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THE EUROPEAN COURT OF JUSTICE AND ITS INCONSISTENT APPROACH TO THE DOCTRINE OF DIRECT EFFECT

The issue pertaining to the circumstances under which individuals may seek enforcement of EU directives has proven to be one of the most controversial areas of EU law [17, p. 328]. This is primarily due to the Court of Justice's approach to and application of the principles surrounding this practice. This article will critically consider the development and current application of the doctrine of direct effect in a bid to determine whether there is any justification for the Court's approach to the matter. It will ultimately be argued that there is no apparent justification for the Court's inconsistent and arbitrary application of the doctrine and that this therefore undermines the underlying purpose of the doctrine: to protect individuals from Community law violations.

There is no express statement in the EC Treaty that Community law should be given direct effect. However, it has long been recognised since the landmark decision of *Van Gen den Loos* that the terminology of the Treaty is capable of granting individuals rights which must be protected by national courts [18, p. 12]. This principle was then expanded in *Grad* so that

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it could be applied to types of EU law that are not directly applicable – most prominently directives. This was confirmed in *Van Duyn* in which it was held that directives could be directly applied because otherwise their underlying purpose 'would be weakened if individuals were prevented from taking...[them]...into consideration as an element of Community law' [23, p. 12]. This approach appears to be based on the need to ensure the effectiveness of EU law and the principle that private individuals have an important role in facilitating legal order within the Community [11, p. 1055; 1, p. 513]. Despite the importance that was attached to direct effect in *Van Duyn*, the circumstances under which it is available have been limited to vertical direct effect and cases in which a directive is sufficiently clear, precise and unconditional [13, p. 94].

In *Marshall* it was emphasised that although directives could have vertical direct effect, they could not have horizontal direct effect [7, p. 34]. The Court held that an NHS retirement policy violated Directive 76/207 and, in interpreting Article 288 TFEU, stressed that 'the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to each member State to which it is addressed' and it could therefore not be relied upon by individuals [27, p. 48]. Due to the principle that duties presuppose rights, individuals cannot be granted rights under directives if they do not impose duties upon them because holding private parties responsible for state failures to implement directives is potentially unfair [8, p. 867]. Yet the formalist rationales that emerge in *Marshall* are unpersuasive, particularly if they are compared to the Court's purposive approach in *Defrenne*. The Court in *Defrenne* held that direct effect extends to include the actions of private parties (in this case a private company) despite the fact that the provision concerned was only addressed to member states [12, pp. 201–202]. Thus emerges the inconsistent nature of this decision and the Court's interpretation of Article 288 TFEU which only concerns member states [5, p. 861]. Article 288 moreover does not stipulate that directives are exclusively binding upon member states; it simply states that directives bind the member states to which it is addressed [4, p. 351]. Despite the clear problems that arise from this decision the Court has confirmed its continued relevance and stipulated in *Faccini Dori* that directives cannot have horizontal direct effect.

This brief glance at the Court's application of direct effect illustrates that its approach is indeed inconsistent and difficult to understand with any degree of clarity [11, p. 1050]. Perhaps most importantly, preventing directives from

having horizontal direct effect allows discrimination to manifest between the private and public sectors [15, p. 401]. Article 288 TFEU does not expressly define 'state' and although it is traditionally limited to judicial, legislative and executive institutions, the CJEU has clearly adopted both expansive and restrictive approaches in case law. The Court in *Foster v British Gas* for example adopted an expansive approach to the application of directives, suggesting that the concept of public entity is sufficiently expansive to include a variety of institutions that are under some form or other of state control [28, p. 18]. The Court therefore extended the protection available to individuals. This does not however mean that the problematic distinction between private and public bodies has been eliminated [19, p. 118]. The Court's approach following *Foster* has been irregular at best. In *Doughty v Rolls Royce* for example Rolls Royce was not defined as a public body because it was not deemed to provide a public service despite the fact that the majority of the company was state-owned.

Perhaps most prominently, decisions such as *Marshall* may be criticised on the grounds that they result in arbitrary differences in the protection that is given to individuals whose rights have been violated by a public authority and a private individual [10, p. 587]. Such arbitrary inequality is illustrated in *Duke v Reliance* in which the facts of the case were similar to that of *Marshall* although the directive could not be relied on because the claimant's employer was a private body. The Court recognised that such a problem could develop although it dismissed this issue on the grounds that 'such a distinction may be easily avoided if the Member State concerned has correctly implemented the directive in national law' [27, p. 51]. The Court however appears to mistakenly presume that directives may only be intentionally rather than mistakenly implemented incorrectly [6, p. 88]. This essentially means that individuals residing in states that have not fully implemented directives will be unevenly protected. Additionally, due to the fact that directives are a core mechanism for the imposition of responsibilities relating to welfare, directives geared towards the specific aim of welfare and social policy are undermined by the Court's approach. Hindering the right of individuals to challenge private parties clearly dilutes the fulfilment of the Community's objectives [10, p. 589].

It has been argued that giving directives horizontal direct effect would result in legal uncertainty because it blurs the distinction between directives and regulations [16, p. 250]. This was however dismissed in *Vaneet-*

veld on the grounds that member states still control the way that directives are implemented [31, p. 25]. The Court in *Francovich* sought to ease its previously harsh and inconsistent approach. Thus was created the doctrine of state liability which stipulates that member states must compensate individuals for any losses that result from the state's failure to fully or properly implement a directive [2, p. 441]. When individuals cannot rely on the horizontal application of a particular directive they may therefore seek damages from the state [9, p. 862]. Yet once again the Court has restricted the availability of this remedy by imposing certain criteria; it is therefore not a remedy that is available to all individuals who are unable to enforce their directive rights.

The Court's inconsistent approach to the doctrine of direct effect becomes all the more perplexing when one considers its willingness to directly apply directives between private parties. In such cases the existence of a discrepancy between national law and a directive are typically settled in favour of the directive, regardless of whether the claim is vertical or horizontal [4, p. 6]. This was the approach adopted in *Bellone v Yokohama* for example, in which the Court upheld an individual's claim that a national law was in breach of Directive 86/653 because it rejected the validity of her agency contract. The Court however reasoned that the decision sought to coordinate member state laws rather than to interfere in the legal relationship between private parties [10, p. 589].

Bellone may however be contrasted to *CIA Security* in which the Court allowed a directive to be enforced in a dispute between private parties. This decision – as well as *Bellone* – suggests that directives may only be directly enforced between private parties if they concern the core goal(s) of the particular directive [1, p. 513]. This approach is indeed arbitrary at best and depends ultimately on the Court's interpretation of any particular directive's core goals. This situation has been rendered all the more complicated following *Mangold* in which the Court allowed a claimant to rely on a directive despite the fact that the dispute was horizontal and that the deadline for the directive's implementation had not yet expired. The Court arguably expanded the horizontal effect of directives much too broadly, which is clearly an approach that is at odds with previous case law [3, p. 337]. *Mangold* also essentially means that private parties will need to consider 'the abstract and unwritten general principles of EU law in order to see if the national provisions are compatible with them' [14, p. 444].

It is therefore evident that the Court has indeed undermined the doctrine of direct effect due to its inconsistent and unpredictable decisions on the matter. There is consequently uncertainty as to when directives may be horizontally relied upon. The body of case law on the matter is incoherent, allowing and then disallowing direct effect in horizontal disputes. Reform is clearly necessary in order to clarify the circumstances in which directives may be enforced against private parties. Until such reform takes place, the doctrine of direct effect will continue to be undermined by the inconsistent and ambiguous approach of the Court.

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