Speech by Ole Due, The Court of justice and the protection of the individual

Caption: In this speech, delivered on the occasion of the 40th anniversary of the Court of Justice, Ole Due, President of the Court of Justice from 1988 to 1994, presents the role of the Court in the protection of the rights of individuals vis-à-vis both Member States and Community institutions. The Court remedies shortcomings in the Treaty through its case-law, while contributing to the development of the Community legal order.

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The Court of Justice and the protection of the individual

Speech by Mr Ole Due, President of the Court of Justice

Your Highness,
Mr Presidents and Ministers,
Your Excellencies,
Ladies and Gentlemen,

In the present debate on the European Union it is often asked whether, in the building of a united Europe, sufficient account is being taken of the fundamental principles of democracy.

Among those principles is that of the effective judicial protection of the rights of individuals.

May I be allowed, therefore, on the occasion of this 40th anniversary, to look briefly at the work of the Court precisely from this angle.

There can be no doubt that the Treaty establishing the European Economic Community intended to create rights for Community nationals. That is the very sense of the rules on freedom of movement for persons, goods, services and capital, the four freedoms which constitute the foundations of the Community.

Nor can there be any doubt that the Treaty also intended to provide for judicial protection of the individual by conferring on the Court of Justice, in Article 164, the task of ensuring that in the interpretation and application of the Treaty the law is observed. The phrase 'that ... the law is observed' refers in particular to the general principles of law, including those intended to protect individuals against infringement of their rights by acts of public authorities.

However, when one looks at the remedies made available by the Treaty one might, at first glance, gain the impression that these are not adequate for the purpose of ensuring that protection. The Treaty does not provide for any right of redress for natural and legal persons against the Member States and limits their right to bring an action for annulment of acts of the Community institutions to decisions of an individual nature, whereas the institutions have wide-ranging powers to adopt rules of a general nature which are capable of affecting the rights of individuals.

In reality the explanation is simple. The Treaty does not have the centralizing vision which some claim to find in it. The great majority of Community rules fall to be applied by national authorities. The protection of individual rights is therefore primarily a matter for the national courts, acting within the bounds of their jurisdiction.

The Treaty has, however, assigned to the Court the function of assisting the national courts in that task by means of the procedure of the reference for a preliminary ruling on the interpretation of Community law and on the validity of Community acts.

It is therefore in particular by providing for very close cooperation between the national courts and the Court of Justice, each acting with due regard for the jurisdiction of the other, that the Treaty has ensured the protection of the individual against infringements of his rights both by the Member States and the Community institutions.

For this system to function it must be possible for the Community provision or the general principle of law relied on by the individual before his national court, and interpreted or recognized by the Court of justice in its answer to a preliminary question, to be applied by the national court.

The fulfilment of that requirement has been ensured by the case-law of the Court since the judgments in *Van Gend en Loos* and *Costa v Enel*, two judgments delivered in the early years following the entry into force of the Treaties of Rome.

The principle laid down by those decisions is very simple. Any Community rule which is unconditional and sufficiently precise to be applied by the national courts may, depending on its content, confer on natural and legal persons rights which those courts must protect, notwithstanding the existence of conflicting national provisions.

On the basis of that principle the cooperation which has developed between the national courts and the Court of justice has ensured the protection of individual rights against infringements by the authorities of the Member States.

The Court has very frequently had occasion to rule on the possibility for those States to restrict the four freedoms mentioned above by pleading grounds relating to the public interest, as understood by the national legislature or administrative authority. In such cases it is more particularly the national courts of first instance which have referred matters to the Court of Justice; and it is above all natural persons or small undertakings which have invoked Community law before those courts. Large undertakings often have other means of avoiding the disadvantages of a partitioning of markets, from which they may sometimes even derive competitive advantages. On the other hand, for the individual the reference for a preliminary ruling does appear as the essential instrument for the protection of the rights conferred on him by the Treaty.

In order to determine whether such obstacles were in accordance with Community law, the Court has often had to examine closely the considerations underlying national legislation in a field as yet unharmonized at the Community level. It may be wondered whether that examination, sometimes felt by the Member States to be an attack on their sovereignty, is in accordance with the spirit of the principle of subsidiarity, now affirmed, in general terms, by the Treaty on European Union.

In my opinion that question must be answered in the affirmative. After verifying that the directives invoked by the Member States in question are compatible with Community law and that the legislation in issue is in principle non-discriminatory, the Court confines itself to examining the question whether the obstacle resulting from the means chosen by the national legislature does not go further than is necessary in order to attain those objectives. In so doing it applies the principle of proportionality which, so far as Community action is concerned, has found its expression in the Treaty on European Union alongside the principle of subsidiarity.

However, as Lord Keith has just stressed, another danger lies in wait of effective cooperation between the national courts and the Court of Justice. That danger is the length of preliminary ruling proceedings. The Court is well aware of this and has striven unremittingly to reduce that length, notwithstanding the ever-increasing number of preliminary references. It also shares the desire expressed by Lord Mackay that the Council will soon adopt its proposal for the transfer to the Court of First Instance of all direct actions brought by natural and legal persons. That proposal is intended to give the Court of justice the time necessary to deal with preliminary references and the Court of First Instance the possibility to undertake a close examination of the frequently very complex facts in the direct actions mentioned above. This should also bring about a reinforcement of the protection of the rights of the individual in this type of case.

Whilst the Court has taken care to protect the individual rights against attacks by national authorities, it has been no less attentive to the protection of those rights against any infringement by the Community institutions.

The Treaties do not contain any catalogue of fundamental rights and contain few provisions laying down other general principles of law, save those which directly concern Community action. The task conferred on the Court of ensuring that the law is observed none the less clearly presupposes the existence of legal principles which set limits to that action and the observance of which the Court must ensure by appraising the validity of measures adopted by the institutions.

These limits to Community action could not result from the direct application of the constitutional provisions of the Member States or of the general principles of law recognized in the various national legal

systems.

On the one hand, the Court has no jurisdiction to interpret and apply the constitutions of the Member States or other rules of national law. On the other hand, the review of the validity of Community acts could not be carried out by the courts of each Member State without disregarding the allocation of jurisdiction prescribed by the Treaty and abandoning the fundamental principle of the unity of Community law.

It was therefore an inevitable evolution of the case-law when the Court assumed full responsibility for the protection of individual rights against any attack by the Community institutions, not only in cases in which the latter themselves apply the Community rules, but also, in cooperation with the national courts, in the far more numerous cases where the application of those rules is undertaken by the Member States and their administrative authorities.

It is of course obvious that the material basis of such an extensive protection had to be found in the constitutional traditions common to the Member States and in international conventions accepted by those States, including in particular the European Convention on Human Rights.

Admittedly, the assumption of that responsibility is not without risks for the Court. It demands close study of comparative constitutional law, a study which must encompass not only the texts of the various constitutions but also national case-law. And as long as the Community, as such, is not bound by the European Convention, there is a risk of conflict with the future case-law of the European Court of Human Rights, a situation which the latter cannot redress.

The Court is fully aware of the need to ensure that the rights of individuals are protected as effectively as they would be by the direct application of the national and international sources of law from which it takes its inspiration. It is glad to note that, even though certain constitutional courts have had some hesitation about abandoning all review of the conformity of Community rules with their constitutions, no one has yet been able to point to any failing on the part of the Court of justice.

The Court also finds support for the idea which it has of its task of protecting the fundamental rights of the individual in the fact that the Treaty on the Union has affirmed that necessity in the very terms used by the Court in its case-law.

It is therefore with great satisfaction that the Court observes that the Union expressly assigns to itself the objective of 'strengthen[ing] the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union'. The Court has always considered that the corollary of status as a Community national is the possession of certain rights which have to be protected. Within the bounds of its jurisdiction the Court has striven to accord to those rights the greatest possible degree of judicial protection. In its efforts it has had exemplary support from the courts of the Member States, which have not hesitated to put to it questions on the compatibility with the Treaty of national legislation restricting access to the courts in areas affected by Community law.

If I had to express a wish on the occasion of this 40th anniversary, it would be that the Court of Justice, together with the other Community institutions and the national courts, will continue to regard the protection of the rights of the individual as one of the very objectives of the building of Europe.