
INTRODUCTION:
“WE WILL DO, AND HEARKEN”

IN THE history of all polities there are memorable “constitutional moments” associated in the collective mind with important changes in the constitutional order. The change may be direct and formal, touching on the constitution itself such as a very consequential amendment or resettlement – say the abolition of the monarchy in Italy – or a very important judicial decision interpreting the constitution – a *Brown v. Board of Education* which forever transformed the discourse of race in the United States. The constitution of a polity may be thought of in less formal ways as well – as, say, an expression of the basic tenets of a polity’s political and civic culture. In this case “constitutional moments” may be linked in the mind to non-legal yet symbolic historical events and the constitutional change they reflect may be indirect and informal – the beginning or end of a deeper process of mutation in public ethos or societal self-understanding. November 9, 1938 and November 9, 1989 – *Kristalnacht* and the fall of the Berlin Wall – constitute, arguably, such moments in the history of Germany.

What, then, are the great constitutional moments in the history of the European Union? There are some obvious candidates. The Schuman Declaration of May 1950? The entry into force of the Treaty of Rome in January 1958? The profoundly important decision of the European Court of July 1964 declaring the supremacy of Community law? Perhaps the 1965 “empty chair” crisis and the subsequent Luxembourg Accord with its hugely important impact on Community decision-making? Perhaps, in more recent times, the 1985 White Paper of the Commission setting the 1992 objective for completion of the single market, or, indeed, the 1986 Single European Act which endorsed that plan, restored majority voting to the Council of Ministers and set a veritable Europsychosis across the continent?

All these would be in contention. But for me it is Maastricht and its

aftermath which cross the line first. Not the content of the Treaty, important as, say, economic and monetary union may be. Not the symbolism (for it is no more than that) of Maastricht's pompous official name: the Treaty on European Union. Nor even the eventual ratification and entry into force of Maastricht. It is the public reaction, frequently and deliciously hostile, and the public debate which followed which almost sunk Maastricht which count in my book as the most important constitutional "moment" in the history of the European construct. For four decades European politicians were spoiled by a political class which was mostly supportive and by a general population which was conveniently indifferent. That "moment" has had a transformative impact: public opinion in all Member States is no longer willing to accept the orthodoxies of European integration, in particular the seemingly overriding political imperative which demanded acceptance, come what may, of the dynamics of Union evolution. This is both a threatening and exhilarating moment in the history of the Community and its Member States: threatening because an important patrimony is called into question; exhilarating because the debate and questioning represent a popular and national empowerment which, incidentally, can bestow on the Union an altogether deeper order of legitimacy.

How is it, one may ask, that this debate did not take place earlier, at those other defining moments in the history of the Community? Consider, in particular, that the European Court has been speaking for years about the Treaties as the "basic constitutional charter" of the Community and Union and that for decades lawyers have been speaking loosely about the "constitutionalization" of the Treaties establishing the European Community and Union. This has meant, among other things, the emergence of European law as a constitutionally "higher law" with immediate effect within the "legal space" of the Community. Supremacy, direct effect, and the protection of fundamental rights have all been accepted as part of the so-called *acquis* of the Community. There is a simpler way of putting this: within its ever increasing sphere of activities, the writ of the Union displaces any conflicting national legislation. This situation was brought about with the full collaboration of national governments, national parliaments, who again and again with each expansion of the Community to include additional Member States ratified the new order, and by national courts. It was in place long before Maastricht and Amsterdam.

How could such a veritable revolution occur without a profound debate within the European polity? We often look to antiquity to provide us with powerful metaphors which may both represent and explain the fundamentals of the human and social condition. Oedipus, Tantalus, Electra, and Antigone are a part of the Western heritage, the significance of which goes

beyond their intrinsic literary content. Here, then, is an early "constitutional moment" of transcendent and enduring consequence which may help both represent and explain one part of the contemporary constitutional phase in the discussion of European Union constitutionalism:

And Moses wrote all the words of the Eternal . . . And he took the book of the Covenant and read in the audience of the people: And they said, All that the Eternal hath spoken we will do, and hearken.¹

Traditional commentary has noted the inversion in the act of acceptance by the people. First, we will do. Next, we will hearken, that is try and understand what it is we are doing. Normally we would expect the hearkening – a metaphor for the deliberative process of listening, debating, and understanding – to precede the commitment to do.

What, then, are the possible meanings of this inversion? What can we learn from it (and into it) for the present-day discussion of European Union constitutionalism?

1. Who, we may first ask, is foolish enough to accept a Covenant of such transformative character without hearkening first? But "who?" is a difficult question to ask here, since one of the things this Covenant did was to constitute in a new way its very subject: their peoplehood is forever changed, internally and externally (even if the nature of change was not fully apparent at that moment). This Covenant is revolutionary and radical not simply, though that too, in its substantive content, but in the very ontological underpinning of its subject. It effectively calls for its acceptance by the subject it seeks to constitute. Why so? I can think of two primary reasons.

First, morally, acceptance by a bunch of pre-Torah slaves would be no acceptance at all. It is only an acceptance by a post-Torah free people (free in the world, since enslaved only to that which is beyond the world) which could have the moral autonomy to engage meaningfully in the act. Only by accepting do they attain the capacity to express meaningful acceptance! Acceptance is the condition for acceptance.

Second, acceptance by the preconstituted subject, for ever privileges that subject as the original author. Now, of course, the logical conundrum, the circularity of the situation, is evident. How can you have acceptance by the subject which acceptance alone would constitute? Hence, the rather anomalous textual device – We will do, and hearken.

2. Not to be forgotten in the dizziness of exegesis is another striking fact of our biblical metaphor already encapsulated in our previous analysis. It is, I think, hard to challenge that the law was a constitution – not simply a

¹ Exodus 24:7.

higher law in the formal sense, but *constitutive law* (a law which constitutes something) or at least transformative in the material sense too, of the people, of their social organization, of their normative hierarchy, of their values and their destiny. But isn't the choice of form interesting? Even the Almighty, creator of heaven and earth chooses a covenant, a treaty. It is because a constitution is constitutive, involving values and controlling a destiny, that its acceptance should be covenantal, involving choice, autonomy and, like all long-lasting agreements, periodic renewal and adaptation.

The biblical narrative is a stunning combination of the pre-modern and the modern, of fate (revelation) and choice (covenant).

3. "We will do, and hearken" may be understood in another way. Peruse carefully the text leading to this moment. You have the Decalogue, rather well known. You have then, far less known, the basics of the civil law of torts, of contract, of criminal law, of labor law, and, of course, of some fundamental religious rituals. All this goes into the Covenant which Moses writes down. But this list is skeletal. It is quintessentially "constitutional" in a different way, a *traité cadre*, wildly indeterminate and open-textured language in many of its provisions, a program which will require immense effort of implementation if it is to become a matrix of life. The Covenant is surely a higher law, the acceptance of which will bind both public authorities and individuals. As such it is a *check* on power. But it also *bestows* immense power on all those who, cloaked with its authority, the authority of a higher law, will be charged with interpreting, implementing, filling the gaps. In this respect, accepting the constitutional covenant represents an immense act of faith. I do not refer only, or even primarily, to faith in the Almighty involved in this particular story. I mean faith in this aspect of the Covenant, of constitutionalism which requires a faith in one's self, in one's co-constituents, faith in one's institutions and their ability, in good faith, to "discover," to constitute the meaning of the constitution through its praxis. The Covenant is not only, even primarily, with the Almighty. It is with one another; it is, like all constitutions, a covenant with one's descendants, who are born into and are expected to live by it. But this will only happen if it is understood and accepted that the power and duty of giving and renewing meaning is also handed down. On this reading the inversion of doing and hearkening, of praxis and understanding, is a key to a great constitutional truth: the text itself, the words Moses wrote down, are hardly determinative or capable of controlling the true realization of the covenantal and constitutional promise. The most one can hope for is that the spirit of the moment be captured and cherished, but – to put it descriptively – it is only through the "doing"

that the true meaning of the covenant will be borne out. To state the same thing normatively: in the doing one must hearken to the spirit of the constitution so that its meaning is not perverted or lost in the praxis. Hence: we will do, and hearken.

4. Looking at the text in sociological and historical terms calls for a different order of interpretation. Do, and only then reason – why would anyone enter into a covenant on a basis of such blind faith, especially when the commitment is so consequential? Let us set aside the impact of revelation (which in any event was rather limited: within forty days of "seeing the thunderings" the Golden Calf was created). Is the blind faith acceptance so strange in the historical and psychological circumstances of the Hebrews? Here they are, having emerged from a traumatic experience into a new world, with all old values and institutions called into question, with new threats replacing the old ones around them. And here comes a Covenant which, on the one hand, refers to a distant idyllic past and then, with the other hand, literally conjures a real promised land of plenty and of peace and a spiritual challenge even greater than that. Would you not yourself have said, We will do, and hearken? What, after all, are the alternatives? Go elsewhere in time? That is Egypt. Go elsewhere in space? That will be the new enemies. Is this acceptance an act of folly or of unreasoned abandon? Perhaps. But also an act of existential decisiveness, of veritably taking one's destiny in one's hand, of following an intuition, an ideal, an aspiration.

The sequence is, well, history: an inevitable dynamic of doing first and thinking later.

For the generation of the Covenant itself, the revolutionary transformation and the challenge proved too much. There were even irredentist voices which called for a return to Egypt, to the pre-covenantal past. And later? That too is history. A constitutional covenant whose object and subject have survived millennia even though its evolving meaning is as hotly debated today as it was forty days from its acceptance, a sign of its vitality, but also a condition of its success. When the process of hearkening, of finding and renewing meaning, ends, so does the Covenant.

And Europe? There is a strange aspect to the current phase in the constitutional debate. It is not, surely, simply a discussion on codification, giving concise written form to the existing constitution the content of which is to be found, messily, in the Treaties and in a constitutional common law developed by the European Court and its Member State counterparts. The explanation, I would suggest, can take its cue from Exodus. Of Europe too it could be said that in response to the project of European integration, to the new constitutional order offered them, the metaphoric response was "We will do, and hearken." Let us be clear: the

"We" was the political class. The population at large was hardly committed. But they were, well, favorably indifferent (lack of commitment may be true also for the population at large at Mount Sinai who, as mentioned, were happily willing to turn to the Golden Calf on the first occasion). There was no deep-rooted debate about the Schuman Plan, about the Treaty of Paris or even the Treaty of Rome – and this despite their many radical, constitution-like features. There was no deep-rooted debate about the constitutionalization process, that remarkable judicial dialogue, or multilogue, between the European Court and its national counterparts.

That this should have happened is, in my view, no surprise. The Europe which emerges from *its* twelve-year slavery is in a traumatic situation in which old institutions and the old order are seriously called into question. The new European construct offers a vision which enables a reinterpretation of a painful past, and holds forth a promised land of prosperity and peace. Its discipline is sketchy, the full import of the new order yet to be worked out. Self-interest and a form of idealism, vision, and pragmatism combine in accepting the new order, and then in accepting the implications as worked out in jurisprudence and praxis. It was a spirit of "Let's do first and talk later," by a generation and its leadership whose personal experiences had instructed them that the alternative to the European dream was the recent European nightmare.

But the result is not, as suggested above, a European legal order of constitutionalism without a formal constitution, but the opposite: it is a constitutional legal order the constitutional theory of which has not been worked out, its long-term, transcendent values not sufficiently elaborated, its ontological elements misunderstood, its social rootedness and legitimacy highly contingent.

It is this understanding of the nature of the current constitutional moment which allows us to trace its trigger to Maastricht. At the popular level, Maastricht was a shock. Public opinion was more shocked to discover that which was already in place than that which was being proposed, and shocked the powers that be by registering defiance and skepticism. Maastricht and the subsequent debates, which, it is hoped, will endure, was the beginning of the first truly Europe-wide public constitutional "hearkening" of an act to which the peoples and Member States of Europe had already said, in one way or another, "We will do."

In many ways it is the very success of the project which explains the eruption of the debate. Europe is a transformed continent and polity. In part it is simply that the very conditions of prosperity and peace allow this debate. In part it is that the implications of the constitutional construct have been made far more visible. The constitutionalism of the Union, the sense

in which the Treaties are the constitutional charter of the polity, have always been described in primarily structural terms: supremacy, direct effect, implied powers, and the like. And indeed, in these structural terms, the Community resembles much more, is much more, a constitutional legal order than an international legal order. But constitutionalism is not merely about the means of government; it is also about the ends of government. The ends underlying the structural means of European constitutionalism, ends which seemed so obvious to the generation of the framers, have been neglected.

Finally, the very success of the Community has undermined its appeal, the need, for the construct. Reconciliation between France and Germany does not speak much to a post-covenantal generation. The debate about prosperity is about redistribution of which the Union message is ambiguous and, in any event, controversial.

My point is that the current constitutional debate is not simply about explicating the theory and values underlining the existing constitutional order, but of redefining its meaning for a new generation and a new epoch.

The overall structure of this book follows the Doing-Hearkening divide. The first part of the book is about the "Doing." It contains essays and articles which explain the structure and process of the European polity and its constitutional dimensions as well as the dynamics of the emergent European constitutionalism. It is about means. Chapter 2, "The transformation of Europe," is the overall vision of European constitutionalism and its evolution. Subsequent essays focus on specific dimensions – the courts, human rights, Europe, and the world.

The second part of the book addresses the "Hearkening." It is about ends. It explores the values of European integration. It explores the debate about ideals, legitimacy, and democracy in the European Union. It traces what may be described as neo-constitutionalism. I do not pretend to have provided definitive answers. But I hope the reader will find the questions I pose of some interest.