

Comment to Prof. Dr. Di Fabio' Speech

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[1] It is astonishing that so many scholars and politicians speak about a future constitution of Europe. Apparently, at present, they find a European constitution to be lacking. Our speaker is one of these people. He advocates a European constitutional treaty brought about by the peoples of the Member States of the European Union (EU). He ignores, thus, a statement of the *Bundesverfassungsgericht* (German Federal Constitutional Court) of which the speaker is a member. As early as 1967, this Court qualified the Treaty Establishing the European Economic Community (EEC) as a sort of constitution of the Community with a legal order of its own. (1) The Court of Justice of the European Economic Communities (ECJ) followed in 1991: *[T]he EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.* (2) [2] Our speaker emphasises that the constitution is a characteristic of a modern state, but does not reserve the notion to nation states. Accordingly, the EU may have a constitution. However, the future constitution intended by the speaker should not be shaped as a copy of constitutions of states. We should agree with this thesis. Our disagreement with our speaker should lie in the fact that a constitution of the EU already exists. Admittedly, this constitution is complicated and clumsy, but it is rich and appropriate to the needs of supranational governance. The European constitution consists not only of the treaties establishing and amending the European Communities and the Treaty on the European Union, but also of judge-made law created by the ECJ. [3] First the European constitution installs an institutional structure which is essential for all governances in the world. The European treaties contain a whole set of objectives, an element never found elsewhere. Our speaker criticises the present distribution of competences as imprecise. The contrary is true. The treaties describe meticulously the conditions of the legal bases for European legislation. There are some exceptions, the so-called final competences. They are, however, tied to the development of the Internal Market. The European treaties require an ever closer union. European integration would come to an end if the completion of the Internal Market by legislation was stopped. [4] The European constitution disposes of constitutional principles: democracy, rule of law, social welfare. In former times the Court of Justice elaborated the components of these principles. Presently, these principles are laid down in Article 6 of the EU-Treaty. Human rights are included. The Court of Justice continues to protect fundamental rights. The principle of subsidiarity is introduced into the Treaty Establishing the European Community (EC). Neither the EC nor the EU is a federal state, but both of them have federal traits, for instance a loyalty clause. The Court of Justice has created structural features of outstanding importance: the unity of the European legal order, the efficiency of European law and the protection of individual rights. [5] We assent to the opinion that, in the coming years, the European constitution should relieve the expansion of the EU to the East of Europe. The transition to majority votes throughout the treaties as proposed by our speaker would be a useful contribution. It is necessary to exclude radical changes. The draft Treaty of Nice is appropriate to this reticence. Even this minimal progress meets with resistance as the Irish vote shows. Nevertheless, extending democratic co-determination by the European Parliament to all legal bases in the European treaties would be a great progress.

(1) BVerfGE 293, 296.

(2) ECJ, Opinion 1/91, European Economic Area I, (1991) E.C.R. I-6079, at 6102 (citations omitted).