PREFACE

After the failure of the Brussels summit in December 2003 it may appear too late – or premature – to publish the contributions to an international Conference on "The Draft Constitutional Treaty of the European Union" which was organised from 25th to 26th September 2003 by the Faculty of Law of the New Lisbon University in co-operation with the ECLN and with the kind support of the Fundação para a Ciência e a Tecnologia. The Heads of State and Government meeting in Brussels have not found a compromise on the remaining points, in particular regarding the voting system at the Council, and the question of the constitutional future of the European Union after the efforts of the European Convention remains open. Will the European Union now slip into enlargement without being prepared from an institutional point of view? Does the failure of Brussels show, for the first time, how we can expect the enlarged Union to function in future? Or does Europe just need more time, after the breathtaking speed of conceiving and drafting the Constitution of a still undefined *sui generis* political body, for understanding why an efficient, democratic and transparent institutional framework is needed for common action in Europe and at the global scene and deciding what that framework should be? The present contributions try to review critically the achievements of the Convention and to develop arguments which may lead the process to good results.

In his welcome-speech *Juiz Conslheiro Luís Nunes de Almeida*, the President of the Portuguese Constitutional Court, considers the Constitution as an "enormous step towards the future establishment of a Federal State", while stressing the condition, that the Community institutions, in the exercise of their powers, "would not be, in any case, authorised to challenge the sovereignty of Member States and the fundamental principles of their respective juridical-constitutional order". In any event, the constitutional character of the Constitutional Treaty and is principle of supremacy over constitutional law would require an amendment of the Constitution of Portugal before the new Constitution of the European Union could be ratified by his country.

The underlying question that dominated the first part of the debate consisted on whether or not the Draft Treaty was worked out at a "constitutional moment". *Ingolf Pernice* develops a positive answer arguing, however, that it would be better to see the Constitution of the European Union as the natural outcome of a constitutional process whose origin as to be dated back to World War II. This catastrophic experience combined with the more recent process of globalisation would be the driving forces of the European constitutional process. In a more theoretical analyse *Neil Walker*, in contrast, takes a critical stand in finding that "the idea of a constitutional moment ... is conceived as a false window of opportunity which marginalises the real constitutional debate for a post-state-political configuration". His focus is on the "transformative" capacity of the Draft Treaty as a constitutional moment. Looking at criteria such as structural design, authority constituting, epistemic development and community mobilisation, the judgement is that it may be too early to give a judgement.

George Bermann addresses the institutional reform under the Draft Treaty from an American perspective. He expresses particular concern regarding the strengthening of the European Council and the failure to give the Union a "more visible and effective 'face' to the external world". The reforms would, indeed, not have added much to "simplicity, coherence and overall intelligibility of the Union's architectural design". Again on the institutional reform,

José María Beneyto Pérez starts by critically assessing how the principle of double legitimacy is reflected in the Draft Treaty: The "conceptual error" he discovers lays in the distinction of the will of the citizens and that of the States. For *Beneyto* the will of the States should not be distinguished from that of their respective citizens. IT is in the light of this *original sin* that he expresses his concerns with the watering down of the functions of the Council and the "steady loss of the monopoly of legislative initiative" by the Commission.

With regard to the Charter of Fundamental Rights *Xenophon I. Contiades* stresses the "exceptionally symbolic power" of the social rights. He finds that "social rights function as interpretative indicators in the implementation of both primary and secondary community law". They "guide the community legislator when producing secondary law", and "they restrict provisions of secondary law or national law which specify social rights, in the form of a social acquis". *Paul Craig* analyses the new provisions on competencies of the Union. In examining the system and categories of attributed powers his focus is on the clarity such provisions and their capacity to contain the growth of EU powers. It looks at exclusive and shared competencies, areas of supporting action, the co-ordination of economic and social policies, and the Common Foreign and Security Policy. After also taking into account the provisions on flexibility, subsidiarity and the role of National Parliaments in supervising subsidiarity, the conclusion is that in spite of the boundaries placed to the EU, the specific provisions in part III "allow 'persuasive soft law' and 'formal laws embodying incentives'" which "may, depending on their content and specificity, serve to accord a significant measure of power on real terms to the EU".

The "constitutional law of external relations" is looked at by *Bruno de Witte*. First he discusses the "formal constitutionalisation" of the EU powers on external relations resulting from the merger of the different pillars and the reorganisation of the Treaties. Second, he evaluates the new provisions with regard to "central constitutional values such as the institutional balance, democratic accountability and the rule of law". He finds curious to see that the pillars of the Nice-Treaty remain very visible – the 'pillar mania' – and that has even led the Convention to forget the international agreements in the comprehensive list of EU instruments in Title V of Part I of the Constitution. In the evaluation of the new provisions, he criticises, among other things, Article III-282 which keeps the European Court of Justice out of the Common Foreign and Security Policy. This critique is shared by *Jiri Zemanek*, who reviews the changes regarding the judicial system, which had just been reformed by the Nice-Treaty. He looks at the "left-overs" of Nice and finds some progress regarding the issue of direct actions by individuals.

The relationship between the adoption of the Constitution and enlargement is discussed by *Vilenas Vadapalas*, who questions the existence of a conditional link between the two. He identifies the main issues on which the debate on the Draft could be reopened. Given the reduced perspectives of the IGC actually coming to mindful compromises on the remaining issues, *Antonio Lopez-Pina* finally takes a stake for an alternative which he considers as the only promising: "Enhanced Co-operation as a European Form of Government".

The editors wish to express their profound gratitude to all those who have contributed to the success of the conference. They appreciate in particular the great hospitality of the New Lisbon University Law School and its Dean, *Carlos Ferreira de Almeida*, as well as *Carlos Costa Neves*, the Portuguese Secretary of State for European Affairs, who kindly opened the Conference. *Isabel Xavier*, *Ravi Afonso Pereira* and *Filipa Marques* Junior and a group of Nova Law

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