

EDITORIAL COMMENTS

What now?

The future of the European Constitution is seriously endangered by the negative result of the referendums in France and the Netherlands. Whatever the no-voters in France may have been saying beforehand, it appears clear today that there was not in fact a plan B in the cupboard in Brussels, all ready to be implemented. The search for some kind of answer, including unanimous ratification, will take a long time. Admittedly, the ingenuity of lawyers knows no bounds, but the fact is that the legal data constitute just one small element of a solution to the problem confronting the Union. When the Member States signed the Treaty establishing a Constitution for Europe, they committed themselves to put it to the ratification procedure, and the statement that the European Council would examine the situation when more than four-fifths of the Member States have ratified reinforces this obligation. However, the Member States remain in charge of the timetable for ratifications and nothing prevents them from coming back on their commitment, by mutual agreement. At the European Council of June 2005, they agreed to give the ratification process more time in order to allow reflection and debate, each Member State proceeding at its own pace. Indeed, even if the countries that fail to ratify are founding Member States, this status does not confer on them a specific right, and certainly not that of stopping the ongoing process in the other Member States. In any event, the “no” from France and the Netherlands constitutes a fundamental political fact, and before seeking a way out of the crisis, it is advisable to take the time to subject both no-votes to analysis.

The reasons for the negative votes may be so contradictory and the results are so much the sum of a variety of preoccupations, that it is difficult to get a clear view of the situation. The national contexts certainly played a major role in the rejection of the Constitution, but it is typical of the referendum procedure that it produces ambiguous replies to clear questions, and muddies any distinction between the question raised and the general context in which it is situated. Even so, at this stage it is possible to distinguish some analytical elements, at least as far as the Constitution is concerned. The French and Netherlands results, however different the explanations may be, probably reflect concerns common to all the citizens of the Union. The Heads of State and Government are well aware of this – as is demonstrated by the postponement of further consultation of the people, except in Luxembourg, where the

political community was brave enough to carry on with the process in the hope of perhaps reversing the course of affairs.

Reasons for the rejection

With regard to the text of the Constitution itself, France was the only country where critical analysis of the text gave rise to passionate debates, and here the criticisms primarily concerned Part III, i.e. the part containing provisions from previous treaties. The impression one gets is that, disregarding the usual proportion of *souverainistes*,¹ voters were not rejecting the proposed reforms, but were in fact rejecting the rules currently governing the European Community. Moreover, many no-voters in France admitted that they would have accepted a Constitution which had not contained Part III. Complaints about Parts I and II were marginal and often based on misunderstandings. It was claimed that the text subordinated the defence policy of the Union to that of NATO, whereas Article I-41(7) CT merely reflects the fact that Member States, including France itself, have undertaken commitments within NATO which the Constitution may not prejudice.

The question of the composition of the Commission gave rise to some discussion, but did not seem essential. On the other hand, the Charter for Fundamental Rights was accused in France of being “minimalist” in character, the principal criticisms relating to secularity – “*la laïcité*” – and the right to abortion. This situation is the result of an obstinate misunderstanding, with a technical answer. The Charter was never intended to replace the national declarations of fundamental rights, and it applies only in the field of Union law. Abortion does not fall within the competence of the Union and a possible conflict on this point between the law of the Member States and Union legislation is extremely hypothetical. Moreover, the Charter cannot be interpreted as prohibiting abortion – which is governed by the right to respect of private life as much as the right to life. A competence of the Union as regards religious freedom is equally lacking; Article I-5 CT, which guarantees the respect of the fundamental political and constitutional structures of the Member States constitutes a barrier to any intervention in this field by the Union. In both cases, provisions of the European Convention on Human Rights are involved; these provisions have been interpreted by the European Court of Human Rights without either voluntary termination of pregnancy or *laïcité* being condemned. At all events, these discussions witness a failure to understand the nature of the Union. If the French wish to preserve in their internal order the possibility of abortion and *laïcité*, their only concern

1. Those who are opposed to any transfer of sovereignty to a federal structure.

should be that the law of the Union does not compromise these rights. On the other hand, there should not be any question of imposing on all the other Member States, in fields which are not covered by the competences of the Union, rights which are foreign to their national traditions. The same debate occurs in connection with the so-called French “social model”. If it is legitimate to wish that the Union should not affect certain national values, what right could there be to impose them on all Europe? According to the motto of the Union, the construction of European unity has to take place while respecting diversity.

The question of Part III is more delicate. This Part contains a number of provisions from the current treaties, with slight improvements. In the present circumstances, was it necessary to make these an explicit part of the Constitution? The Convention discussed this point at length. Excluding this part from the Constitution would have invited the reproach that there was an attempt to hide the most important parts of primary Union law from public opinion. Including it, led to debate on the “*acquis communautaire*” itself, and the debate was amplified by the fact that this *acquis* was being “constitutionalized”, which did not change anything in legal terms but had great symbolic importance. Indeed, the main criticism of this Part was that policies were being constitutionalized, whereas a constitution should limit itself to setting principles and an institutional framework, leaving the determination of policy to the legislature. In fact, this vision reflects a major incomprehension of the nature of Part III, an incomprehension which is unfortunately justified by the title it has retained (“The policies and functioning of the Union”). Part III is not so much about policies, as about competences. Member States could not simply allocate competences to the Union in the broad definitions of Title III of Part I. It is not sufficient to say that the Union has a shared competence in social matters: it is essential to define both the contours of this competence and the methods of its exercise. Anything else would deprive the national competences of all content. Thus, Part III does not determine the contents of policies, but fixes their contours. People who are not very familiar with the constraints of a federal State, however, have great difficulty in grasping these nuances.

Another barrier to understanding the Constitution results from the fact that Part III was mostly drafted in 1957. Since then, both practice and case law have brought further interpretation of its terms. However, in the context of a referendum, the voter reads the text proposed in total ignorance of the meaning these provisions may have acquired after more than forty years of practice. This leads to misconceptions, which may be exploited by politicians in good faith or bad faith. Take the debate on free and undistorted competition, with regard to which the impression was given that it granted compa-

nies total freedom and that it subjected public services to the law of the market, whereas in this field Community action has all been directed to *regulating* the market. Unfortunately, any attempt to express this requires difficult technical explanations, which do not fit well in an electoral debate but make the person providing the explanations sound like a pedant hiding his insincerity behind incomprehensible explanations.

The failure to meet the wishes of the citizens

These technical explanations hide a deeper problem. Those in favour of the Constitution were unable to mobilize the electorate on its positive aspects, because they could not point out its virtues. The ratification of the Maastricht Treaty may have been difficult, but at least that Treaty carried with it a strong idea: the single currency. There is nothing like that in the Constitution, whose innovative elements concern institutional reform and the inclusion of the Charter of Fundamental Rights. An idea can be seductive, but it's hard to fall in love with a Constitution. Where were the ideas which might have gained the support of citizens who are not particularly interested in institutional mechanisms?

The referendums reveal that the essential question for citizens was that of security in the broad sense.² On previous occasions, the contribution of Europe to security may have appeared obvious, but today the horizon is clouded. Just after the war, European integration seemed to represent the guarantee for reconciliation between the former belligerents and therefore for peace in Western Europe. Similarly, during the cold war, the Community ensured the solidarity of European democracies. At the economic level, the

2. The Eurobarometer of 30 and 31 May on the motives of the French voters show that for the "no" voters the essential reasons were: the risks of negative effects on the employment situation and relocation (31%), the economic situation in France (26%), the too liberal character of the text (16%), opposition to the government (16%). Hostility towards Europe appears in only 4% of the answers and the rejection of a political Union in 2%. In an identical survey carried out in the Netherlands, the main motive for the "no" voters was the absence of information (32%), followed by the fear of the loss of national sovereignty (19%), opposition to the national government (14%) and the cost of Europe (13%). It is clear that, in that country, an active election campaign by the supporters of a "yes" would have significantly contributed to modifying attitudes. What is also striking is that when one asks the Dutch what they expect from renegotiation, 65% of them answer "a more social Europe", which tends to meet with French concerns. These figures show clearly that it is the feeling of economic and social insecurity which was decisive, and not opposition to European integration. Moreover, 83% and 78% of the "no" voters in France and in the Netherlands respectively declare themselves in favour of European integration and in favour of their country's membership of the Union (*Flash Eurobarometer* 171 and 172, June 2005)

establishment of the internal market, accompanied by tariff protection, gave hope for the creation of an area of prosperity. For current generations, the memory of the second world war has faded away, the Soviet Union only exists in history books, and tariff protection has disappeared in the labyrinths of the WTO. The positive aspect of the *acquis* of European integration for citizens (free movement of persons and of goods, Erasmus programme, etc.) is forgotten and no one would think of crediting Europe with these remarkable achievements.³ People do not think twice about crossing the borders of a Member State without identity checks or customs control or any control of amounts of money transported. On the other hand, the current difficulties due to globalization or immigration *are* attributed to the European Union. It is quite unfair, but it is a by-product of a triumphant Europe which claimed that it could solve all problems. Thus, there is a price to pay for a process like that of Lisbon or the open method of coordination; these contributed to making people believe that the Union could bring growth and competitiveness, but really they are a mixture of measures at Community level and others intended to operate in the areas of national competence. In the absence of a clear identification of the different responsibilities, the failure was laid only at the door of the European Union. It would have been preferable when communicating with the public at large to define clearly the responsibilities of each party, and not to claim the responsibility of the whole for Europe, while in fact it only controlled part of the policies. Within the framework of its current competences, the Union cannot stamp out unemployment, but only ensure that the measures taken at its level constitute a framework supporting full employment; as far as the Union's task was concerned, it usually did its share of legislative work.⁴

Basically, the rejection of the Constitution expresses feelings of insecurity and impotence of the Union and the Member States *vis-à-vis* the challenges of today's world. The Union seems a vague concept with indefinite geographical borders. The rapid pace of enlargement gives the impression that

3. One should not be surprised. It may be regrettable that historical memory is so short, but would it occur to anyone today to credit his or her State, at an election, with the abolition of feudal privileges or slavery, or the recognition of religious freedom?

4. Where it was not able to do so, this was usually due to the opposition of one or two Member States. E.g., it had been decided that the creation of a Community patent would be a means of encouraging competitiveness. However the file is blocked due to two States which require that their language be used during the procedures, which would make the cost of the patent prohibitive, owing to the problems of translation into more than 20 languages.

the Union is in perpetual motion without a fixed term of reference, and therefore without an identity. Past and future enlargements are carried out without sufficient possibilities for the involvement of citizens. In the absence of a real public debate on enlargement, which would have made it possible to analyse the advantages and costs, a fear developed that enlargement caused unemployment and relocation, or that the new Member States would be gateways to illegal immigration – even though such a fear was sometimes the complete opposite of economic reality. In view of the difficulties encountered at the national level, it is scarcely surprising that voters grasped the opportunity to express their feelings not on the Constitution, but on the difficulties they attribute to enlargement. The services Directive promoted by Commissioner Bolkestein – and the remarks made in this context about Polish plumbers – set off a latent xenophobic reaction in France against these nationals of the new Member States, who it was claimed were going to profit from “social dumping” to threaten the employment of French citizens; in fact, since the country of origin rule only covers the provision of services, the extent to which a plumber comes to Paris from Warsaw to repair a leak may be rather limited. The crisis about Chinese textile imports gave the impression that the Union was a completely open economic whole without any possibility of protective measures. In this respect it is regrettable that the Union took some time to transmit a message designed to reassure producers, while the United States confronted with the same problem had already reacted, at least in words, with extreme firmness. The subject of relocations has caught public opinion, whereas these are actually very limited in the European internal area. But, above all, the French have blamed Europe for the absence of growth and employment, while the instruments designed to solve these questions fall first and foremost within the national competence, and any observer can note that, within Europe, results vary significantly depending on policies followed by the Member States.

These elements show that the solution to the crisis cannot be found primarily in the current text or an amended text of the Constitution. That also means it is not necessary to give up the whole operation, but before any further constitutional debate, confidence in the Union must be restored. It is easier said than done, but perhaps a more modest approach should be taken and we should refrain from giving the impression that the Union is the answer to all ills. The division of responsibilities between what falls within the competence of the Union and what belongs to the Member States must be explained relentlessly. This concerns primarily the responsibility of the national governments, but some simple measures could contribute to making the Union more transparent. Without making the debates within the Central Bank public, is it possible to hope that it escapes from its current autism and

communicates more frequently with the public, like its American counterpart? There is nothing in the treaties to forbid making the legislative debates of the Council public. Why not do so as of now? Such a measure would certainly contribute to more transparency, but it would also force the governments to assume their responsibilities towards their citizens without always blaming an anonymous Brussels bureaucracy for the measures that they supported within the Council. And, wouldn't it be possible to try and restore confidence where it has been lost, by following a policy which meets citizens' expectations. A clear but determined common policy in the field of immigration would show that the Union can tackle this question with a common effort, without disavowing its humanistic traditions. A redefinition of objectives with a view to supporting growth and a clear explanation of the position of the Union within the WTO in the framework of the current negotiation would reassure the Europeans on their economic security. Could one not point out what the Europeans owe to the Union as regards the environment? Not only would national policies hardly have progressed without the Union, but also it is the only body to persevere in implementing a policy to combat climate change. An acceleration in implementing major rail or road trans-European networks would confront citizens with concrete positive achievements. Finally, should one continue deciding on future enlargements at intergovernmental level, or would it be more appropriate to associate citizens with the debate on the borders of Europe – a debate moreover which is inseparable from that on common values? There are myriad methods, but the aim is simple. Listen to European citizens, explain policies, and establish security. For this, it is a question of improving practices before changing texts.

One of the positive results of the “no” vote is that citizens have entered the arena of European politics. It is to be hoped that they will remain there. If so, during national elections, the European debate will form part of the national debate. And if this is the case, then new Heads of State or of government who take their seat in the European Council in a couple of years' time will have received a mandate from their voters, and the constitutional debate can be resumed. The crisis affecting the Union today is regrettable, but it would be wrong not to grasp it as an instrument of progress and use it in constructing a Union adapted to its times.