a formalized rule is much easier to change than an implicit, silent one.

I believe, therefore, that the answer should be sought by observing those countries that have passed from a monarchy governed by Salic law to a Republic. Indeed, I believe that it is precisely this diachronic comparison that will allow us to identify what remains the same in change.

VII. Crypto-Type Emersion: How to Reveal Submerged Legal Elements

If a crypto-type is, by definition, unwritten and therefore not formalised, how can we find it? Two different forms of government, such as monarchy and Republic, should have two different official rules for the succession of the head of State. However, if we find that they practice the same rule – the reservation of the office to the male sex – that's proof that a cryptotype lives and acts in one of the two forms, changing the official rule.³⁶ The so-called 'Salic Law', formally practised over the centuries as a rule of succession in the monarchical age, seems to have survived into the republican age.

To stay within the history of the great European monarchies, let us briefly recall here that even the House of Hohenzollern, which ruled first Brandenburg, then Prussia and finally all of Germany, followed the Salic law of succession to the throne. Since Germany became a republic, it has never had a female president.

du 2 avril 2002).

³⁶ R. Sacco, n 2 above.

Similarly, the House of Braganza in Portugal has always followed the Salic Law of Succession, albeit with a degree of openness dictated by circumstances, and since Portugal became a Republic, it has only had male Presidents.

The same applies to Italy. The House of Savoy has always been a strict follower of the Salic law. In fact, this dynasty, with its various branches, succeeded one another for more than a thousand years. Throughout this period, Salic law was the undisputed rule of succession.

In 1870 Rome was incorporated into the Kingdom of Italy. The kings of Italy had their official residence in the *Palazzo del Quirinale*, until then a papal palace. It could be said that this palace, the symbol of political power par excellence, has always been a 'palace of men': first popes, then kings. Italy became a republic in 1946. The President of the Italian Republic has his official residence in the Quirinale Palace, in continuity with the Popes and the King in his role as Head of State.

Since 1946, all the Presidents of the Italian Republic have been men.³⁷

The same argument can be made for many other European states that have, sooner or later, moved from a monarchical to the current republican form of government.

In Poland, for example, only men succeeded to the throne in the monarchical era, and today, in the republican era, all presidents have been men. The same is true in Romania. The royal family provided for male succession to the throne and today, in the republican era, all the presidents of the republic have been men. Hungary is no exception. What was true in the monarchical era is still true in the republican era. It also applies to Bulgaria. It is also true of Montenegro, where the office of President of the Republic is held by men. It is also true of Macedonia and the Czech Republic, albeit with more complicated and less linear histories of independence and sovereignty. Old habits die hard.

How is this possible? I think the question should be rephrased as: what happens when a president succeeds a king? What happens when the monarchical institution of the Head of State is replaced by the republican institution in that apex role?

We usually think of a constitutional change as obvious as the transition from a monarchy to a Republic as a clean break. In this case, however, there seems to be some continuity in the change. Where royal houses have practised a male line of succession, the throne takes on – in the collective mind – masculine connotations. In other words, in countries such as Italy, France, Germany and

³⁷ A. Baldassarre and C. Mezzanotte, *Gli uomini del Quirinale* (Bari: Laterza, 1985); S. Cassese et al eds, *I Presidenti della Repubblica. Il Capo dello Stato e il Quirinale nella storia della democrazia italiana* (Bologna: il Mulino, 2018); C. Fusaro, *Il Presidente della repubblica* (Bologna: il Mulino, 2003); G. Ansaldo, *Don Enrico* (Firenze: Le lettere, 2013); C. Ghisalberti, *Storia costituzionale d'Italia 1848-1994* (Bari: Laterza, 2002); L. Sabino, *La scelta del Presidente. Cronache e retroscena dell'elezione del Capo dello Stato da De Nicola a Napolitano* (Roma: Stampa Alternativa, 2024); G. Oliva, *Gli ultimi giorni della monarchia. Giugno 1946: quando l'Italia si scoprì repubblicana* (Milano: Mondadori, 2016); G. Giovannetti and M. Pacelli, *Il Colle più alto. Ministero della Real casa, Segretariato generale, Presidenti della Repubblica* (Torino: Giappichelli, 2023).

Portugal, where the throne has always been blue, the Head of State is perceived ‘as blue’, even in the republican era. The explicit constitutional rule that reserved the throne in the male line in the monarchical age is submerged in the institutional transition to the republican form and becomes a cryptotype and, as such, conditions the gender of the Head of State.

The Italian case is certainly a good example of this.³⁸ In the ashes of the Second World War, Italy held an institutional referendum on 2 June 1946, asking Italians whether they wished to retain the monarchical form and the House of Savoy, or whether they wished to make Italy a Republic. Italy became a Republic.

The House of Savoy, after some hesitation, left the country and went into exile. Italy then had to embark on a republican constitutional project, redesigning many of the institutions that had until then characterised the institutional life of the country, including the figure of the Head of State, which is what interests us most in this essay.

What prerogatives and tasks should the President of the Republic have? Where should his institutional seat be located? No one had ever seen a President of the Republic in Italy, and so it seemed natural to give him the same powers as the King. Thus, the President of the Italian Republic inherited from the Savoy the institutional seats such as the *Quirinale Palace*, *Castel Porziano*, and other state properties of the Savoy Crown. He inherited the role of representative of national unity, and therefore the supreme control of the armed forces, the power to appoint senators for life, the power to grant pardons or commutations of sentences following convictions pronounced by the judiciary, the power to promulgate laws and make them effective in the legal system, the power to give the task of forming the government and appointing ministers, the power to preside over the supreme body of self-government of the judiciary, immunity for what he does in the exercise of his role. Does that not sound like a king?

In other words, in the absence of any alternative model to which reference could be made, the shadow of royal prerogatives stretched over the nascent figure of the President of the Republic and ended up giving the President what belonged to the King. Change was fed by continuity: the President set on the king’s blue throne.

The past continued in the present as far as institutional prerogatives were concerned, with the sole exception of the mechanism of election: the King is such by dynastic right, the President is such because he is elected.

It is therefore this – the mechanism of succession – that is the only characteristic of the sovereign that did not pass to the president. Consequently, the Salic law, which until then had been an official element of Italian public law - ‘the throne is hereditary according to the Salic law’³⁹ – no longer had any legitimacy in the official law and thus was therefore abolished along with the entire previous

³⁸ A. Mastropaolo, *L’enigma presidenziale. Rappresentanza politica e capo dello Stato dalla monarchia alla repubblica* (Torino: Giappichelli, 2017).

³⁹ Statuto Albertino, Art 2.2.

monarchical order. Anyway, its male logic has silently survived within the Head of State office.

In more than seventy years of republican life, the Presidents of the Italian Republic – heirs of the Kings of Italy – have all been men.

A royal dynasty that for more than a thousand years regulated the succession to the throne in an exclusively male way has associated the throne in the collective imagination with the colour blue. When Italians think of a throne, they think of a king, not a queen. And so, at least until today, they have always thought of a male president, not a woman. The formal and positive rule of the monarchical age has been submerged in the republican age. The crypto-type lives on behind the paradigm of formal rule.

VIII. Conclusions

There is thus a great continuity in institutional change.

Indeed, as we have seen, institutions, even those that appear to have been created *ex novo* in a break with the past, carry with them a kind of inheritance that very often embodies certain features of what preceded them.

The Ptolemaic dynasty, which ruled Egypt after the death of Alexander the Great, did not hesitate to invent a continuity with the pharaohs of ancient Egypt and to use their title. Caesar, the man who founded the empire, became the very idea of emperor in the collective imagination – across peoples and time – so much so that even today we say *Kaiser* in German and *Tsar* in Russian, and even the Arabic word *Alcazar* clearly refers to him. Similarly, popes still have among their various attributes the word '*pontifex*', once the title of some other Roman magistracies.

A similar and perhaps even more obvious phenomenon can be seen in religious cults. It is well known that the pagan cult of Mithras was replaced by that of Christ: both are said to have been born of a virgin in a cave on 25 December. There is also a clear line of continuity between the Egyptian cult of Isis, the Roman cult of Demeter and the Marian cult. Similarly, the adoption of the cult of Saint Michael by the Lombards was apparently facilitated by the fact that they recognised in him many of the attributes of Wodan. Christianity was thus able to merge the legal and institutional framework of the Roman Empire and the popular religiosity of the Hellenistic-Roman period: where one would expect a clean break, there are in fact numerous points of 'continuity in change'. Similarly, the presidents of our modern Republics have many points of contact with the kings who preceded them at the Head of State.

Indeed, if it is true that it is easy to see a clear legislative discontinuity in the transition from monarchy to Republic – at least in terms of the constitutional framework expressed – it is equally true that many new institutions, such as that of the President of the Republic, which had no alternative models to draw inspiration

from, in reality traced the constitutional prerogatives of the sovereign.

These prerogatives, especially in the Italian case, were officially incorporated into the Constitution and are the current prerogatives of the President of the Republic.

At the same time, however, at the level of tacit law and unspoken rules, the idea that there was still a man on the throne, albeit a republican one, was also transferred from the king to the president.

In this way, a rule that had been formalised in the monarchical age survived in a silent and tacit form in the republican age and continues, at least to this day, to determine the sex of the Head of State. In this way, a rule that was formalised in the monarchical age survived in a silent and tacit form in the republican age and continues to determine, at least to this day, the gender of the Head of State. Hence, legal cryptotypes are unspoken, silent, and unofficial rules, nevertheless they still apply and condition the official legal framework.

The survival of legal cryptotypes is therefore not guaranteed by the force of the law, it is guaranteed by the force of their entrenchment in a people's culture and by the implicit in their minds. Therefore, at least one last question must be asked: how long does a crypto-type live?