Introduction

In the time-scale of history, sixty years is very short. For centuries, ever since the Greeks and the Romans, since the Normans and the Germans, not to mention the British and the French, the peoples of Europe have constantly waged war on each other. During the last century alone, from 1914 until 1918 and from 1939 until 1945, merciless wars inflamed the European continent causing hatred and massive destruction, leaving its peoples bled white and prey to starvation.

What is the situation of Europe today, only sixty years on?

Europe is at peace. Europe is democratic. Europe is prosperous. War has become unthinkable among the peoples which have united within the European Union. The dense web of commercial, economic, political and legal links they have built between them are such that it is difficult to realise nowadays that the blitz on London, the flattening of Dresden and the occupation of Paris by the German army only took place around sixty years ago.

In simple terms, the present situation might be described as follows: the European Union (EU) has its own law-making institutions, including a Council composed of Ministers who are members of national governments of the Member States, and a directly elected European Parliament. The Council and the European Parliament share the power of co-deciding legislative, administrative and budgetary acts, which are proposed by the Commission. The Commission, which exercises the powers conferred on it by the Council for the implementation of Community law, also ensures that this law is applied and may take a Member State to court if it fails to fulfil its obligations. The European Parliament shares with the Council the power to approve the appointment of the President of the Commission and of the Commission as a whole; the Parliament also has the power to remove the Commission from office. The 'laws' (regulations and directives) adopted by these institutions within the fields of power of the European Community (EC)

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are superior to the laws of the Member States and may have direct effect on the citizens. The Union has a single market and manages a single currency and monetary union for a number of its Member States. There are a number of fields for which the Member States have lost power to adopt legislation or to negotiate international agreements. There are other fields where laws or treaties can be imposed on the Member States and which they are obliged to implement, or else be faced with having to make lump sum or penalty payments, as well as paying compensation to adversely affected people. The European Court of Justice has the power to rule on disputes between the institutions, between institutions and Member States about the extent of their respective powers, and on the rights and obligations of Member States and citizens under European law.

How did that happen in such a short period of time? and how did this fabulous adventure begin?

Immediately after World War II, the old dreams of a reconciled, if not united, Europe began to take a concrete shape in the economic and political fields. On the economic side, financial help from the United States, symbolised by the speech of General Marshall on 5 June 1947, was followed by the establishment of the Organisation for European Economic Cooperation (OEEC, which became OECD[1] in 1961) at the Hague Congress in 1948. This was quickly followed, on the political side, by the establishment of the Council of Europe and the signature of the European Convention on Human Rights respectively in 1949 and 1950. On the military side, the Western European Union (WEU) and the North Atlantic Treaty Organisation (NATO) were established respectively in 1948 and 1949.[2]

At the same time, following the speech of the French Foreign Minister Robert Schuman on 9 May 1950, efforts began to build a smaller but more integrated Europe, around France and Germany. This attempt relied on powerful institutions and using the so-called 'Monnet method' of progressive building up 'through practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development'.[3] The European Coal and

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[1] OECD : Organisation for Economic Cooperation and Development.

[2] A Treaty establishing the European Community of Defence was signed in May 1952, but it was rejected by the French Parliament in 1954.

[3] Quoted from the third paragraph of the Preamble to the Coal and Steel Treaty.

The founding Member States and the successive enlargements

1952
Belgium
France
Germany
Italy
Luxembourg
Netherlands

1981
Greece

1995
Austria
Finland
Sweden

1973
Denmark
Ireland
UK

1986
Portugal
Spain

2004
Cyprus
Czech Republic
Estonia
Hungary
Latvia
Lithuania
Malta
Poland
Slovakia
Slovenia

Figure 0.1. The founding Member States and the successive enlargements.

Steel Community was launched by its six founding States in 1951 and entered into force in July 1952 (it lapsed on 23 July 2002). Then followed the Conference of Messina in June 1955 after which the Treaty establishing the European Economic Community was signed in Rome on 25 March 1957 and entered into force on 14 January 1958.[4]

That was the real start of the historic adventure which led to the establishment of the European Union. Since then, the original Treaty of Rome has been modified several times and the six founding States have admitted among them, in successive 'enlargements', 19 other European countries (see figure 0.1). The enlargement process reached its culmination on 1 May 2004, with the accession of ten new countries, including eight former communist countries from the other side of the Iron Curtain, which had divided the European continent since the end of World War II.

The different treaties establishing the European Community and the Union (see box 0.1) were the first ones in European history where the issues at stake were not about delimiting borders between States or to establish the power of one State over another. Their aim was to multiply

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[4] Together with the Treaty establishing the European Atomic Energy Community, known as 'Euratom'.

and strengthen the links between European countries in order to prevent war and to help them to entrench democracy, to respect human rights and to ensure prosperity and security for their peoples.

Box 0.1   The main amending Treaties

The Single European Act (signed on 17 Feb. and 28 Feb. 1986)

This Treaty, which entered into force on 1 July 1987, gave a decisive impulse for the completion of the Internal Market with a deadline (1992) and the means to achieve it through the possibility for the Council to adopt by qualified majority the legal texts establishing the internal market.

The Treaty establishing the European Union (EU) (signed on 7 Feb. 1992)

Also known as the 'Maastricht Treaty', it added two 'pillars' to the Community pillar, i.e. the pillar on the Common Foreign and Security Policy and the pillar on Justice and Home Affairs. It also created a single currency, the euro, and provided for a timetable for its establishment. Following a narrow 'Yes' vote in France and a 'No' vote in Denmark, later on reversed by a 'Yes' vote, the EU Treaty entered into force on 1 November 1993.

The Amsterdam Treaty (signed on 2 Oct. 1997)

This Treaty entered into force on 1 May 1999. It 'communitarised', i.e. submitted to ordinary Community rules, parts of the Justice and Home Affairs chapter of the Treaty on European Union (the chapter on visas, asylum, immigration and civil judicial cooperation) and integrated into the EC Treaty the so-called 'Schengen *acquis*', on the removal of controls of persons at internal borders, which had been developed by certain Member States outside the Treaties. It created the office of High Representative for the Common Foreign and Security Policy.

The Nice Treaty (signed on 26 Feb. 2001)

The main purpose of this Treaty was to adapt the institutions to the enlargement to ten new Member States by adapting the size of the Commission and the weighting of votes in the Council. This Treaty entered into force on 1 February 2003, following hurdles in the ratification process in Ireland.

I

Is the Constitution for Europe 'dead and buried'?

In 2004, on the basis of the numerous Treaties which had built the EU over the years, the Heads of State or Government of the 25 States members of the European Union decided to take yet another step, through adopting a 'Constitution for Europe'. On 29 October 2004, in Rome, in the very room where the original 1957 Rome Treaty was signed, 25 European Heads of State or Government solemnly signed the 'Treaty establishing a Constitution for Europe' on which they had reached a political agreement on 18 June 2004.[1]

This Treaty, they declared, '*completes* the process which began when the Treaty of Rome established the basic framework for European integration' and 'like the Treaty of Rome, it will serve for many years as the foundation of a Union at the service of its citizens'.[2]

This ambiguous formula contains, in a nutshell, two different interpretations which could be given of this new Treaty.

According to the first interpretation, this formula means that the Constitution would finally mark the end of European integration: it declares it completed, so that it will not go any further. This explains the reason for the deletion of the famous first paragraph of the preamble to the original Rome Treaty about laying 'the foundations of an ever closer union among the peoples of Europe', which was repeated by the Maastricht Treaty in Article 1 of the EU Treaty.

According to the second interpretation, this formula shows that the Constitution would be yet another step in the ever deeper European

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[1] The Constitution text, as signed on 29 October 2004, has been published in the Official Journal of the European Union, OJ 2004 No. C310, 16 December 2004 (accessible from the internet site 'europa', http://europa.eu.int/constitution/index_eu.htm).

[2] See the Conclusions of the Presidency of the European Council, Brussels, 17 and 18 June 2004, doc. 10679/04 ADD 1. All Presidency Conclusions since 1998 may be found on the internet site of the Council: http://ue.eu.int, under 'documents' and 'European Council'. The verb 'completes' is emphasised by the author.

integration, sowing the seeds for further integration. This latter interpretation is supported by the express mentioning in the Constitution of symbols usually associated with a State, such as a flag, an anthem, a motto and a 'Europe day', the names 'Union Minister for Foreign Affairs' and 'European law' and, above all, the name 'Constitution for Europe' which would be given to the new Treaty on European Union (see box 1.1).

Box 1.1   Article I-8 of the Constitution reads:

'The symbols of the Union

The flag of the Union shall be a circle of twelve golden stars on a blue background.

The anthem of the Union shall be based on the "Ode to Joy" from the Ninth Symphony by Ludwig van Beethoven.

The motto of the Union shall be: "United in diversity".

The currency of the Union shall be the euro.

Europe day shall be celebrated on 9 May throughout the Union.'

Would these symbols allow for a sort of 'creative utopia' and prepare the minds of the peoples for something more integrated to come later? Or would they remain a sort of 'compensation gift' conceded to the Euro-enthusiasts for not having made in the Constitution the great leap forward the latter would have liked, or even a kind of apology for the 'stop' to further integration which might be contained in this Constitution?

On the one hand, some Euro-enthusiasts claim to be disappointed that the new Treaty does not deliver on its promises because the actual content of the so-called 'Constitution' does not correspond to the grandeur of its name. On the other hand, the Euro-sceptics denounce the symbols which have been retained as an alleged proof of yet another undemocratic plot towards the creeping transformation of the EU into a State.

From the outset, some people feared that the choice ('the fatal choice' according to the journalist Christine Ockrent) of such a heavily loaded symbol as the name 'Constitution'[3] for this new European basic Treaty would run the double risk of triggering hopes and illusions on the part of the Euro-enthusiasts, followed by disillusion and disappointment, while

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[3] On the issue of the name 'Constitution' and its use for an EU Treaty, see my article 'Does the European Union have a Constitution? Does it need one?' (1999) 6 *European Law Review* 557–585.

at the same time provoking concern and criticism on the part of the Euro-sceptics. Added to each other, it was considered by some that these negative reactions could imperil the very ratification of the Treaty, particularly in the Member States which had decided to submit the authorisation to ratify it to a popular referendum.

Therefore, one might think that instead of clarifying the debate on Europe for the citizens,[4] the choice of the name 'Constitution for Europe' has confused the elements of the choice given to the voters in the referenda: did they have to vote for a strengthening of the EU as it is or for an EU radically transformed into a new project? Strong efforts of explanation had to be made on the part of national governments and political parties to clarify the debate. Obviously, these efforts have not been sufficient. Both in France and in the Netherlands, the referenda gave a clear result against the ratification of the Constitution. For a lot of commentators, the story finishes here: the Constitution is 'dead and buried'.

Section 1: The ratification process of the Constitution

Article IV-447 of the Constitution sets out the legal requirements for the Constitution's entry into force:

> This Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements . . . [it] shall enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the second month following the deposit of the instrument of ratification by the last signatory State to take this step.

This is, as it ought to be, in accordance with Article 48 of the EU Treaty: a modification (and, thus, a repeal) of the EU Treaty may only enter into force if approved by all the Member States' Governments and ratified by all Member States according to their constitutional requirements.

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[4] See the European Parliament's Resolution on the Constitution: 'Welcomes the fact that the Constitution provides citizens with more clarity as to the Union's nature and objectives and as to the relations between the Union and the member States, notably because: . . . (i) it provides guarantees that the Union will never be a centralised all-powerful "superstate" . . . (j) the inclusion of the symbols of the Union in the Constitution will improve the awareness of the Union's institutions and their action.' (doc. A6-9999/2004, 9 December 2004).

Therefore, legally, the rule is quite straightforward: if a State fails to ratify the Constitution, it will not enter into force.[5]

Of the Governments of the 25 Member States which signed on 29 October 2004, in Rome, the draft Treaty establishing a Constitution for Europe, about 15 have decided to request the authorisation to ratify the Treaty from their national Parliaments. At the time of writing (September 2005), 11 of them had obtained this authorisation: Lithuania (11 November 2004), Hungary (20 December 2004), Slovenia (1 February 2005), Italy (6 April 2005), Greece (20 April 2005), Slovakia[6] (11 May 2005), Austria (25 May 2005), Germany (27 May 2005), Latvia (2 June 2005), Cyprus (30 June 2005) and Malta (6 July 2005). In Belgium, the two Chambers of the Federal Parliament approved the Treaty in April and May 2005, as well as most of the regional and community Parliaments, but the process still had to be completed in one of the regional Parliaments. Estonia is due to submit the Treaty to its Parliament in the autumn of 2005. Finland and Sweden have announced that they would postpone their parliamentary ratification.

About ten Governments decided instead, for constitutional or for political reasons, to organise a national referendum in order to allow their people to decide directly on the ratification of the Treaty. That was the case in Denmark, Ireland, Luxembourg, France, the Netherlands, Spain, Poland, Portugal and the UK, the Czech Republic not yet having decided whether it would proceed through a referendum or through parliament. At the time of writing (September 2005), four Member States have proceeded with a popular vote; two said 'Yes' and two said 'No':

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[5] Right after the end of the negotiations on the Constitution, speculation quickly started on what would happen in case of non-ratification by one or several Member States. See, among others: B. de Witte 'The Process of Ratification and the Crisis Options: A Legal Perspective' in *The EU Constitution: The Best Way Forward?*, Asser Institute Colloquium on European Law, The Hague, 13–16 October 2004; L. S. Rossi 'What If the Constitutional Treaty Is Not Ratified?' (30 June 2004) *EPC Commentary*; L. S. Rossi, 'En cas de non-ratification . . . Le destin périlleux de ce Traité-Constitution' (2004) 4 *Revue trimestrielle de droit européen* 621–637; C. Grant, *What Happens if Britain Votes No? Ten Ways Out of a European Constitutional Crisis* (Centre for European Reform, March 2005); J. Shaw 'Failure to Ratify the Constitutional Treaty: What Next?' in Ingolf Pernice/Jiří Zemánek (eds.), *A Constitution for Europe: The IGC, the Ratification Process and Beyond* (Nomos Verlag, Baden-Baden, 2005, European Constitutional Law Network-Series, Bd. 5).

[6] In July 2005, the Supreme Court of Slovakia suspended the process, pending judgement of an application claiming that it is legally necessary for the ratification to be through a referendum.

- the first referendum took place in Spain on 20 February 2005, where the Treaty was approved by a very high majority of 76.7%, with a relatively low turnout of 42.3%;
- the second referendum took place in France on 29 May 2005, where the French people rejected the ratification of the Treaty by a clear majority of 54.87%, with a high turnout of 69.3%;
- the third referendum took place three days later in the Netherlands, on 1 June 2005, and the Treaty was again rejected by an even clearer majority of 61.6%, with a high turnout of 62.8%;
- the fourth referendum took place in Luxembourg on 10 July 2005 where the Treaty was approved by a clear majority of 56.52% and a very high turnout of 86.8% (voting is compulsory in Luxembourg).

The referendum was legally binding in France. In the Netherlands, where it was the first ever nationwide referendum in modern times, it was consultative, but the major political parties had agreed that a turnout rate above 30% would be considered as producing a result that the Parliament would agree to follow. The results of the French and Dutch referenda were considered as a political earthquake in Europe.

Section 2: Analysis of the negative referenda in France and in the Netherlands

Following those two 'No' votes, taking into account the legal rule according to which a single failure to ratify is enough to prevent the Constitutional Treaty from entering into force, many observers concluded that the Treaty would never enter into force.

The British press declared the Treaty 'dead and buried' (*Guardian*, 4 June 2005).[7] The British Government decided immediately to postpone the ratification procedure which had to begin in the British Parliament before the referendum.

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[7] The difference between the quasi-unanimous jubilation of the British press and the quasi-unanimous sadness of the French press was striking: Martin Wolf wrote: 'The French and the Dutch have demolished the road to "ever closer Union". . . Perfidious Albion wins again . . . The French (and Dutch) have answered the UK's European question : vive la France', *Financial Times*, 3 June 2005. Less serious British newspapers went as far as celebrating the end of European integration.

By contrast, the French press was on a very sad note: Serge July wrote: '. . . un désastre général et une épidémie de populisme qui emportait tout sur leur passage, la construction européenne, l'élargissement, les élites, la régulation du libéralisme, le réformisme, l'internationalisme, même la générosité' (a general disaster and an epidemic

Is that final? Should we indeed consider the Constitutional Treaty as being dead and forget about it? On the face of it, in principle, yes: for the time being, it is, at least, frozen. However, both French and Dutch political authorities, after the referenda, have called on the other Member States to continue the ratification process. Moreover, this was unanimously confirmed by the 25 Heads of State or Government at their meeting in Brussels on 16 and 17 June 2005: despite media pressure to issue the Constitution with a death certificate, and despite the difficulties some of them face in the ratification process, they have decided, in their wisdom, that this process should effectively continue, albeit with an adjusted timeframe. This means that all Member States remain committed, at the highest level, to the ratification process in the terms of the conclusions of 17 June 2005.

Therefore, things are not as simple as they might appear at first sight. If the ratification process is still going on, how could one affirm that the Constitutional Treaty must be forgotten?[8]

In order to try and determine what could be the political consequences of the two failed referenda for the fate of the Constitutional Treaty and for the future of European integration, two questions deserve to be raised:

1. Were these results a political surprise, representing a brutal reversal of the opinions of the Dutch and French people as regards European integration, as might appear at first glance?
2. Should these results be interpreted as a refusal, by two founding Member States, of the continuation of European integration?

In order to try and answer the first question, one may take into account several elements, among which the evolution of the turnout in

of populism which wiped out everything in its path, European integration, enlargement, elites, the regulation of liberalism, reformism, internationalism, even generosity), *Libération*, 30 May 2005; the cover page of *L'Express* read: 'Chirac défait, la gauche éclatée, la France isolée, l'Europe en crise' (Chirac defeated, the left blown up, France isolated, Europe in crisis) (no. 2813, 30 May to 5 June 2005); the cover page of *Le Nouvel observateur* read: 'Etat de choc, le pouvoir rejeté, les élites désavouées, l'Europe sanctionnée' (state of shock, the governing power rejected, the elites disavowed, Europe punished) (no. 2117, 2 to 8 June 2005) and the title of the editorial of *Le Point* read: 'L'Europe en berne et la France au piquet' (Europe at half-mast and France in the corner) (no. 1707, 2 June 2005).

[8] One might think about Mark Twain: when an obituary of him was published while he was still alive, he is reported to have cabled the press to say that reports of his death had been greatly exaggerated.