

CONSTITUTIONAL PRESIDENCY

ALEXANDER THE GREAT ONCE ASKED A PHILOSOPHER

HOW A MAN COULD MAKE HIMSELF MOST LOVED

THE PHILOSOPHER ANSWERED

BY HOLDING SUPREME POWER WITHOUT INSPIRING FEAR

ROMAN FOUNDATIONS
OF A
CONSTITUTIONAL THEORY
FOR THE
EUROPEAN UNION

CONSTITUTIONAL PRESIDENCY

DESIGN FOR A HEAD OF STATE

FOR THE
EUROPEAN UNION

BY

MARTIJN HOLLINGER

AN EXPLORATION OF THE POSSIBILITIES
THROUGH A
HISTORICAL AND PHILOSOPHICAL ANALYSIS
OF
ROMAN, EUROPEAN & AMERICAN CONSTITUTIONAL TRADITIONS

BRAVE NEW BOOKS

MMXX

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None of these contributors participated in the creation of this work.

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TABLE OF CONTENTS

ABSTRACT	11
-----------------	----

INTRODUCTION

I. Roman Context	13
------------------	----

II. Modern Context	19
--------------------	----

III. Proposal	27
---------------	----

PART I - EUROPE AS A UNION

History of the European Constitutional Order

CHAPTER I - POPES AND EMPERORS

I. Imperial Constitution	37
--------------------------	----

II. Freedom of the Church	51
---------------------------	----

III. Decline of Papal Authority	59
---------------------------------	----

CHAPTER II - REGIONAL SOVEREIGNTY

I. Late Middle Ages	73
---------------------	----

II. Universal Monarchy of Charles V	83
-------------------------------------	----

III. Royal Absolutism	102
-----------------------	-----

CHAPTER III - THEORIES OF POLITICAL LEGITIMACY

I. Origins of Government	131
II. Controversy of Leadership	141
III. Sovereignty Redefined	159
IV. Nation States	174

CHAPTER IV - FLUID CONSTITUTIONS AND IDEALISTIC REVOLUTIONS

I. Uprooting Order	189
II. Napoleon Bonaparte	200
III. Spring of Nations	213
IV. Rise of Nationalism	219

CHAPTER V - NEW IMPERIALISM AND TOTALITARIANISM

I. International Competition	230
II. Philosophical Outlines of Popular Governments	245
III. Second World War	255

CHAPTER VI - INTERNATIONAL COOPERATION AND EUROPEAN UNIFICATION

I. Cold War	272
II. European Integration	276
III. European Union	285

PART II - CONSTITUTION OF THE GOLDEN MEAN

Design for a Head of State for the European Union

CHAPTER VII - THE CREATION OF A HEAD OF STATE

I. Representation 303

II. Constitutional Cohesion 311

CHAPTER VIII - A PEOPLE'S VETO

I. The Federal Republic 321

II. Direct Democracy 326

CHAPTER IX - CONSTITUTIONAL DICTATORSHIP

I. United States of America 335

II. European Union 349

CHAPTER X - CONFEDERAL MONARCHY

I. On the Matter of its Form 353

II. On the Question of Embodiment 355

CONCLUSION 361

NOTES 363

Proposal for the Creation of a Confederal Monarchy

With the political and economic integration of Europe at an advanced stage, and the system of the federation largely in place, it seems only a matter of time before a profound sense of federal nationalism will come into being that might lead to an unforeseen form of populism.

As a result, the constitution will have to be prepared for it, but because the European Union is an association of nations instead of states, a federal republic is not likely to come into existence even though the process seems to have already been initiated.

In order to ensure therefore that the federal government will never collide with the sovereignty of nations, the latter will have to be guaranteed at all times, despite the future evolution of the federation. A compromise version can therefore be created with the intention to reconcile the two by allowing both to exist simultaneously.

A head of state that serves a confederal purpose could signify the potential of European union without being the consolidation of it. As a constitutional concept that overarches the federal government on behalf of the nations and the people, it would transcend the federation regardless of its form, even if it turns into a presidential republic.

But as a concept that channels power while remaining independently of it, it needs to be able to withstand possible infringements, which means that it will have to take the form of an institution that is ultimately detached from the realm of politics, and which commands the necessary respect by itself.

It will therefore have to trace back its own right of existence to a unique source of authority that can only be found if the monarchical root of Europe is taken into consideration, since the universalism implied makes it the only form capable of overcoming the political divisions involved.

As a result, an imperial monarchy would be the continuation of the deepest roots of authority known on the continent, and as a constitutional lock on the supreme powers within the federation, it would be the guardian of the constitution without being able to control it.

As an institution, it would protect the nations from an overly ambitious federal government, and because it precedes the federal presidency in case it would become autonomous, an emperor would balance out the popularity of his counterpart and therefore prevent dangerous concentrations of power.

Introduction

'It is a truth clearer than light that without renovation, a republic cannot continue to exist; and the means of renewing them is to bring them back to their original principles.'¹ - *Niccolo Machiavelli*

I. Roman Context

Constitutional Evolution

In the imagination of man, there has been no greater empire than that of the Romans. It constitutes the origin of a sustained concentration of power on the continent of Europe, and it is therefore the beginning of its process of political unification, even if it reaches back thousands of years. It was the only time in history when most of its countries formed a union that lasted for centuries, and because it managed to uphold such an exceptional degree of stability and peace, its secret has been sought ever since, but it has never been rediscovered. While it eventually collapsed due to its many imperfections, its spirit has continued to affect the organization of political systems ever since, and it has therefore never ceased to inspire the ones who devoted themselves to the government of the state.

But their dream of union was filled with all the shades of darkness known to man as well, and the concept of imperialism that sprang from it has been a great source of distress to many people around the world. As the history of mankind unfolded itself, the premise of concentrated power has been exposed as one of its greatest threats, and the excesses that have come of it have proven that no man can ever be trusted with too much supremacy over others. It has therefore become a custom of society to scatter its forces in order to avoid manifestations of its destructive abilities, and channeling them through the many layers of established institutions has become a nearly sacred premise to a civilization that has seen the horrors of totalitarian regimes only decades ago.

Unfortunately, the wisdom has never been far from the consciousness of man, as even primitive tribes knew that the powers of society had to be di-

vided in order to avoid the dangerous consequences of unbound autocracy. But while the premise was applied in most forms of political organization ever since, it was eventually overthrown every single time, because when circumstances changed, public opinion changed along with them, and when the blessings of former accomplishments were taken for granted, while its flaws surfaced as pressing problems, praise quickly turned into disdain.

When this process is initiated, organizational forms tend to transform into their opposites, and when the development concerns political systems, an inevitable cycle seems to be repeating itself without end. It is an evolution that has already been described by ancient philosophers and historians who believed that the fluidity of constitutions was the result of the ever-recurring passions that dwelled within society.

Polybius: 'Monarchy first changes into its vicious allied form, tyranny; and next, the abolishment of both gives birth to aristocracy. Aristocracy by its very nature degenerates into oligarchy; and when the commoners inflamed by anger take vengeance on this government for its unjust rule, democracy comes into being; and in due course the license and lawlessness of this form of government produces mob-rule to complete the series.

When a new generation arises and the democracy falls into the hands of the grandchildren of its founders, who have become so accustomed to freedom and equality that they no longer value them, they begin to aim at preeminence. It is chiefly those of ample fortune who fall into this error, and when they begin to lust for power and cannot attain it through themselves or their own good qualities, they ruin their estates, tempting and corrupting the people in every possible way. And hence when by their foolish thirst for reputation they have created among the masses an appetite for gifts and the habit of receiving them, democracy in its turn is abolished and changes into a rule of force and violence, until they degenerate again into perfect savages and find once more a master and monarch.

Such is the cycle of political revolution, the course appointed by nature in which constitutions change, disappear, and finally return to the point from which they started.'¹ (2nd century BC).²

If forms of government contain in themselves all the ingredients that will bring about their own destruction, society seems condemned to suffer a pre-

determined course in its development, and because the process may well correspond to human nature, the confinements of its political organization may well be its inescapable fate.

But while an examination of history would undoubtedly reveal the validity of this theory, it can likewise be said that the same society has always cherished ideals that have contributed to its own healing as well, and which have always been rediscovered and applied whenever they were needed the most.

Roman Authority

Because all these elements of social organization eventually come to pass when the depths of Roman history are examined, studying it will provide an exceptionally clear insight into the workings of such forces in all their possible variations. But aside from its general theoretical value, the history of Roman civilization is essentially the part of European history when its most fundamental principles came into being, and even though they are ancient, they still form the basis on which the modern structures have evolved upon.

As history tends to repeat itself, it will come as no surprise that the characteristics of their developments will reveal similarities to those of modern Europe, and this common ground may well indicate that their solutions may be able to solve some of the contemporary flaws as well.

Before Rome became an empire, it had been a democratic republic for centuries, which had been founded on the basis of a common hatred against the last king whose personal conduct had completely destroyed the reputation of the monarchy even though it had been loved for more than two hundred years. After an angry mob had deposed him in order to free society from the arbitrary rule of one man, the monarchy was overthrown and his power was indeed dispersed, but because it fell into the hands of the aristocrats, a form of government was established that suited their interests above all. When the common people realized they were left out of the enjoyments and liberties of the newfound republic, they became so deeply disappointed that they rebelled within just a few years time, and centuries of struggle followed before they finally felt equally represented. But even after their demands had been fulfilled, they eventually supported the most popular Roman who ever lived, not knowing that he would abolish democracy in the end.

Because the republic had been eroded by a constant succession of civil

wars, its institutions had become susceptible to strongmen who were capable of influencing politics from outside its regular proceedings, and it was in these circumstances that Julius Caesar made his way through society. After he had worked as a lawyer, he won over the hearts of the people as an enthralling politician, after which he would prove his worth as a general by conquering a significant portion of western Europe.

When the Senate in Rome was in disarray, he used his momentum to seize control over the republic, and because his incredible military power and popularity had made him irresistible, the senators eventually had no choice but to confer the complete power and authority of the state unto him by declaring him dictator for life. But becoming master of the constitution implied that his rule could only be curtailed by means of an assassination, and since the republican ideals were still cherished by most of the senators, his death was indeed brought about when some of them murdered him less than five years after his coup.

But while the republic seemed saved from the confinements of perpetual dictatorship, the assassination had offered no solution to the instabilities of government, and because most people still adored their national hero, they longed for some form of a continuation of his rule. When his adopted son then presented himself as the obvious successor, he quickly gained the support of both the people and the armies, and it enabled him to acquire an amount of power that matched his political ambitions. After Augustus had been voted into power as an ordinary magistrate, the senators granted him many privileges and honors that befitted his extraordinary status, and when his mandate was extended for decades at a time, he was in effect elevated over the constitution of the republic as well.

Although the rise of the Caesars had been incidental and on the basis of their personal authority, the constitution was amended to establish the set of powers as a permanent position, and because the newly created office was elevated over all other institutions, while the matter of succession came to depend on the will of the incumbent, monarchy was in effect reinstated.

Roman Universalism

After Rome had been on the brink of collapse, the imperial constitution proved to be the means to stabilize it, and while Augustus forged a political union that encompassed the countries surrounding the Mediterranean Sea,

he reminded the Romans of their distinct heritage and their golden ages in the past. Combining the traditional and universal outlook on the world with a policy of reaffirming their identity was a strategy that had become indispensable after their sense of themselves had almost dissipated during the times of expansions and chaos that had preceded his reign.

But now that the power of society had been concentrated in an emperor who embodied all aspects of the national identity, their internal unity had been restored, and since he prescribed the laws of a considerable portion of the known world, peace finally seemed secure. Because his reforms turned out to be so successful, the era that would follow from it become known as the *Pax Romana*, the Peace of Rome, which laid the foundation of a state that managed to prolong its existence for another five hundred years. After it eventually collapsed, the imperial legacy continued in Constantinople for another thousand years, and even in the center of Europe, an extensive political union was still called the Holy Roman Empire until its dissolution only two hundred years ago.

But the form of constitutional universalism that prevailed in the end could never have endured if it had merely been the product of political ideology aimed at serving the national interest. What truly captured the imagination of man during this time was an event that took place within the boundaries of the empire, and which became the reason why Western society started counting the years of its current era.

While the event refers to the birth of Christ alone, the fact that he was born during the reign of the first emperor is more than coincidental, because at this turning-point in history, they both laid the foundations of the political and religious constitution of the civilization they represented, by setting new conditions that allowed for new beginnings to occur at a time when society seemed stuck in its development.³

Although the empire and this new religion initially conflicted because both seemed to be the supreme authority in the world, they eventually merged after a separation of powers had clarified that both relied on each other for the same purpose, but that they were distinct nonetheless, meaning that neither could ever claim possession of the authority of their counterpart. When the Church then grew rapidly in number throughout the empire, it became the second most important institution in society, and although it took more than three centuries before the emperors would convert to it themselves, the

imperial government was eventually subjected to its authority. In return, the Church convinced its followers that adherence to the laws of the universal monarchy was willed by God, because government was an extension of the divine order and therefore a natural condition of the human existence.

St. Augustine: 'This heavenly city, then, while it sojourns on earth, calls citizens out of all nations, and gathers together a society of pilgrims of all languages, not scrupling about diversities in the manners, laws, and institutions whereby earthly peace is secured and maintained, but recognizing that, however various these are, they all tend to one and the same end of earthly peace.' (c. 420 AD).⁴

When the Church survived the collapse of the Roman government in the West, it eventually came to consider itself to be the rightful owner of the imperial title, and when the pope crowned the first emperor three centuries after the fall of the empire, the dignity was revived and coupled to the sanctity of the Church. Because both the pope and the emperor were determined to manifest this ideal of a Christian empire on earth, combined they came to represent the most universal values known to man. While the first functioned as its earthly protector, the latter served as the keeper of its divine inspiration, and given the fact that this organizational form endured for so long, a significant portion of the history of authority can be understood as a combination of the impact both Jesus and Augustus had on Western society.

By tapping into the religious consciousness of man, they were able to influence people to such extent, that they were considered nothing less than divine themselves, and the image of perfection they projected therefore became the driving force behind the political and cultural unification of the West. Even though the passions incited by their visions and personalities have faded over time, its consequences have proven to be eternal, since nothing has ever arisen that was considered more profound, and it therefore explains why the common era commenced while these two men were alive. As an American professor once wrote:

Jesse Benedict Carter: 'Great nations like great individuals are always mysterious, and no man has ever been able to explain satisfactorily the greatness of Rome. We feel her greatness, we see the results of it in action, but we cannot explain it, for its causes are hidden from us. In Rome's case, however, we can point out at least one ob-

vious element of greatness, her willingness to learn of others. No nation was ever more ready to accept advice, to gain knowledge and to adopt ideas. The miracle of Rome was and is her ability to preserve her individuality, not as a thing apart laid up in a napkin, but to use it and by it to subdue all things unto herself. She did not necessarily always improve on that which was given her, but she always adapted it to herself. She always transfused it with her own individuality. This is not to detract from the glory of Rome. Properly understood, this point of view really increases her glory. Her essence lies not in material accomplishment, but in the possession of those forces which have enabled her to subdue all things.' (1911).⁵

II. Modern Context

Controversy of Federal Leadership

While this spirit of Roman universalism seems to have been extinguished long ago, the fact that modern society is a continuation of its past may well indicate that its inspiration has never left us and that it has only altered its form, which implies that it is merely known to us under different names. In that sense, the comparison between the ancient foundations and the more modern manifestation of European union seems to be most clear when it is indeed focused on this ideal of universalism, which is the ambition to eradicate all unnecessary forms of division among nations and citizens in order to safeguard a peaceful enjoyment of shared prosperity. Because it emphasizes the sense of the whole at the expense of the particular, it seems attainable only through a stable cooperation for the common good, which comes most naturally in the form of a union in which all members feel themselves closely tied to it.

But while the nations and states that constitute Western civilization all share the same roots, the ones that are now part of federations have once fought intensely for the right to claim their own sovereignty, and while the process of joining them has always been voluntary, the formation of these unions has always been resisted with passionate resolve. While they were founded on the basis of ideals that bordered on absolute necessities, they have often failed to connect to the sentiments of the people or to look after the distinct interests of the regions they encompassed. As a result, the abstract rule of federal governments is often sincerely detested, especially in

the early stages of development when the sense of the whole has not yet matured.

Because the distinctions between the two perspectives often seem irreconcilable, the tensions that come of it have often been the cause of rebellions, secessions and civil wars, which is not surprisingly considering that the principle of universalism that pervades these unions requires an attitude of openness and cooperation that might seem to come at its members' own expense. But because the success of a federation depends on their willingness and ability to adapt themselves to its changing circumstances, it produces a certain amount of instability in society that often leads to an identity crisis, as if the demise of the sense of self is a natural consequence of a community's openness towards others.

As a result, firm manifestations of leadership have often presented themselves as the means to overcome the destabilizing aspects of political unification, since its leaders often seemed capable of personifying the soul of the community in a way that it was recognizable and therefore popular. Since manifestations like these seem to be a recurring and therefore natural phenomenon in society, this fluctuation between fluidity and consolidation of the common identity seems to be one of its most controversial dynamics, since its consequences ultimately affect the entire concept of authority.

When Rome was still the center of the Mediterranean world, and the Senate of the republic practically functioned as its federal government, it encountered all cultures, ideas, and religions with curiosity and toleration because it ultimately considered itself superior to them. It was a sense of self that was boldly reaffirmed by central leadership that reminded citizens of their common history and traditions, and it meant that the ones who were capable of embodying this spirit served as the backbone of society, which was especially so in times of crisis when the situation called for a more efficient form of government.

Montesquieu: 'Jealous as the people were of their legislative power, yet they had no great uneasiness about the executive. This they left almost entirely to the senate and to the consuls, reserving scarce any thing more to themselves than the right of choosing the magistrates, and of confirming the acts of the senate and of the generals. Rome, whose passion was to command, whose ambition was to conquer,

whose commencement and progress were one continued usurpation, had constantly affairs of the greatest weight upon her hands; her enemies were ever conspiring against her, or she against her enemies. As she was obliged to behave on the one hand with heroic courage, and on the other with consummate prudence, it was requisite, of course, that the management of affairs should be committed to the senate. Thus the people disputed every branch of the legislative power with the senate, because they were jealous of their liberty; but they had no disputes about the executive, because they were animated with the love of glory.¹⁶

When after the civil wars, the republican institutions had been silenced by the heroic emperors who seemed to embody the complete root of authority within themselves, an almost divine icon of power had come into being that inspired a magical belief in the ones who had managed to attain it. As a result, extremely popular and charismatic figures have roamed the earth ever since in pursuit of the glory such as it had been experienced by the ancient bearers of the imperial crown, which made that even more than a thousand years later, a commander like Napoleon would still crown himself emperor while wearing a laurel wreath on his head like his Roman predecessors had once possessed.

Although this monarchical root of authority was never continued in the United States of America, it can still be said that the federal presidency too is more than a political institution alone, as the officeholder represents the nation in foreign and domestic affairs, which makes it the foremost symbol of national unity. But while it never served as a continuation of the Roman emperors, the traditions, history, and memories involved all make it into an impressive and venerable institution that commands the respect of many people around the world, which makes it the consolidation of the irrational root of authority that serves a monarchical purpose nonetheless.

As an elected leader of government however, who is replaced every four to eight years through popular elections, people expect of him to fulfill their expectations in the realm of politics as well, which means that the will of the people would reign directly if the institutions of the republic wouldn't be able to ensure the stability and security of a constitutional government.

But if the aforementioned evolution of political systems is indeed a natural phenomenon in society and its description is indeed accurate, then this combination of the rational and irrational roots of authority might become

dangerous if a president would become so popular that the constitution is adapted to the person instead of the other way around. Although it seems unlikely in the American context, it is a process Europe has seen many times before, and it has enabled its most powerful leaders to incite the most profound as well as the most explosive political developments in history.

It can therefore be said that when institutions that signify authority in society are embodied by individuals that are invested with power, their personality is added to the equation, and because this combination of static and dynamic elements will have to be realigned occasionally to adapt the whole to the changing circumstances, personified leadership either allows for the growth and prosperity of a civilization or it will bring about its own decline and destruction, which makes that the influence and authority of individuals is a highly unpredictable and extremely precarious element to say the least.

As a result, it would be wise to split the root of authority within the system so that the popularity of elected officials would not only be checked by the boundaries of the law, which can be amended relatively easily, but by an institution that commands a portion of this popular affection in the form of a tradition that guards the constitution from politicians by locking the supreme powers. As such, it can gradually become the embodiment of the sense of the federation in a way that it is disconnected from the power of politicians, which makes that it can incorporate surges of federal populism long before it arises, namely by channeling and neutralizing the feelings associated with it in a way that it does not translate itself into political will and power.

When Hitler rose to power through popular elections and then obtained a majority in the legislative assembly, the only one who could have stopped him was the president who still had the right to veto. But because he was an old man who probably suffered from dementia and died soon afterwards, while the institution of the presidency itself was a relatively new creation that lacked the firm roots that could have put a stop to these developments, Hitler only had to pass a law to unite the office with that of his, after which all constitutional opposition against him had effectively been eradicated. If the head of state had been a more consolidated institution that had stood at a greater distance from him, like the pope in Rome checked him by vying for the loyalty of tens of millions of his citizens in an apolitical way, such encroachments would not have been so easy.

Although this seems an extreme example in the light of this theory, the fact that an elected politician eventually overtook Europe undeniably happened even though no one expected it to be possible. As a result, its consequences have shaped the future of the continent ever since, considering that it has not only become weary of nationalism and too passionate politics, but that it has become afflicted with fears that have laid the foundations of the current federation, and which may have come to constitute its main weakness as well.

European Union

After the Second World War, politicians soon realized that despite their differences, they couldn't possibly do without some form of economic and political cooperation. But because their trust in the idea of unification had been shattered after they had experienced the results of similar aspirations only years before, the European Community eventually came into being as a compromise version that was designed to avoid the extremes of complete separation on the one hand, and a complete centralization on the other.

Although it would stress the importance of binding central authority as a necessary means to achieve success for the common good, it assured its citizens that the organization would only handle affairs that couldn't possibly do without some degree of federal coordination. But notwithstanding this fundamental restriction, which it came to regard as one of its most foremost conditions, even the safest forms of government are not exempted from the potential side effects of their own noble intentions.

In our time, a constant succession of political and economic crises have undermined the people's faith in the entire project, and it can therefore reasonably be assumed that the twenty-first century hasn't been its golden age up until now. But even though most problems have been caused by developments that have taken place on a global scale, and which therefore cannot be ascribed to the federal government alone, the federation has been created for the purpose of ensuring stability on the continent by at least diverting such calamities from the attention of its citizens. Since this sense of stability has been shaken nonetheless, it can be said that on this particular point, it has failed to live up to the expectations. On the other hand however, there has undoubtedly been an enduring peace on the continent ever since it was created, and combined with the overall prosperity of its citizens, its contri-

butions to society are no slight achievement.

But the fact that its entire right of existence is questioned despite of this, may be symptomatic of the image it has conveyed of itself up until this point. Its own unwillingness or inability to assert itself has made it appear almost invisible even though it undeniably affects people politically, and as a result, they may feel it is somewhat cloaked in secrecy and perhaps even out of control. Misunderstood as it may be, a constant sense of decline has contributed to its increasingly unsympathetic image, and even though most criticism on its functioning may be irrational, it has to be dealt with accordingly, even if the problem is merely a matter of perception.

If this assessment is true indeed, it poses no less of a problem than had it been merely a matter of technical complexities. In the worst-case scenario, such waves of popular discontent carry the potential of paving the way for an autocratic figure who will do away with democracy in the end. A leader like that often rises on the basis of his ability to convince the people of the validity of his visions, and because his rule is often considered to be more representative and efficient than any other aspect of the establishment, most citizens will actually perceive of these changes as an improvement. They will relate to his actions and motives, and because he derives his power from the consent of so many, his political office will give him ample opportunity to assert himself and to arouse the passions of his followers even more.

As such, one must consider the possibility that the current form of the federation leaves a void that can only be filled with the sort of leadership that it intended to eradicate in the first place. If such a sudden correction of the popular sentiment takes place, and the development is left unchecked, then the sense of unity might too much come to depend on the directions such personalities provide. Because it resembles a process the continent has seen many times before, and history tends to repeat itself, the likelihood of such a scenario may well indicate that Europe is at least susceptible to such a crisis once again.

A Belgian history professor has therefore compared the current state of the European Union with the fall of the Roman Republic in his book *Le Declin*, and to illustrate the probable conclusion of such a course of events, the German version of his book is titled more boldly: *Auf dem Weg ins Imperium*. His assessment that European civilization is in the midst of a dangerous identity crisis and his prediction that it might lead to empire seems

valid in many ways, because despite the foundational ideals and democratic intentions of both, they were both severely criticized by their citizens because of their presumed lack of democracy. In the case of Rome, the late Republic eventually indeed faced the threat of popular politicians and generals who undermined its institutions by asserting their own personal power.⁷

These instabilities are not very different from that of contemporary Europe, since it has freed itself from dictatorial regimes only decades ago. Given the fact that many countries were still a military or communist dictatorship until the seventies, eighties or even early nineties of the twentieth century, it is safe to say that democracy is still in the early stages of its development, and that it therefore needs to be handled with the utmost caution, since it has all the potential of becoming a threat to itself.

But this is exactly the point where the European Union becomes a most peculiar organization, because even though it promotes the idea that it only handles affairs that are in need of some form of federal coordination, there has undoubtedly been an undercurrent that has hinted at far-reaching political unification, as official proclamations to that extent have exemplified.

Schuman Declaration: 'By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.' (1950).⁸

Solemn Declaration on European Union: 'The Heads of State or Government, on the basis of an awareness of a common destiny and the wish to affirm the European identity, confirm their commitment to progress towards an ever closer union among the peoples and Member States of the European Community.' (1983).⁹

Such statements lay at the very base of the project, and because they seem to acknowledge the existence of a European identity, and common ground that extends far beyond economic interests alone, political integration to the degree that it eventually becomes one and the same nation might be the goal that pervades the whole effort, even if the idea still lingers unconsciously.

If it were only a consolidated free trade organization, it would never have been in need of a parliament to secure itself of a mandate of the people, and its leaders would never have requested their consent for the creation of a federal constitution as they did in 2004, since a constitution is after all the most basic foundation of a state. When the initiative was proposed to and subsequently rejected by the French and Dutch voters the following year, all other referendums to that end were canceled immediately. But because most aspects of the proposal were passed anyway when the Lisbon Treaty was signed only two years later, its contents had been ratified despite of it, but in a way that it could be done without the direct consent of the people.

Proceedings like these have exposed the European Union as a project of the national governments among themselves since it has been built without the direct involvement of its citizens most of the time, and it is therefore the reason why a strange situation has come into existence in which the beginnings of a federal government have been created and a process of a profound federalization has been set in motion even though it lacks the conscious and formal approval of its citizens.

Although its functioning certainly cannot be called undemocratic, since its policies are mostly determined by the national leaders of government, and always remain subjected to the veto of an elected federal parliament, while its abilities are severely constrained, the fact that it has gone so far that a majority of the member states can decide in matters for the whole offers proof of the fact that it has certainly begun to develop into a federation that has the potential to overrule national sovereignty.

Since foreign leaders thus have a profound say in affairs that affect the national interest, there is enough reasonable ground for a general feeling of uneasiness, and even though the consequences of this federalization haven't been alarming up until now, examples of similar developments in history seem to indicate that the authority and power of beginning federations tend to escalate in time, which means that a process has been set in motion that not only seems unstoppable, but already out of control.

When resistance against these forces becomes too intense, and more importantly, when it is ignored for too long or even blatantly subjected to the overwhelming power that propels the process of federalization in the first place, the two forces can collide as when they did when the United States of America was confronted with the negative side effects of similar devel-

opments.

Although the states had agreed to the creation of a federal government themselves, a decision of a majority on the question of slavery was deemed unacceptable by some, and it therefore led to their secession and ultimately to civil war. Although it may have been the result of the uncompromising attitude of both sides, the Supreme Court ruled after the war that the acts of secession had been unconstitutional to begin with, since the common roots were so profound, and membership so irreversible, that the member states had ceased to be separate entities the moment they had formally committed themselves to the perfection of the Union.

Chief Justice: 'The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these, the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not?' (1869).¹⁰

Although a withdrawal from the European Union is still possible, such a simple solution might no longer be an option when in a hundred years or so the process of federalization has reached a more advanced stage in its development. When that happens, and policies of the federation have become a nation's inescapable fate, the situation might create intolerable tensions in time, and because no one knows what issue will precisely be the height of them, there has to be some providence in existence that is so undefined and abstract, and so potentially powerful that it can vent these tensions no matter what the question will be.

III. Proposal

In order to avoid such conflicts from arising, much can be learned from the Romans once again, since they implicitly solved the problem by creating a

hierarchy of forces within the constitution that allowed for extraordinary forms of sovereignty to manifest themselves incidentally.

After they had overthrown the last king, it took only fifteen years before the people felt so excluded by their aristocratic government, that they left the city in protest until their demands were met. The Senate then complied with their wishes by instituting the office of the tribune of the people, which was a magistrate who was allowed to veto all legislative proposals, judicial rulings and executive decisions on their behalf. But the senators reserved the right to appoint a dictator in times of crisis to be able to deal with pressing matters, and since this office was elevated over all other institutions, the acts that emanated from it could not be overturned. As such, the constitution provided for checks and balances to ensure that nothing was implemented if it was not absolutely necessary or if it was not supported sufficiently, while it still allowed the senators to assume complete control in times of emergency.

If this design is considered not just ancient history but a timeless example of how federal constitutions can be formed even today, then it might serve as the basis of a constitutional concept that could introduce the best of both worlds into the framework of the contemporary European Union. In the understanding that more sense of control is desired, but that a concentration of power in the federal government is unwanted, the design intends to channel the aforementioned incidental powers without introducing a new decision-maker.

A supreme institution could be added to complement the current structure that would be invested with a veto power that will be in the hands of the people themselves, who can invoke it by calling for a referendum. It would place the entire structure of the federal government under a complete democratic check, which will then become the highest power within the regular framework of the European Union. To counterbalance the weight of such democratic interventions, the national leaders of government would be able to override a people's veto in case it interferes with the absolute necessities of efficient government. In times of crisis, their joint declaration of a state of emergency would allow them to access the undefined authority of the institution, which is supreme in the realm of the federal government. As such, it would give them the ability to either overrule its institutions or to do whatever is necessary to preserve the stability of the Union.

Since the powers of the proposed concept would be delegated at all times, there is no need for the creation of an actual institution, let alone an officeholder. But because federal governments tend to expand their capabilities in time, and given the fact that its administration might come to consider itself to be the supreme authority in the absence of supervision, it would be wise to consolidate the proposed concept as a separate institution that will be the guardian of the powers without it being able to control them itself.

Because it would overarch all federal institutions, it seems most obvious to style it as a head of state, and given the fact that it would remain independent of the proceedings of the federal government, it would not interfere with its evolution in the future. Even if the federation would centralize and take the form of a presidential republic, the envisioned institution does not have to alter its form, since both can exist simultaneously.

The main advantage of this flexible concept is that it will lock the supreme powers of the federation within an institution that merely channels them in accordance with the rule of law. By leaving the extent of its authority mostly undefined, while the actual use of its power is severely constrained, it will ensure that the federal government can never exceed its mandate in the future, or cause too much harm to one nation for the benefit of the whole.

Although this seems a contradiction given the nature and capabilities of the federal government in its current form, history has proven that constitutional arrangements run the risk of liquidizing when circumstances change, which is why preparations are in order that need to be implemented before the situation arises.

Montesquieu: 'In a republic, the sudden rise of a private citizen to exorbitant power produces monarchy, or something more than monarchy. In the latter, the laws have provided for, or in some measure adapted themselves to the constitution; and the principle of government checks the monarch: but, in a republic, where a private citizen has obtained an exorbitant power, the abuse of this power is much greater, because the laws foresaw it not, and consequently made no provision against it. There is an exception to this rule, when the constitution is such as to have immediate need of a magistrate invested with an exorbitant power. Such was Rome with her dictators.'¹¹

Contemporary Value

Considering that the European Union is an unloved organization, it may not be getting the popular attention that is needed to check the development of its institutions and their capabilities. If the Commission and Parliament are allowed to evolve as more or less independent entities that are capable of determining their own conditions insofar as they are not constrained by the treaties, then the growth of their authority might become problematic in time.

That such thoughts are not without a sense of realism is proven by the fact that Parliament has in recent years been trying to provide the Commission with its own democratic mandate that is independent from the national leaders of government, which means that it could indeed be the inception of an autonomous federal government.

Although the treaties determine that a candidate for the presidency of the Commission is proposed by the Council, and that he or she is subsequently accepted or rejected by Parliament, the latter has unilaterally upturned these proceedings on the basis of a passage that was included in 2009 that stated that the Council had to take the parliamentary elections into account when proposing its candidate.

The addition was then used by Parliament during the elections of 2014 to revert the proceedings by stating that it would present its own candidates instead, namely the ones who had served as the main representatives of the parties during the elections. It even threatened that it would veto all other proposals, which effectively removed the Council's power to nominate the new president. When the candidate of the largest party after the elections was indeed accepted by the Council, a new precedent had been set, and the new power of Parliament had more or less become consolidated because of it. In a formal decision adopted on the 7th of February 2018, it stated:

'The European Parliament warns that it will be ready to reject any candidate in the investiture procedure of the President of the Commission who was not appointed as a 'Spitzenkandidat' in the run-up to the European elections.' (...). 'It underlines that the 'Spitzenkandidaten' process fosters the political awareness of European citizens in the run-up to the European elections and reinforces the political legitimacy of both Parliament and the Commission by connecting their

respective elections more directly to the choice of the voters; acknowledges therefore the important added value of the ‘Spitzenkandidat’ principle in the goal of a strengthening of the political nature of the Commission.¹²

Although the election of 2019 effectively put an end to the system when an independent candidate was eventually nominated for the position and then accepted by Parliament, it seems that the presidency and the unclarity that surrounds it may be the nucleus of the future evolution of the federal government. Given the fact that its functioning is mostly defined in treaties and still lacks the firmness that comes from established traditions, it is mostly constrained on paper, which means that its potential is relatively undefined and therefore unknown. Since this makes it especially vulnerable to sudden political changes and influences, such an imposition of one of the branches becomes dangerous when it works towards the creation of a centralized or even a presidential republic that seems to be allowed to act in disregard of the national government leaders on the grounds of a supposed possession of an independent mandate.

When such transformations are brought about through the use of voids that are found in the treaties, they reveal the existence of a peculiar ghost in the machine that seems to be trying to manifest itself. Furthermore, if such changes are unilaterally implemented at a time when the other branches are incapable of countering them, the federal government is itself in violation of the treaties the Union is based upon, since they are forged by the national governments among themselves. So when the federal government remains unchecked as it now is, it seems to be allowed to amend the functioning of the federation at will on account of having been granted its own mandate during the federal elections, and when that happens, it could indeed evolve into a centralized republic that may come to compete with the governments of the member states within a few decades time.

The proposed concept of a confederal head of state would therefore provide an additional security check that is detached from the political arena to ensure that the federal government can never exceed its mandate in the future. But because the design is itself a combination of three highly controversial elements, namely the possibilities of direct democracy, constitutional dictatorship, and embodiment of the position to occur, this book is written with the intention to explain that even though the concept might seem radical, its

components are fully consistent with the theories and traditions the current arrangements are based upon. Since it is not intended to be subversive or controversial in any way, a careful examination of the technicalities and the spirit that undoubtedly pervades it will effectively deprive the proposal of all revolutionary semblance.

Given the extent of the proposal however, it seems too profound and overwhelming to even be considered. It must therefore be said that its purpose is merely to give citizens and national leaders of government more sense of control without intending it to ever be used. On the contrary. By granting both the competent powers they need to keep each other in check when disagreement on the desired course becomes problematic, its existence alone might contribute to the formation of a stronger bond of trust between them. In that sense, it could contribute to an increasing willingness to cooperate in the interest of the common good, which is the essence of a commonwealth no matter what its form of government might be called.

It is a consolation in this regard that the United States has experienced the evolution of a federal government long before Europe began its attempt to unify the continent in such a way. Its first president warned however in his farewell speech, that constitutional changes should always be the result of careful examination and formal consent before they are executed, for if they are proclaimed in the spur of the moment, they often set in motion a process that tends to escalate into forms that are eventually far worse than for which they were originally intended.

George Washington: 'It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres; avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart is sufficient to satisfy us of the truth of this position.

The necessity of reciprocal checks in the exercise of political power; by dividing and distributing it into different depositories, and

constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them.

If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.' (1796).¹³

PART I

EUROPE AS A UNION

History of the European Constitutional Order

'Every one can see that what unites any form of society is community of interests, and what disintegrates is their conflict; that either tendency may be changed or modified by a thousand accidents; and therefore that, as soon as a society is founded, some coercive power must be provided to co-ordinate the actions of its members and give to their common interests and mutual obligations that firmness and consistency which they could never acquire of themselves.' (1761).¹⁴

- *Jean-Jacques Rousseau*

Chapter I

Popes and Emperors

I. Imperial Constitution

Western civilization has never seen its power more concentrated than when the Roman Senate granted Julius Caesar dictatorial authority without specifying his mandate or setting limitations to his term. As the complete embodiment of sovereignty, he was able to amend the constitution at will without seeking the consent of either the people, the senators or the courts, and with the government functioning fully under his control, he dictated the laws of the Mediterranean world while he personally commanded his invincible armies to enforce his will on its inhabitants. Since he was the supreme priest of state religion as well, his power was complemented with full religious authority, and because his personal success and popularity had elevated him to infinite heights, he was praised and honored as if he were a living god.

But when some of the senators became horrified at the sight of this dictator sitting in a golden chair in the middle of the Senate, he would soon realize that unchecked power is unsustainable in a world where the very lives of others are at stake, as within a month after unlimited authority had been conferred unto him, a group of senators gathered around him and took back control by stabbing him to death.

After the waters had calmed and Augustus had succeeded him as the state's executive, he made the essential compromise of reconnecting the powers of the head of state to the old republican constitution, thus creating a form of government that combined both of them. Fully aware that reigning as an infallible god was an impossibility in the realm of politics, he adapted himself to the practical conditions presented to him, and it enabled him to exercise a maximum amount of power while remaining within the confines of the law.

By allowing the senators to constrain his power with terms and limita-

tions, he acknowledged the primacy of the Senate and the rule of law, but in return for this concession, he requested the authority to assume control as a supreme commander whenever firm rule was necessary to secure the stability of the state. As a result, the republic was complemented with a powerful executive who adhered to the principles of the constitution, and because it enabled the rule of a permanent head of state, this combination made him dream of having designed the best possible form of government.

Augustus: 'May it be my privilege to establish the state in a firm and secure position, and reap from that act the fruit that I desire; but only if I may be called the author of the best possible government, and bear with me the hope when I die, that the foundations which I have laid for the state will remain unshaken.'¹⁵

Although some of his successors would amend his designs during the centuries that followed, few of them ever dared to overstep the boundaries and claim the position that Julius Caesar had once possessed. But in order to control the government with a degree of uncontested authority, they needed some sort of special distinction that would legitimize their rule over the members of the nobility, since they were close at being their equals in terms of political influence. The answer was found in the realm of religion, where the memory of Caesar lived on ever since the Senate had proclaimed him divine after he had died, as it would be the belief that he was a god and that his successors were therefore close to the divine as well that would eventually turn his legacy into the root of monarchical authority that would endure for nearly two thousand years.

Although the government continued to function in accordance with the old republican proceedings most of the time, the emperorship became the living tradition of the state that ensured a smooth transfer of power through the lines of predetermined succession or hereditary rule. It served as a lock on the summit of power and authority by protecting it against the ambitions of politicians and generals, while the institution of state religion functioned as the essential means to endow imperial monarchy with a necessary degree of authority that could not be infringed.

But because Caesar had embodied the fullness of authority within himself, the fusion of its elements had fallen apart the moment he had died, and although some would come close at realigning them, none would ever attain

such a complete concentration again. As heirs of divine power however, it would most often be their wish to rule with complete authority once again, and in their attempt to concentrate the power of society within themselves, they would often seek their own glorification to prove their worth.

For this reason, they sought the cooperation of the ruling classes and the love of the people, they would incite wars for territorial and financial gain, they would struggle with the state's institutions and its laws whenever they felt they obstructed their path, and they would find themselves at odds with religion when its priests condemned their conduct or personality if it was deemed corrupt. But because power was only truly possessed when it was acknowledged by the ones who were influenced by it, the rule over society never ceased to rely on consent in whatever form, and it made that unbound dictatorship was seldom condoned for long.

Roman Ghost in Europe

Although the empire had centered around the Mediterranean Sea where all its economically important cities had been situated, it had been more than a political organization, as it had been an idea above all, and it was this idea that survived throughout the ages. Rome had always envisioned a complete unification of the people it encompassed because it was believed that only a successful incorporation would guarantee the continuation of its dominion in the end. Although the process had always been resisted by both sides, it was deeply rooted in the Roman conception of the world, and it had therefore been followed through relentlessly.

When Emperor Claudius had once proposed to allow the notable men from the northern provinces to be admitted into the ranks of the Senate, many of its members had objected to his suggestion, and they had tried to convince him that the magistracies were so deeply rooted into the fabrics of their own people that they ought to be held by them exclusively, since only they were familiar with the virtues and glories of the ancient traditions.

Claudius had remained undaunted however and he had reminded them of the origins of their city and how it had incorporated the peoples of Italy in similar fashion, and who had then become forefathers to many senatorial families. He had likewise reminded them of their founding father Romulus, who had sometimes fought people the same day he had welcomed them as citizens, and how their offspring had become their kings in just a few generations time. It could therefore be said that disclosing the magistracies was

essential to the character of their commonwealth, and he added that even though most citizens had been subjected by force, the sharing of wealth and opportunities had brought about their loyalty and a continuous peace.

Claudius: 'I find encouragement to employ the same policy in my administration, by transferring hither all true excellence, let it be found where it will, in order that not individuals merely but countries and nationalities should form one body under the name of Romans.' (48 AD).¹⁶

Such was the ideal the Romans cherished and through which they had conquered the world in order to govern its nations, but when their empire had collapsed and its many different peoples were free to determine their own course, the idea that order relied on universal laws never left the minds of the ones who governed the states and churches during the centuries that followed.

Although the perceived truths of these overarching structures sometimes brought society to the brink of destruction, it would become clear as history unfolded itself that conflict between the nations and the factions would even be worse, and that after they had collided and strife had reached its natural conclusion, peace only seemed secured when the interests of all contending parties were honored for the benefit of the whole. But whether strife had been political or religious in nature, domestic or international, in the end, it had all revolved around the questions of what constituted the principles that determined the rule over society, and who was invested with the proper authority to determine their worth in a given situation.

When the central authority of the emperors in the West had succumbed to the invasion of barbarian tribes, it was above all Christianity that would fill the void that had been opened, and by positioning itself as the supreme authority known to man, it would become the driving force behind the cultural unification of the many different peoples on the continent. Because the Church had evolved along the lines of the imperial government by establishing its centers of administration close to the quarters of its secular counterpart, it had become the obvious institution to wield its authority, and so it did when the Roman government had become unable to fulfill its duties.

Already two decades before the abdication of the last emperor, the pope had negotiated a truce with the invading Attila the Hun, who had immedi-