Three approaches to the Draft Treaty establishing a Constitution for Europe

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INTRODUCTION

Theories on integration have always gone with the praxis of integration. Although not automatically and completely, nor with chronological precision the process of integration has been accompanied by a theorisation process in spite of the pragmatism which has guided the construction of Europe.

Europe is now facing the approval, amendment or rejection of the "Draft Treaty establishing a Constitution for Europe" (18 July 2003). This legal-political construct looks to create a closer union than has existed to date between the citizens and States of Europe. We are witnessing a legal-political debate that will go on even after a Constitution for Europe or a European Constitution has been formally approved through a treaty. Integration will also continue without this implying, nevertheless, that the idea of integration has no bounds, in the sense of the more the better. Like almost everything in the social, political or legal realm, integration is a search for an ever changing balance which requires renewal. The ideational construct which is reflection, above all as theory, must interact with the praxis construct of integration.

This paper is a partial previous view -- three approaches--of another broader examination currently taking place on the Draft from nine theoretical approaches, which will be empirically contrasted from it.

1. A TRANSFORMATIVE SPILL-OVER PROCESS

Schmitter has recently defended the position that neo-functionalism is also worthy of consideration today, although with some adjustments.[1] The main points are still valuable: 1) conflictive growth, even with contradictions; 2) the action of community institutions and socio-economic groups, without this implying the exclusion of member States; 3) spill-over to new responsibilities to be able to fulfil the prior ones; 4) a drive towards political integration. However, forty five years after Haas's first formulation, we must recognise that functional interdependence was delayed, difficult and uneven.

[1] On functionalism, neo-functionalism and their revisions, see Nicolás MARISCAL, *Teorías Políticas de la Integración Europea*, Tecnos, Madrid, 2003, pp. 26-28 and 127-179.

The theory placed too much emphasis on the Commission and paid little attention to the European Court of Justice and the European Council, little importance was given to the international context and there was no consideration for enlargement to include new States. In addition, the incorrect valuation of politicization proved to be more against than in favour of integration.

Neo-neo-functionalism is epistemologistically situated in gradual processes--not in great events-- and is ontologically situated in transformative processes-- not in reproductive ones: "... transformative, that is to say, they specify conditions under which the identity of actors and their relationships change in the course of the integration process".[2] The direction of the change goes from the national to the supranational level, but does not occur automatically or simply but requires a considerable amount of political action; national actors after having evaluated the scope and level of regional institutions (supranational) "under certain conditions, will prefer to resolve these crises by expanding their mutual obligations ('spill-over'), rather than contracting or just reasserting them".[3] This is not an uninterrupted or linear process but of series of decision making cycles caused by crises.[4] Neo-neo-functionalism formulates relevant macro-hypotheses that can potentially be falsified for every decision cycle:[5] hypothesis of spill-over, natural entropy, politicization, widening the audience or clientele only in exceptional circumstances, increasing mutual determination, externalization, additivity, what we could call the indigestion hypothesis and the hypothesis of curvilinearlity.

Although exercising great caution, Schmitter expresses the intuition that European integration at the beginning of the twenty first century, with the 2002-2003 Convention, could be entering a new cycle, "a transforming cycle".[6] The transformative nature would be determined by the long term definition of its political purpose (*finalité politique*) and since the European Union (EU) would be--if this were true-- the only case entering an integration process in such a cycle, at the moment, one could only guess what and how it would occur.

The prolific rich proposals formulated by neo-neo-functionalism would call for time to pass and a great deal of work to contrast them and draw up the final versions. For the time being, and with a much more modest approach, I suggest three keys to the neo and neo-neo-functionalist interpretation of the Draft Treaty establishing a Constitution for Europe: a) the processes; b) the spill-overs; and c) a transformative cycle?

a) The processes

Process refers to a series of events linked by causality and/or finality, which is conceptualised as a whole and expresses the change. What is selected as a process mainly depends on the observer, or the analyst. In my opinion, it may be useful to point out three processes in European integration which lasted for different lengths of time

[2]Philippe C. SCHMITTER, "Neo-neo-functionalism" , manuscript to be published in WEINER, Antje and DIEZ, Thomas (eds.), *European Integration Theory* , Oxford University Press, Oxford, 2003, [p. 20].
[3]*Ibid*., p. [21].
[4]See previous formulations by Schmitter himself on these points in Nicolás MARISCAL, *op. cit*., pp. 28 and 170-172.
[5]Philippe C. SCHMITTER, *op. cit*., p. [22ss].
[6]*Ibid*, p. [26].

and could be delimited as: 1948-2004; 1986-2004; and 2000-2004. They do not appear as such in the European Draft Constitutional Treaty, but are essential contexts for its interpretation by political scientists. The first, 1948-2004 covers the entire history of European integration, from the preceding cooperation organisations to the European Communities and the European Union. The second period starts with the relaunch of the integration set down in the Single European Act of 1986 and continues until the present marked by a sequence of events: "The White Book" on the internal market, the Delors Commission, the reaction of big industrial groups, the Single European Act, more structural funds and the creation of cohesion, the single market, the European Union of Maastricht, the euro, the European agreements for enlargement, the Treaties of Amsterdam and Nice, the Charter of Fundamental Rights**,** etc. The third process began with the German Minister of Foreign Affairs, Joschka Fischer's speech at the University of Humboldt in Berlin. It continues to develop in a contradictory manner with the euro, the Treaty of Nice, the Charter of Fundamental Rights, the Giscard d'Estaing Convention, the Intergovernmental Conference at the end of 2003 and the enlargement to ten new member States and, without having been completed, it aims toward a European Constitution in 2004. All of these factors are underlying in the Preamble to the Draft, which is permeated by a sense of process and progress. None of these processes-- finally the growth of integration--has been linear or simple.

b) The spill-overs

Coal and iron were the first industries to integrate after 1951. The following attempts in the fields of defence and policy were premature and failed. Atomic energy and the Common Market, which included the fields of agriculture, transport and common trade policy-- in addition to touching other areas--successfully followed after 1957. The implementation and development of these sectors or scopes were to demand and would go with new actions and policies, which would provisionally be based on the flexible article 235 of the European Economic Community (EEC) Treaty firstly and the European Community (EC) Treaty later. After Amsterdam, this was to become article 308 EC. The Single European Act (1986) and the Treaties of Maastricht (1992), Amsterdam (1997) and Nice (2001) included a greater number of sectors and fields affected by integration and European regulations. Part III of the present Draft Treaty establishing a Constitution for Europe, deals with *the policies and functioning of the Union*-- in a very broad manner, sometimes perhaps to an exaggerated degree. Three broad general scopes are included under the name of *internal policies and action*: the internal market, economic and monetary policy, and the area of freedom, security and justice, to which another ten specific policies are added: employment, social policy, economic, social and territorial cohesion, agriculture and fishing, the environment, consumer protection, transport, trans-European networks, technological research and development and space and lastly, energy. Six areas in which the European Union can decide to take action to coordinate, complement or support are also envisaged: public health; industry; culture; education, professional training, youth and sport; civil protection; and administrative cooperation. Common foreign and security policy (CFSP), which includes common security and defence policy (CSDP), common commercial policy and cooperation with third countries and humanitarian aid are presented under the name of *the Union's external actions*. Lastly, we must not forget a specific treaty for atomic energy which is still in effect. This incredible sectorial growth in the quantitative sense-- over 20 areas-- and qualitative -- some affect the very core of state sovereignty-- are the basis for an interpretation of the Draft from the spill-over

approach and a more in depth examination of the different types of spill-overs discussed by the neo-functionalists. These are: objective or due to a certain systemic connection between sectors and scopes; subjective or fostered by socio-economic actors that do no wish to remain outside the integration process; and cultivated, in other words, decided and encouraged by the authorities.

The Draft Constitutional Treaty not only increases the scope of integration but also its level with the changes introduced in decision making procedures. The change on Council-European Parliament joint decision making (Articles I-33 and III-302), inaugurated by the Treaty of Maastricht and later somewhat modified, has become "the ordinary legislative procedure" although there are still numerous important exceptions. The qualified majority of the European Council and the Council of Ministers (Article I-24), defined now by the double majority: the number of States and 60% of the population of the Union, has been considerably extended, in spite of exceptions. The European Council itself becomes part of the single institutional framework of the Union (Article I-18). An interpretation and examination based on spill-overs of these developments may be quite fruitful.

Although the neo-functionalist theory did not pay any attention to it, the most transcendental spill-over of European integration has probably been the increased number of member States from the initial 6: 9, 10, 12, 15, 25 and probably 27, 28 in the near future. As neo-functionalism foresaw and conceptualised, the dynamics of growth sector by sector have been vital, but the enlargement with the inclusion of new member States has not been less so. The motives and founding aims of European integration, as well as the principles of its construction and execution of many of its objectives have called for enlargement, spill-overs that generate contradictions, which, to date, have been successfully resolved. The necessary new enlargement to 25, the biggest spill-over quantitatively, and in many aspects qualitatively, causes contradictions that may challenge integration itself. The Draft Treaty for the European Constitution in Title IX of Part I of *Union membership* and also in VIII *the Union and its immediate environment*- in addition to many other articles-- envisages a Europe with 25 member States and even more. However, the issues of quantitative limits have not yet been resolved-- how many? -- and above all, qualitative-- what and how much integration?-- and as a result, the potential spill-overs.[7]

c) A transformative cycle?

As has been mentioned above, transformative means that the conditions in which the actors' identity and relationships change are specified and that this change has a long term political purpose, moving from the national to the supranational level. The requirement to enter a cycle of this nature is to have previously been through the initial and base cycles. In Schmitter's opinion, this requirement seems to have mostly been

[7]See J.H.H. WEILER, " A Constitution for Europe? Some Hard Choices?", *Journal of Common Market Studies*, Vol 40, no. 4, p. 564 and "Some Unconventional Thoughts on the Constitutional Convention", Lasok Lecture May 2002, School of Law, University of Exeter, http://www.ex.ac.uk/law/postgrad/prosp/Weilerlecturetext2002.doc (7/05/2004). Philippe C. SHMITTER in 4.1. An *Excursus* on "Enlargement" in *op.cit*. pp. [41-44] presents some brief consideration from neo-neo functionalism on the enlargements, concluding: "Just as a proper and complete theory of integration must also be a potential theory of disintegration, so an adequate theory of enlargement should also be a theory of (potential) contraction".

fulfilled, as he asks in a somewhat doubtful tone, if the 2002-2003 Convention initiates a transforming cycle:

> *"It is possible that the so-called "Convention" might generate such an outcome, i.e. delimit definitively the territorial scope of the Euro-polity, define the nature and scope of common institutions, and assign these functions* (compétences) *to specific levels of governance. If the EU were at this point in its evolution (which I doubt), it would presently be in what I will call below: "a transforming cycle".*[8]

In the past some meaningful changes with political purpose took place with the move from the national to the supranational, whether or not they were actually transformative cycles in the strictest sense. The biggest was the creation of the European Union with the Treaty of Maastricht (1992), which, jointly with the Communities (the first pillar) set common foreign and security policy (CFSP) and justice and home affairs (JHA) (second and third pillars) although only the first was located at the integration level and the other two at the cooperation level. The implementation and later development of the European Council should also be analysed from the transformative viewpoint in spite of its ambiguous intergovernmental-supranational nature. This is also true for the introduction of the euro, which affected the member States, socio-economic actors and citizens and is now developing some of its powerful political potential.

The Draft Treaty establishing a Constitution for Europe only partially responds to the possible result of the 2002-2003 Convention recently pointed out by Schmitter. However, the text constantly assumes that it is a Constitution. It formally abolishes the pillar structure although there are still limits placed on integration and differences in decision making procedures. For the first time, the Union (Art.1-6) is granted a legal personality. In my opinion, the European Constitution-- as the citizens get to know and legitimise it--will trigger a truly transformative cycle in the future if and when it manages to create a feeling of "us", a collective "us", a shared common project. In other words, a European people together with the peoples of the member States. The possibilities of what political-legal forms may cover this transforming spill-over are still open: in his time, Haas thought of an institutionalised supranational political community and later in asymmetrical superposition. Schmitter has worked on forms like the *confederatio*, the *condominio*, and the *federatio* for years, recently adding the *consortio*.[9]

The future is still open to possibilities and the neo-neo-functionalist theory that sees European integration as a transforming spill-over process can then be contrasted empirically.

2. A TREATY BETWEEN STATES

[8]Philippe C. SCHMITTER, *op.cit*., p. [26].

[9]Philippe C. SCHMITTER, "La Comunidad Europea como forma emergente de dominación política" in BENEDICTO, J. and REINARES, F. (eds.), *Las transformaciones de lo político*, Alianza Editorial, Madrid, 1992, pp. 158-200; "Neo-neo functionalism", *op.cit*., p. [40].

Hoffmann's sharp eye did not miss the changes in States' capacity for action and sovereignty during the second half of the twentieth century and the new development of the European Communities, which could not be reduced to only power relationships. State nations, nevertheless, survive and continue to be key actors in spite of having become obsolete to fulfil some of their functions. Specifically, the European Communities are tolerated and they are useful to help the States possibly maintain their status, although they are affected by the Communities. The condition required for new more centralised community policies or decision making procedures is that the policy preferences of the States' Governments should converge. European integration tends to -- and should thus be analysed-- an international system with fewer more powerful States.

The most complete writing on intergovernmentalism is the liberal version set forth by Moravcsik in *The Choice for Europe,*[10] which was later completed. The starting point is a rationalist framework, with rationality being understood as adjusting the means to the ends and optimisation of the cost/benefit relationship. Rational Governments formulate national preferences which reflect the (geopolitical and/or economic) objectives and interests of the State's influential internal groups. Given the marked differences between the various Governments' national preferences, it is necessary to face up to them and undertake bargaining in order to achieve mutually beneficial cooperation. The intergovernmental theory of bargaining explains the efficiency and allocation of gains in a different manner than the supranational theory. Finally, a choice is made between whether to pool/delegate sovereignty to supranational institutions or not in order to guarantee agreements. However, this does not give the supranational institutions autonomy, but makes up a principal (the States) -agent (the Union institutions) model . This Harvard professor has done outstanding analyses of the Single European Act (1986), Maastricht (1992), Amsterdam (1997) and Nice (2001) from the view of liberal intergovernmentalism.

From my point of view, an interpretation of the Draft treaty establishing a Constitution for Europe is also possible from this perspective. Intergovernmentalism in general, and more specifically, the liberal version, offers many rich and varied approaches, hypotheses and methods. Only some can be considered in this paper: 1) the supremacy of the member States in the conception and functioning of integration, in some scopes and procedures, symbolised in the formal nature of the interstate treaty of the constitutional agreement and carried out through policy; 2) convergence or at least tolerance of the national preferences of other Governments is symbolised and guaranteed by keeping unanimity; and 3) bargaining between the different Governments in order to set up mutually beneficial cooperation, expressed in the will, implementation, course and conclusion of agreements. The greater or lesser degrees of rationality of the Governments of the member states cannot be dealt with in this paper. Nor can the complex formation of each one's national preferences due to the play of internal interests and powers. The principal-agent model analysis which is shown in the the direction chosen by the European Council and the decision making power of the Council of Ministers will be discussed at another time.

a) The masters of the treaties

[10]Andrew MORAVCSIK, T*he Choice for Europe. Social Purpose and State Power from Messina to Maastricht*, UCL Press, London, 1999. On intergovernmentalism and some of its variants, see Nicolás MARISCAL, *op. cit.* pp. 29-32 and 199-225.

The will to bring to light this Constitution, to build a common future through the European Union comes from Europe's citizens and States. These first articles (Art. I-1, I-3.5; I-9, I-10; I-32) clearly and repeatedly state that it is the member States that confer, transfer or attribute competence to the Union, and those not expressly attributed to the Union remain in their power. The conferral principle therefore delimits the competence of the Union. It will also respect the national identity of the member States, inherent in their basic political and constitutional structures and the essential functions of the State (Art. I-5.1; Preamble II). The use of competence is ruled by the subsidiarity principle so that the Union only intervenes when the member States are not sufficiently able to reach objectives and the Union may fulfil this task better. The national parliaments are in charge of monitoring that this principle is respected (Art. I-9).

The current Draft empowers the Government of any member State, the European Parliament or the Commission to present proposals for revision of the Treaty for the Constitution to the Council of Ministers, which is to notify the national parliaments. The European Council decides by simple majority to examine the modifications proposed and whether or not to call a Convention to draw up recommendations for the preceptive Conference of the representatives from the member States. These amendments would only go into effect if ratified by all the member States although the potentially superior channel is left open by which the European Council could face the situation of ratification by four fifths of the member States two years after the signing while others have not ratified.

This brief view of the actors that are creating the Constitution for Europe, the conferral and subsidiarity principles for delimiting and exercising the respective competences respecting the structure and identity functions of the State and the Constitution revision procedure, demonstrates the supremacy of the member States:

> *"The EU draft constitutional treaty assures not only the lasting "domination"* (Herrschaft) *of the member States over treaties by reserving the right of ratification for constitutional changes and the so called evolutive clauses (own resources, citizenship of the Union,* r*ight to vote for the European Parliament, art. III-227. 1 Draft. EU Constitution) but also the dominant role of the Council (European) in these procedures".*[11]

b) Unanimity

Unanimity is mentioned in over fifty articles of the Draft constitutional treaty. Although the criteria for counting could be discussed, the Council of Ministers decides by unanimity in over seventy hypothetical situations, to which almost a dozen more must be added, to be exercised by the European Council.[12]

[11] Peter M. HUBER, "Das instituionelle Gleichgewicht zwischen Rat und Europäischen Parlament in der künftigen Verfassung für Europa", *Europarecht*, Heft 4, 2003, p. 598.
[12] Wolfgang WESSELS, "Der Verfassungsvertrag im Integrationstrend: Eine Zusammenschau zentraler Ergebnisse", *Integration* 4/03, p. 289. Chart 2 shows a total of 78 cases of unanimous decisions made by the Council.

Unanimity in the Council of Ministers is required, above all, for decisions concerning some fiscal provisions, social policy, common foreign and security policy (CFSP): European decisions and carrying out common security and defence policy (CSDP), some international agreements within common commercial policy, adhesion agreements for new member States and association agreements with the EU for countries and territories. In spite of long debate, what is now called the flexibility clause (art. I-17) -- the previous art. 235 EEC and later Amsterdam art. 308 EC-- mainly sets down that provision and maintains the unanimity requirement in the Council of Ministers in order to adopt pertinent measures in the case power for action was not foreseen for steps the Union might need concerning policy. Unanimity is also required for some points referring to non discrimination, citizenship, the area of freedom, security and justice, the environment and institutional issues such as provisions for the election of European Parliament members by direct universal suffrage, the make up of the Committee of the Regions and the Economic and Social Committee and modification of a proposal from the Commission by the Council of Ministers (art. III-301), the same as in some points on enhanced cooperation. Until 1 January 2007, unanimity will also be required for some decisions concerning economic, social and territorial cohesion and for some financial provisions.

The European Council is obliged to achieve unanimity in the case of a European decision which confirms a severe persistent violation of the values of the Union by a member State (art. I-58), in determining the composition of the European Parliament and the rotation of the presidency in the Council of Ministers, for authorisation to pass from special to ordinary legislative procedure and from unanimity to the qualified majority in the Council of Ministers. This is also the case for common foreign and security policy: determination of the Union's interests and strategic objectives (art. III-194) and European decisions (art. I-39.7).

In my opinion, unanimity is justified in different degrees in the very diverse cases that range from those concerning the essence of the constitutional agreement, members being admitted and belonging to the Union, the make up of basic organs, making some provisions more flexible and the authority to act in the face of new necessities. It extends to others that reflect the conception of a Union that is not as close between countries or the particular interests of some member States. In any case, unanimity is the expression of the intergovernmental, interstate logic that partially underlies the Draft. If no State can be bound by agreements, rules or provisions it has not accepted, the agreement of every State is needed if all are to advance: unanimity. Intergovernmental unanimity is inversely proportional to the supranational community. Both types of logic and dynamics are underlying in the European Union, now established by a Constitution, which is formally set down by a treaty.

c) Agreements and disagreements between Governments

Although these events are recent and historical research will probably contribute new relevant data on the subject, the relative openness and ample information about the process already allow for a tentative political scientific approach.

The Intergovernmental Conference for institutional reform opened on 14 February 2000. The second phase coincided with the French presidency of the Council, also inaugurated with the promise of institutional reform within the context of enlarging the

European Union. The different conceptions of Europe, the power struggle between member States, between the States and Union institutions and even between the institutions themselves, the claims for reunited Germany's demographic importance to be translated into political terms and the divergence between large and small nations marked a tense path ahead. In the last days, the nationalist demons, tactless expressions and arithmetical calculations were added to the picture, which showed a fierce power struggle was underway. Thus, with considerable concern for possible failure, the European Council was held in Nice on 7, 8 and 9 December 2000. A tense, dramatic meeting which finally resulted in a treaty for a 27 State European Union which was seriously questioned and criticised from the first moment, even by Union institutions. Germany had 99 European Parliament members, more than the other three big nations with 72. This inequality was especially difficult for France to accept. The four big nations would have 29 weighted votes in the Council and Spain and Poland, considered nearly big , would have 27. The biggest nations lost their Commissioner, and each State would have one of their nationality but only while the Union had 27 members and from that moment, there would be fewer Commissioners than States.

In the later fiercely debated Declaration on the future of the Union, the Conference "underlines that, with ratification of the Treaty of Nice, the European Union will have completed the institutional changes necessary for the accession of the new Member States" (2); "calls for a deeper and wider debate about the future of the European Union" (3) addressing, *inter alia*, a delimitation of powers between the European Union and the Member States, the status of the Charter of Fundamental Rights, a simplification of the Treaties and the function of national parliaments;" the Conference recognizes the need to improve and monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States" (6); and "agrees that a new Conference of the Representatives of the Governments of the Member States will be convened in 2004, to address the abovementioned items with a view to making corresponding changes to the Treaties"(7).[13]

The member States again voiced their opinions on the future of the European Union at the European Council in Laeken on 14 and 15 December 2001. The starting point of their Declaration is the success of the European Union, which, nevertheless, was at a crucial point as it had to face the double challenge of bringing the institutions closer to the citizens and the external changes of rapid mutation and globalisation on the world scene. A renewed Union was facing three basic challenges: better allocation and definition of competences, simplification of the instruments and greater democracy, transparency and efficiency. The Declaration formulates several dozen questions, suggesting that they should be answered in a Constitution.[14]

This renewal and reform of the Union should be preceded by an Intergovernmental Conference, in agreement with the law in force. However, given the traumatic experiences of the last conferences on the one hand, and the efficiency demonstrated by

[13] TREATY OF NICE (2001/C 80/01). *Declaration on the future of the Union*. See Francisco ALDECOA LUZARRAGA, "El Tratado de Niza, consolidación y reforma de la Unión Europea", *Cuadernos Europeos de Deusto*, no. 25/2001, pp. 11-54.
[14] EUROPEAN COUNCIL MEETING IN LAEKEN (14 and 15 December, 2001), *Presidency Conclusions*, Annex 1: Laeken Declaration on the future of the European Union, II.

the Convention that drew up the Charter of Fundamental Rights for the European Union on the other, the European Council decided to hold a Convention.[15]

The Convention was set up on 28 February 2002. The Governments seemed to have everything under control. The European Council in Laeken had named Giscard d'Estaing (former president of France) president and Amato and Dehaene (former prime ministers of Italy and Belgium) as vice-presidents. How the Council would be formed had already been decided: 15 (one for each member State) representatives of the Chiefs of State or of Government, 30 (2 for each member State) parliament members from the national parliaments, 16 members of the European Parliament and 2 representatives from the Commission. The States which were candidates for adhesion to the Union would be represented in the same conditions and would take part in the talks, but would not be able to stop consensus. An organisation with a Praesidium was even organised, specifying in advance the members it would be formed by, the date of the inaugural session, the duration, work methods and secretary. It was also decided that "the final document will provide a starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions".[16] In spite of Giscard d'Estaing's informal contacts with Governments of the most powerful States, they did not control the Convention, which went far beyond the scope that was originally foreseen. During the three stages, listening, deliberation (in which 11 work groups were formed) and formulation of the articles, a sort of self mandate was generated, with new innovative political dynamics and a Europeistic ethos. In an atmosphere of success and renewed hope, the Draft treaty establishing a Constitution for Europe (18 July 2003) emerged. [17]

The million euro question in the following weeks was what would happen with the Draft. What would the Intergovernmental Conference (IGC) do with the Draft from the Convention? Its legal capacity to modify or even reject it was not questionable, but there were serious doubts about its political capacity to improve it and reach agreement once Pandora's Box of changes was opened. The IGC opened in Rome on 4 October 2003 with quite a few superficial differences between the States: the presidency of the European Council, the double majority: the number of States and 60% of the population of the Union in the Council, the Legislative Council formation of the Council of Ministers, European Commissioners and Commissioners without the right to vote, the Union's Minister of Foreign Affairs, the unanimity requirement for any revision of the Constitution, the veto on common foreign and security policy (CFSP**)**, the cooperation organised for common security and defence policy (CSDP) and the fact there was no mention of God and Europe's Christian roots in the Preamble. Furthermore, the invasion and occupation of Iraq by the United States with the diplomatic and military backing of some European States and the firm opposition of others divided Europe and made relations tense. The swords were unsheathed for the two following months--in spite of

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[15] *Ibid.*, III.

[16] *Ibid.*

[17] Carlos CLOSA, "El valor de las instituciones: mandato y auto-mandato en el proceso de la Convención" and Gemma MATEO GONZALEZ, "Hacia una Constitución Europea: la Convención Europea y su impacto en la Conferencia Intergubermental de 2003 y 2004", *Cuadernos Europeos de Deusto*, no. 30/2004, pp. 39-56 and 115-139. Iñigo MENDEZ DE VIGO, "El modelo de la Convención y el Parlamento Europeo" (manuscript, 2004). Josep BORRELL, Carlos CARNERO and Diego LOPEZ GARRIDO, *Construyendo la Constitución Europea. Crónica Política de la Convención*, Real Instituto Elcano de Estudios Internacionales y Estratégicos, Madrid, November 2003. Franciso ALDECOA LUZARRAGA, "*Una Europa": su proceso constituyente. La innovación política europea y su dimensión internacional. La Convención, el Tratado Constitucional y su política exterior (2000-2003)*, Biblioteca Nueva, Madrid, 2003.

the agreements on European defence between Germany, France and the United Kingdom with attempts to approach Spain. The hope was that the impasse and tension would be overcome once again at the last minute with the skilful diplomacy of Italy which presided the Union. However, this was seriously questioned after the meeting of Foreign Affairs Ministers on 28 and 29 November in Naples and the probability of failure loomed large, which would mean a two-speed Europe. The poor example of France and Germany's lack of respect for the economic and monetary stability pact, Spain and Poland's rooking and isolation about the advantages obtained in Nice with weighted voting in the Council, France's diminished wounded *grandeur*, the Italian presidency's lack of creativity, efficiency and skill, etc. led to the dramatic failure in Brussels on 12 and 13 December 2003:

> *"The European Council noted that it was not possible for the Intergovernmental Conference to reach an overall agreement on a draft constitutional treaty at this stage. The Irish Presidency is requested on the basis of consultations to make an assessment of the prospect for progress and to report to the European Council in March*". [18]

The new year of 2004 was soon filled with pleas to overcome the crisis and the Irish Prime Minister who was then presiding the European Council, Ahern, renewed hopes but realistically pointed out the enormous difficulty of still having twenty matters pending. There were also reactions against the different speeds although the possibility still remained and was used as a threat from time to time. Germany, France and the United Kingdom denied their intentions to form a directory ... following each of their numerous meetings. The announcement that Polish Prime Minister Miller was leaving and that Aznar's party had been defeated in Spain's elections in March helped to clear the air.
At the European Council in Brussels on 25 and 26 March, European leaders finally agreed to approve the European Constitution at their meeting on 17, 18 June or even sooner. The groups of experts have been working since the first of April and on 17 May the Intergovernmental Conference got back to work at the Ministers of Foreign Affairs level in pursuit of consensus.

During 2000-2004, the member States appear structurally and functionally as starring actors in the system of European integration. The initiative and decision to take new steps forward, the functional institutionalisation of the Convention --whose dynamics, nevertheless, would overflow its scope--, the recovery of control of the Draft in the Intergovernmental Conference, their will --jointly with the citizens'-- to create a European Constitution, attributing competence to the Union, keeping unanimity in key areas or concerning each member's own interests which are considered important, the necessary ratification of the Constitutional Treaty by all the member States, show the pre-eminence of the States. This supremacy of so many different States has been and is such that--and this has indeed been the case-- it can cause them not to reach agreement, paralysing and ultimately destroying integration. There is no European integration without convergence of the States' preferences, adjusted during intergovernmental bargaining. Yet these pre-eminent States and their Governments alone are unable to carry out and push integration forward.

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[18] European Council Conclusions on the IGC, Press Release, Brussels, 13/12/2003. *El País*, 14 December 2003.

3. EUROPE MERGES IN A GLOBALISED WORLD

Wessels studied European integration from the time of the ECSC (European Coal and Steel Community) to the EU (European Union) with a dynamic medium scope macropolitical approach, expressed in simpler terms as a political-historical perspective.[19] He examined the institutions, procedures, associations, intermediary groups, scope of tasks, transfer of competence and enlargement of instruments, verifying the existence of long term growth tendencies and structural differentiation which are not easily reversible.

The main feature is the merger of instruments and public resources from different levels (sub-State, State and supranational) in an administrative-political organisation--the EC/EU--, controlled by the member States and community institutions. The reasons for this merger stem from the need to respond to the impossibility of the member States being able to guarantee functions and benefits individually in today's increasingly interdependent globalised world. The merger of instruments and public resources involves greater degrees of joint action from the actors and calls for their Europeanisation, however, without diluting or transferring their loyalty. On the other hand, it means linking them within the European Union system, processes and procedures, which also causes the partial transformation of the national states' own systems.

This merging process creates a European administrative-political system. The political dimension is mainly defined by the binding decisions which result, also including a broader scope for public policy, the transfer and increase of competence at the European level, growth and differentiation of institutions and procedures and the involvement of intermediary groups. The administrative dimension conforms to a merged administration model, with State and community officials participating in each stage of dealing with problems and jointly applying quasi-state instruments.

Wessels interprets the merger as part of a wider historic context of the evolution of the European state in an increasingly interdependent globalised world.

In my opinion, an interpretation of the Draft constitutional treaty for Europe may be suggested from the perspective of this merger theory to search for: 1) the merger of instruments and public resources from several levels; 2) the Europeanisation of the actors; and 3) the emergence of a European administrative-political system. The degree to which these factors are present may be used to contrast the theory.

a) Common foreign and security policy

The Union's action on the international scene is based on a series of values and principles which it aims to foster in the rest of the world, also expressly mentioning multilateral cooperation, particularly in the framework of the United Nations. The main principle of common foreign and security policy (CFSP) is cooperation and coordination of the Union and the member States (Art. I-39.1 and 4). Separated from

[19] Nicolas MARISCAL, *op.cit.*, pp. 36-37 and 331-339.

the Union, the member States do not have the resources to carry this out--above all, in the area of common security and defence policy (CSDP). Each of the States, even the most powerful in Europe, individually lacks the capacity to play a decisive role on the world scene. The Minister for Foreign Affairs, who is also vice-president of the Commission--wearing two hats--is a central innovation of the Draft. It will be necessary to observe how this develops in actual practice. Other potential cases of merging public instruments and the Europeanisation of the actors include the composition and action of a European External Action Service, the Political and Security Committee, the European Armaments, Research and Military Capabilities Agency, the special Committee for negotiation of international agreements and the European Voluntary Humanitarian Aid Corps. The clause on solidarity is, in my opinion, very meaningful in the sense of a European administrative-political system emerging. It contains remarkable potential, particularly in today's globalised dangerous world (arts. I-42 and III-231). "In conclusion," affirms Aldecoa, "we believe that the reforms in European foreign policy in the Draft constitutional treaty should be valued very positively since they set the foundation of ´more Europe´ in the world and the development of responsible foreign policy".[20] Maintaining unanimity is the clearest feature of the subsistence of intergovernmental logic and it also brakes the dynamics of the increasing merger of instruments and public resources, Europeanisation of the actors and growth of a European administrative-political system.

b) The area of freedom, security and justice

In the last decade of the 1900s, the area of justice and the interior in the European Union had already emerged and grown, and the Constitution now sets down and develops these points as the area of freedom, security and justice without internal borders (Art. I-3.2). These three values cannot be separated although emphasis is placed on "a high level of security". This is shared competence (Art. I-13.2). In other words, in the scopes and points mentioned, the member States exercise this competence to the degree to which the Union has not exercised its authority or has ceased to exercise it, and it is specified as policy on border controls, common policy on asylum or immigration, legal cooperation on civil and penal matters and police cooperation. A series of means to carry these actions out are envisaged: closer contact between national laws--however, there would be very important limitations on common immigration policy and legal cooperation on penal matters--, mutual recognition of legal and extralegal resolutions, in addition to penal sentences, administrative and operative cooperation between authorities and the competent services, the training of staff and police information, and organs and instruments such as Eurojust, Europol, a new permanent committee for operative cooperation in the Council of Ministers would be strengthened or created. This would also include a possible European Public Prosecutor’s Office, an integrated system of border management to be progressively installed, along with a common asylum system. Reading between the lines of the Constitution, we can see tension and compromises between the Union and member States. The European Parliament and the national parliaments take part in the evaluation of Eurojust and the control of Europol. Following a critical analysis of the area of freedom, security and justice, Monar valued the Convention's work and stated "We can not only expect the Union's capacity to act to increase but also strengthened political

[20]Francisco ALDECOA LUZARRAGA, "La Política Exterior Común en el Tratado por el que se instituye una Constitución para Europa: más Europa en el mundo", *Cuadernos Europeos de Deusto* no. 30/2004, p. 37.

and legal unity in the freedom, security and justice area, as one of the coherent bases and principles (including solidarity) of the project of integration." [21] However, he points out serious deficiencies in structure, simplification and transparency and its lack of a clear all encompassing conception. The overall result is a positive valuation concerning progressive interstate reform of the treaties, but he does not consider it sufficient to be part of a Constitution of the Union. [22]

The freedom, security and justice area of the European Draft constitutional treaty offers, in my opinion, a very rich suggestive text for an interpretation in search of merging public resources and instruments from several levels, the Europeanisation of the actors and growth of an administrative-political system and for contrasting the merger theory.

c) Institutions

Wessel himself recently examined the Draft constitutional treaty in the light of the EU system's evolution to the present time. The tendency analysis concentrates on institutional architecture. The European Council will be an organ of the Union in future, but its actions will not be submitted to legality control from the Court of Justice. New tasks are being added and setting up a presidency is foreseen, which will give it a clear image and voice. Although maintaining unanimity in some scopes, the extension of the decisory procedure by a qualified majority in the Council of Ministers-- the double majority: number of member States and 60% of the population-- is a key point. We could say the same thing about the extension in the European Parliament (EP) concerning the codecision procedure, which will become the ordinary legislative procedure. From another point of view, the European Council should take into account the results of the EP elections when proposing a candidate for president of the Commission. The EP still lacks a large amount of constitutional competence in the revision procedure of the treaty establishing the Constitution. The Commission's authority is strengthened as well as its capacity for action, especially in the case of the president. However, the compromise presented about the number of Commissioners (15 European Commissioners+ non voting Commissioners) is not convincing. Although there is underlying controversy between the intergovernmental and supranational models, which is reflected in ambiguous provisions with conflictive potential, the institutional architecture of the Draft constitutional treaty " nevertheless strengthens, above all, long term continued development towards institutional merger".[23] In other scopes, the tendency is not as clear or strong. In the area of freedom, security and justice, one can observe advances from non binding agreements towards the community method which includes intense participation of national governments. However, the tendency is more limited in common foreign and security policy in spite of new formulation. On the whole, the professor from Cologne concludes:

> " *The Union created by the Constitutional Treaty could be understood as the latest development of the European State. From this analytical perspective, the verified process of merging*

[21] Jörg MONAR, "Der Raum der Freiheit, der Sicherheit und des Rechts im Verfassungsentwurf des Konvents", *Integration* 4/2003, p. 548.
[22] *Ibid*., p. 549.
[23]Wolfgang WESSELS. "Der Verfassungsvertrag im Integationstrend; Eine Zusammenschau zentraler Ergebnisse", *Integration* 4/03, p. 297.

> *in the constitutional treaty would be distinctive of the present degree of the State's secular evolution".* [24]

Approval and implementation of the European Constitution and its effects can be analysed in future from the point of view of contrasting the merger theory in actual practice.

IMPRESSIONS

At this point, with three approaches which are part of a broader study-- suggestions for nine interpretations-- it is too early to reach conclusions. However, some impressions can be provisionally set forth. From the neo-neo-functionalist, intergovernmental and merger theories, the enormous complexity of European integration is demonstrated. However, each theory only partially explains it. This impression can be formulated with Schmitter's words:

> *"I think that all students of regional integration-- and first and foremost, those working on the European Union-- now understand that no single theory will be capable of explaining its dynamics and predicting its outcome. The EU is already the most complex polity ever created by human artifice and it is going to become even more so before it reaches its end-state-- whatever that will be".*[25]

Hamilton's wise historic words also apply to the Draft constitutional treaty for Europe, with its lights and shadows, potential and limitations, its uncertain prospects and future implementation which are inherent to a legal-political project of this scale and probable medium term duration:

> *"the system, though it may not be perfect in every part, is, upon the whole, a good one; is the best that the present views and circumstances of the country will permit; and is such a one as promises every species of security which a reasonable people can desire.*
>
> *..... I should esteem it the extreme of imprudence to prolong the precarious state of our national affairs and to expose the Union to the jeopardy of successive experiments in the chimerical pursuit of a perfect plan. I never expect to see a perfect work from imperfect man. The result of the deliberations of all collective bodies must necessarily be a compound, as well of the errors and prejudices as of the good sense and wisdom of the individuals of whom they are composed. The compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as*

[24] *Ibid*., p. 298.
[25] Philippe C. SCHMITTER, *op. cit*., Conclusion, p. [40].

many dissimilar interests and inclinations. How can perfection spring from such materials?". [26]

The current Draft is by no means perfect from the legal-constitutional point of view and some improvements have been set forth. However, the main problem is not technical but political: conceptions about the European Union, concerning interests and power. Neither the different States, nor the different peoples, *länder*, regions or autonomous communities, political parties, organizations or social movements or the very institutions of the European Union find their preferences fully reflected in the Draft. Nor will they see them in the European Constitution. These limitations are imposed by the very nature of unity in diversity, agreement between those which are different and the plurality that coexists and shares a common project. Some points of the Draft can still be improved technically. The States must reach agreement if they want a European Constitution. The individual citizens and organizations among us that opt for the unity of Europe will have to overcome our particular views and interests by looking at the broader whole and trusting that what is good for it is also beneficial to each of us. This idea presupposes that "we" are a certain group, community; a sense of solidarity that the Constitution itself helps to build.

[26]Alexander HAMILTON, James MADISON, and John JAY, *The Federalist Papers*, the New American Library, New York, 1961, (No. 85: Hamilton) pp. 523-524.