Case Examination of Van Gend en Loos judgment of the European Court of Justice

Law 413 - European Union Law

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Abstract

Alongside the fact that European Union (EU) legal system is new and unprecedented, it also harbors the structure of being progressive. This structure represents an integration process that binds nations together, rather than being a set of international treaties concluded by them. The legal system of the EU does include not only the member states but also the individuals. In this paper, Van Gend en Loos decision of the European Court of Justice, which is of great importance in the emergence of this supranational structure, will be examined. The event subject to this decision and its content will be mentioned. The direct effect principle arising from Van Gend en Loos will be analyzed. Previous decisions of the European Court of Justice that were effective in making this decision born and the subsequent cases affected will be investigated. On the basis of individuals and supranationality, what Van Gend en Loos stands for in EU law and its importance regarding today's situation will be emphasized.

Keywords

European Union, individuals, direct effect, supranationality, Van Gen den Loos

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Introduction

Van Gend en Loos plays a vital role in the EU law as a landmark decision of the European Court of Justice because this is the first case that the principle of direct effect has been introduced and the signs of new legal order were seen. The parties of the case were Van Gend en Loos, and the Nederlandse Administratie der Belastingen (Netherlands Revenue Administration). The critical discussion on the case is whether Article 12 of the EEC Treaty provides a right that can be claimed before national courts by individuals or not, which means the case involves the discussion of direct effect doctrine.

The idea that a legal person or any individual in that sense can claim a right that Treaty conferred to them is what has been discussed in this case. This notion of conferred rights that individuals can allege before the national courts based on a Treaty is called the direct effect principle today. Directly invoking Community law, independent of national law, is an accepted notion in EU law, and the Van Gend en Loos case is the seed that makes this principle born and grow. Since the direct effect principle is not mentioned in any of the Founding Treaties, it is created by the European Court of Justice by its jurisprudence, and it demonstrates the autonomous nature of the legal order of the Community. The principle of direct effect is crucial in terms of establishing individuals as a right and obligation holder of the Community and making them the effective enforcement mechanism that protects what is aimed with this integration.

European Court of Justice, by this decision, accepted that the persons are at the heart of the European integration and, therefore, they can be both right and obligation-holders in this new system. Acknowledging the individuals as an enforcement mechanism for the potential breaches by member states is a kind of penetration to the national legal systems by Community law. This is one of the aspects why this decision carries so much importance.

Moreover, the member states agreed to transfer some of their sovereignty rights to the Community to create a new legal system based on supranationality. Granting rights to the individuals by direct effect principle, The Court of Justice also emphasized that the individuals have the right to police whether the member state acts in the way required by the Community law. Thus, the Community law was given implicit supremacy.

Van Gend en Loos decision of the European Court of Justice will be examined in this paper regarding its importance in European Union law.

1. The Summary of the Case

Van Gend en Loos is the case that came before the European Court of Justice of (ECJ) as a request for a preliminary ruling procedure about a discussion over tariff policies of Netherlands, by the Tariefcommissie, which is a Dutch court, under subparagraph (a) of the first paragraph of the Article 177 of Treaty Establishing the European Economic Community (EEC Treaty).[1] According to Article 177, if the national court or tribunal considers that the upcoming decision on the dispute can be affected by the interpretation of the Treaties or validity and interpretation of the act of institutions of the Community, it can refer to the ECJ for rulings thereon.

Van Gend en Loos is a Dutch importation company that carries chemicals to the Netherlands from Germany. Between Benelux countries (Netherlands, Luxembourg, and Belgium), a protocol was concluded and involved some categories that regulate the imported products' rate. The chemical carried by Van Gend en Loos, firstly classified under products subjected to 3% customs duty. Later, the category of the chemical was altered and became subjected to 8%. The claim of this company was that the Netherlands government had increased the tariffs on intra-Community trade, contrary to Article 12 of the EEC treaty, which prohibits any increase or introduction of new customs charges between member states.[2] Thus, The Dutch court raised two questions, being referred to the ECJ. The first question was about whether Article 12 of the EEC Treaty has direct application.[3] within the member states. In other words, whether the individuals being the nationals of that state can, on the Article mentioned, claim individual rights that the national court must protect. The second question was conditioned for an affirmative reply to the first, and it was about the lawfulness of the rise in customs duty by the Netherlands. It should be highlighted that the legislation, which caused this case to be born, was 'TariefsBesluit' that is the protocol between Benelux nations. Therefore, the conflict in the case was between the Treaty of Rome and the mentioned protocol, which was later enacted by[4].

The Dutch, Belgian and German governments intervened and denied that Article 12 could have a direct internal effect in member states since it imposes "only an obligation on the part of the Member States". Inadmissibility of the case was also claimed by the Belgian and Dutch governments, arguing that the case was about application rather than the interpretation of the Treaty and ECJ had no jurisdiction over the application. If accepted that the issue was about applying the mentioned

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[1] Van Gend en Loos v. Nederlandse Administratie der Belastingen, C-26/62.

[2] "Article 12: *Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other.*"

[3] Direct effectiveness and application have the same meaning in this case.

[4] William Phelan, *Van Gend en Loos, 1963: Direct Effect. In Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period*, (Cambridge: Cambridge University Press, 2019), p. 32.

provision, only the mechanisms provided under Articles 169 and 170 can be used to allege that a state has infringed the Community law. The Belgian government also argued that the outcome of the case could not be changed by any of the answers received from the ECJ; it had no jurisdiction over the dispute. Lastly, the Dutch government rejected the existence of the alleged rise in tariffs and stated that the tariff was not raised at all.

It can be helpful to bring up a discussion on the compatibility between the Tariefbesluit and Article 12 of the EEC Treaty. When the governments adopted the TariefsBesluit, compatibility of the protocol with the EEC Treaty has argued on a national basis. The protocol was considered as an international agreement. Even though the Dutch Parliament questioned its compatibility with Article 12 of the EEC Treaty, the Dutch government had convinced the Parliament that the protocol complies with Article 12 within the objectives of the Founding Treaty.[5] Moreover, when the direct effectiveness of Article 12 was argued to be incompatible in the various administrative organs of the Netherlands, the arguments were concluded by stating that Article 12 could not be directly effective. When the German stand towards the protocol is considered, it was argued by Ulrich Everling, who was from the Economics Ministry of Germany at that time, the Founding Treaties did not differ from a traditional international agreement; therefore, the states are the ones who are bound by the Treaties, not their nationals. As a result of this outcome, Article 12 could not be brought by the nationals of the member states before the national courts. Furthermore, according to this claim, it is member states' duty to protect their citizens and their right according to the national constitution against the rules of European law, not the European laws against the national constitutions.[6] An exciting fact must be emphasized here that Everling was selected as a judge for ECJ and served in the Court from 1980 to 1988.

Acknowledging the opinions of advocate generals in European Union case law are outstandingly effective on the Court decisions, it would be crucial to refer it in this examination. Advocate General Karl Roemer asserted that a direct application of an Article could only be possible if the provision itself provides individuals to enjoy the given right.[7] Article 12, on the other hand, included only an obligation regarding member states without any reference to individuals. Therefore, argued by Roemer, Article 12 cannot be claimed before the national courts and directly applied. Moreover, Advocate General discussed that Articles 169 and 171 of the EEC Treaty had specific

[5] Morten Rasmussen, *Revolutionizing European law: A history of the* Van Gend en Loos *judgment* (International Journal of Constitutional Law, Volume 12, Issue 1, January 2014), p. 158.
[6] *Ibid*, p. 159.
[7] Opinion of Mr Advocate General Roemer delivered on 12 December 1962, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61962CC0026.

ways to deal with the breaches, and necessary measures determined by ECJ held mandatory for the member states.[8] However, accepting the direct effect for this provision would mean accepting that Community law will prevail over national law. Thus, the legislation which led this dispute to arise must have been confined to a declaration of nullity. In Roemer words,

> *"For the purpose of Community law, it had been intended to make the direct application of the provisions of the Treaty, in the sense that they are to prevail over national law, a fundamental principle, the procedure for enforcing obedience could have been confined to a declaration of the nullity of measures taken contrary to the provisions of the Treaty."*[9]

Roemer also noted that not all member states legislation systems' are integrated into the same level, which born variation in constitutional laws and application in Community law. Therefore, acknowledging Article 12 as directly applicable would result in a situation where inequality between states will occur. Since the Community is "far from uniform" concerning supranationality, the breaches of mentioned Article would be against the vital aim of the Community itself.

Advocate General answered the second question raised by the Tariefsbesluit. However, we believe that this answer should not be explained deeply since it requires an affirmative reply to the first question, and Roemer did not give a positive answer to that. Nevertheless, shortly, he argued that the court should not make any assessments connected to the second question.

2. The Decision of The European Court of Justice

When the jurisdiction of the Court was questioned by the governments of both Netherlands and Belgium, the Court answered the claims by saying that, Tariefcommissie made a preliminary reference about whether Article 12 of the EEC Treaty could be claimed before the national courts by the individuals to the Court of Justice according to the Article 177 of the Treaty. Hence, it is a concern about the interpretation of the provision; the Court rejected the claims of the Government of the Netherlands and the Belgian Government, which argued that this reference is about the application of the Treaty.

ECJ replied to the questions raised by the Dutch court by the preliminary ruling regarding Article 12 and the lawfulness of the increase mentioned. According to the decision, Article 12 of the

[8] Phelan, p. 33.

[9] Opinion of Mr. Advocate General Roemer delivered on 12 December 1962, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:61962CC0026.

EEC Treaty was a directly effective provision creating adducible rights before national courts. The courts of member states are obliged to protect these rights independent from the national law; as Grief stated, "European Union law can create rights for individuals that national courts must protect".[10] The Court also decided that the chemical product was faced with an increase of rate in customs duty. According to the ECJ, it does not matter whether the charge enforced to companies was born out of an immediate increase in tariffs or because of a rearrangement of duty classification; both would be contrary to Article 12.

The Court asserted that the Community law constitutes a new legal order in international law and the comprise made by the states will provide rights, not for only them but also their nationals. This famous declaration of the Court is,

> *"New legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals*".

The idea of new legal order was supported by highlighting the Preamble of the EEC Treaty, which referred not only to governments but "peoples" too.[11] [12] The logic behind this statement is that the European legal system goes beyond international law to generate a genuine "*Droit Communautaire"*.[13] It was argued that the Treaty of Rome could not be understood in a traditional way, and it involved people within its core. Meaning that the Community was not just established to make member states' governments' be obliged by its law, but it carries the meaning of itself, which is "the people living in a particular area and considered as a unit because of their common interests".[14] Thus, the people were considered as both the object and the subject of the Treaty; rights and obligations can be conferred upon them and should be. The Court referred to the importance of cooperation between the citizens and member states through the European Parliament and the Economic Social Community and argued that by accepting being a part of the Community, the member states have also recognized that nationals can invoke Community law before the courts and tribunals. The aim of Article 177 was observed to be in parallel with it.

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[10] University of Kent. (2016, December 8). Reflections on the European Court of Justice's judgment in Van Gend en Loos | Professor Nick Grief. YouTube. Retrieved December 11, 2021, from https://www.youtube.com/watch?v=06U63Is4-wA

[11] "*Determined* to establish the foundations of an ever closer union among the European peoples…" .

[12] *"Directing* their efforts to the essential purpose of constantly improving the living and working conditions of their peoples…".

[13] Rasmussen, p. 152-153.

[14] Cambridge Dictionary, https://dictionary.cambridge.org/tr/s%C3%B6zl%C3%BCk/ingilizce/community

Most importantly, today, in European Union law, for a provision to be accepted as directly effective, it should be clear, unconditional, and precise according to the accumulated jurisprudence of ECJ, and the basis of this acceptance is rooted in Van Gend en Loos decision. Regarding the direct effectiveness of Article 12, ECJ articulated that it is a provision containing a clear and unconditional prohibition and a negative obligation. Being an unconditional and clear provision, Article 12 had in its nature to be adapted as directly effective. Besides, the obligation created by this provision had not any reservations made by the states, which would make it conditional on being enforced. As explained further in the Article, the mentioned quality of 'creating a negative obligation' or 'not having reservations on provision' is not accepted as such today.

The Court rejected the argument brought by Benelux nations and asserted that Articles 169 and 170 were not the only ways or tools to address breaches. Where the member state infringed the Treaty, and these articles are somehow ineffective, supervision of individuals is accepted as a way to protect what the Community tries to achieve.

3. The Direct Effect

The direct effect is the principle providing that Community law can confer rights upon nationals of member states if the provision including these rights meets the criteria established by the European Court of Justice. The common notion holds that the doctrine of direct effect is rooted in the European Union structure that arose from Van Gend en Loos. Such principle was not mentioned in any of the Founding Treaties, yet it was and is a vital and firmly used principle. It symbolizes the autonomy and authority of the Community law. From a socio-political perspective, Van Gend en Loos stands as a moment of a transitionally integrated constitution of Community.[15]

The direct effect is used as both direct effectiveness and applicability in Van Gend en Loos. The division of this principle into two, in time, can be regarded as the expansion of the direct effect doctrine, which penetrates the national legal systems of member states.[16] With the production of individual rights by "new legal order", the national states had begun to lose a part of their monopoly over legislation and sovereignty. As stated before, ECJ held the doctrine of direct effect conditioned to some criteria: being clear, unconditional, containing no reservation, and involving negative obligation in Van Gend en Loos. The provision regarding the dispute should not be from a primary source to be counted as directly effective, and this is not a condition for this principle. The criteria did not remain as it was established, yet the effects it has imprinted on EU law can be observed. ECJ

[15] Teacher, Law. (November 2013). Relevance of ECJ (CJEU). Retrieved from https://www.lawteacher.net/free-law-essays/european-law/relevance-of-ecj.php?vref=1.

[16] Sophie Robin-Olivier, T*he evolution of direct effect in the EU: Stocktaking, problems, projections*, (International Journal of Constitutional Law, 12(1), 2014), p. 166.

itself decided that the Treaty of Rome could grant rights to nationals of member states even the words 'right' or 'individual' does not mention in the specified provision.[17] If the provision that is taken before the ECJ by preliminary ruling procedure meets the criteria, then the rights it confers can be raised in national courts. Thus, the rights are created by the national law and the Community law, and the consequence of sharing this competence on legislation is 'penetration of national law' as stated above. It should also be highlighted that the national court cannot determine whether the provision regarding the case is directly effective by itself. The procedure of preliminary ruling is always mandatory on the issue of validity and interpretation of provisions regarding Community law.

Today, the criteria that must be taken into consideration while deciding on a provision to be directly effective are being clear, precise, and unconditional. This criterion gave ECJ an extensive interpretation authority, especially when Treaty provisions are concerned. In the further judgments, the only requirement for these provisions was actually degraded into "justiciability" of the law and opened the way for granting all free movement provisions to be directly effective.[18]

The principle of the direct effect that is emerged in the Van Gend en Loos has an aspect where it imposes constraints on national legislation and remarkably in policies in favor of European legislation. The individuals and national courts combined have obtained the right to become the enforcement mechanism for Community law. Besides, the direct applicability has become an extensive constraint on states by having direct application that is also a principle that originated in *Van Gend en Loos*.[19] The provisions included in Community law required to be in litigation process before the national courts. This process is the concern of private parties, yet the direct effectiveness has made these parties the police of the legislation like states. Hence, the pursuit of interests of individuals, which are generally smaller for the Commission or the member states to take action according to Article 169 and 170, were provided a legal assurance which is counted even today as a fundamental cornerstone of European democracy. Then, the direct effect doctrine can be stated as a remedy for the weakness in dispute settlement that is left blank by Articles 169 and 170 in the EEC Treaty. The shift in enforcement mechanism realized from reliance on actions before the ECJ by Commission or member states towards the adequate role of individuals and domestic courts.[20] This can be seen as an actualization of private individuals becoming the actors of politics, law, and in the international area, which is argued to be by the liberalist perspective.

[17] Phelan, op. 40.
[18] Robin-Oliver, p. 169.
[19] Phelan, 45.
[20] Phelan, p. 47.

3.1. Today's Situation and Direct Applicability

The direct effect is a principle in EU law that has been evolved by the case law. The principle gives individuals the right to invoke a European provision before a domestic court, but not all provisions of the European Union law instruments are counted as directly effective. Some conditions are required to be met by these. today, generally accepted conditions for a provision to be directly effective are being clear, precise, and unconditional. The principle of direct effect has evolved after *Van Gend en Loos* and was subjected to change in different forms. The division between the direct applicability of an instrument and the direct effectiveness of a provision are now accepted as separate principles; however, they originated from the same implicit idea of the superiority of Community law. While the direct effectiveness is bonded to what ECJ decides, direct applicability is regulated under Article 288 of the Treaty on the Functioning of the European Union (TFEU).

Direct applicability of an EU instrument is an ability of EU legislation to be considered part of a member state's law without further domestic implementation.[21] Article 288 explicitly states Regulations as directly applicable; thus, they are legally binding in their entirety, and they have general application.[22] They come into force and do not require an action of member states for that. It should be highlighted that no other instrument in EU law is directly applicable other than Regulations.

To better build the connection between these two principles, they can be observed in an aspect that their ability to limit the sovereignty of the states. Both doctrines in EU law support the idea that integration of the Community cannot just stay in an economic basis. Political and legal uniformity must be established for integration to become wholly beneficial and reach its aims. Even though the integration process of politics and law is not easy, thinking that national interests are the biggest concern of states, the idea of collective security can outweigh the hardship of the process. ECJ has been criticized for becoming a judicial activist and extensively using its monopoly over interpretation, yet the idea of uniform application and making the Community a separate sphere can be seen as a justification for these decisions to be made and principles to be born.

3.2. Rights of Individuals

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[21] Glossary, Direct Applicability (EU), Thomson Reuters Practical Law, Retrieved from https://uk.practicallaw.thomsonreuters.com/w-018-9106?transitionType=Default&contextData=(sc.Default).

[22] "Article 288 - **(ex Article 249 TEC):** *To exercise the Union's competencies, the institutions shall adopt regulations, directives, decisions, recommendations, and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but shall leave the choice of form and methods to the national authorities. A decision shall be binding in its entirety. A decision that specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force.*"

As it was referred on the Preamble of the Treaty, individuals are included in the European legal system. In their defense, the governments argued that the Treaty is an international agreement; hence it could only create rights and obligations for states, not for their citizens. The Court of Justice rejected this claim in *Van Gend en Loos* by emphasizing that the Treaty is more than a traditional international agreement. When the objectives and the Preamble of the Treaty were considered, it could be fairly stated by the ECJ that the individuals play a vital role in the European legal system, which began to be established at that time.

The importance of the *Van Gend en Loos* decision was about introducing the doctrine of direct effect, which means that the nationals of the member states can declare their rights born out from the European law before the national courts of the member states. However, the significance of the case on the rights of individuals went beyond this. Another matter here is that a possibility to police the member states about whether their activities are compatible under the requirements of EU law was given to the individuals with Van Gend en Loos decision.[23] Thus, either the Commission or a member state, with this decision, individuals have also become competent to claim a potential breach of the Treaties. However, the matter here is that, after the Van Gend en Loos decision, national governments would confront their national court when they breach the European legal norms. Also, there would be no necessity to move the question to the ECJ if the provision regarding the dispute was already decided to be directly effective by the ECJ.[24] Consequently, it forged a mechanism that has self-control within the framework of the European law in the member states' legal system.

As stated in the decision, the European legal order cannot be deemed an example of traditional international law. European law differentiates from international law by constructing rights and obligations for the citizens of the member states, yet this does not imply that individuals have some overly broad rights to intervene in the sovereignty of the member states. The introduction of the direct effect does not directly give individuals complete protection or application of the rights provided under the Treaties.[25] Moreover, Community law does not aim to protect the right or compensate the damage comprehensively; the aim here is that the individuals should be able to invoke their right before the national courts or tribunals.[26] Even if individuals are granted protection with direct effect, this protection has also required the cooperation of the member states' national courts. Direct effectiveness itself could be considered as a revolutionary notion in Community law. Nonetheless,

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[23] Damian Chalmers & Luis Barroso, *What Van Gend en Loos Stands for*, (International Journal of Constitutional Law, 12(1), 2014), p. 119.
[24] M, Rasmussen, *Law Meets History: Interpreting the Van Gend en Loos Judgment,* (Cambridge: Cambridge University Press, 2017), p. 110-11.
[25] Chalmers, Barroso, 118.
[26] *Ibid*, p. 119.

the enforcement motivation would play a crucial role regarding whether the rights of individuals have been genuinely emphasized in Community law. Furthermore, the European legal order did not introduce any rights of appeal, remedies for judicial error, legal aids in the scope of the cases within the Community law. Therefore, it cannot be asserted that ECJ itself is the protector of the rights of individuals.[27] In this sense, the problem was that the member states could not be considered entirely enthusiastic about accepting that a legal system would limit their sovereignty and take over superiority. As a consequence of this unwillingness, the states become skeptical about applying European law both in the administrative and legal organs in their country, especially France, Italy, and Germany. [28]

On the other hand, it cannot be denied that Van Gend en Loos decision is a cornerstone in the Community history due to the fact that it is a demonstration that individuals are at the heart of the European legal system. According to Walter Hallstein, the European Community is a system where individuals and institutions are connected through Community law. The member states cannot interfere with this relationship between the citizens and the institutions.[29] Although there is a requirement of collaboration from the national courts, there is also a direct connection between the individuals and the Community institutions, which has been flourished from the Community law. As a result of this connection, the individuals are granted some rights which enable the European Community to limit the sovereignty of the member states. Thus, there is a transposing of rights from the member states to the Community and then the Community to the individuals. This transaction is why there is no necessity for intervention of the member states in the relationship between their nationals and Community. This approach of the Community law towards the importance of the individuals in the legal system makes the European Community law unique, in other words, *sui generis* compared with the international law.

3.3. The Relationship Between *Van Gend en Loos* and Supranationality

From the Preamble of the Treaty, it can be affirmed that individuals are a part of the European legal system. Therefore, it could also be stated that making the individuals part of the system is the intention of the founders of the European Community. As a result of this intention, the unique design of the European Community has been shaped by the Treaties and the case law, which means that the European Community can be classified as neither federalism nor confederalism as Schuman defined the Community as, "*Midway between confederalism which recognizes the complete independence of*

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[27] *Ibid*, p. 118.

[28] Rasmussen, *Revolutionizing European law: A history of the* Van Gend en Loos *judgment,* p.155.

[29] Antoine Vauchez, "*The transnational politics of judicialization. Van Gend en Loos and the making of EU polity.*" (European Law Journal, 16 (1), 2010), p. 21-22.

states in an association and federalism which seeks to fuse them in a superstate", whereas this statement can be understood as what supranationality of the Community stands for.[30] Supranationality means that the Community exercises its power within the competencies defined in the Treaties, also the competencies transposed to it by the signs and ratification of the member states.[31] After transposing these rights to the Community, member states have become powerless in specific fields where they have given consent to transpose their sovereignty to the Community. Therefore, the Community would act regardless of the interests of the member states and consider mainly the interests of the individuals and the Community itself.

However, when the situation of that time when Van Gend en Loos decision was given is thought, it cannot be claimed that understanding supranationality in the Community is vital. Firstly, the European Parliament did not have any competence in the legislations process rather than giving opinions that were not binding.[32] Moreover, these opinions of the Parliament should have been delivered when they were asked, and in most of the cases, they were not invited. Therefore, it could not be said that the interests of individuals were influentially represented in the Community legal system. When the Community institutions are considered, as there are two supranational organs in the European Union today, it can be seen that the Parliament was outside of the democratic responsibility and accountability at that time. As a result of this exclusion, the only supranational organ remaining was the Commission. The Commission has been one of the supranational organs since the beginning of European integration because it is representative of the interest of the Community rather than the interests of the member states. Therefore, complete supranationality has been aimed but not achieved at that time of the Community due to the democratic deficit based on the lack of competence of the Parliament.

When the ECJ introduced the direct effect in its decision of Van Gend en Loos, ECJ has put considerable emphasis on the importance of the new legal system. As interpreting the Treaty to enable the individuals to claim their rights before the national courts, ECJ implicitly made the individuals guardians of the Community rules. If a member state infringes an individual's right born out of the Community law, the individual would have the right to claim it. This action would be brought before the national courts of the member states; therefore, the national courts become obliged to guard the individuals' rights alongside the individuals themselves, against the national legislations which

30 Domingo, Rafael. (2019). Robert Schuman: (1886–1963). 10.1017/9781108669979.025.
31 Kimmo Kiljunen, *The European Constitution in the Making*, (Centre for European Policy Studies, 2004), p. 11.
32 Joseph H. H. Weiler, *Revisiting Van Gend en Loos: Subjectifying and Objectifying the Individual*, (50th Anniversary of the Judgment in Van Gend en Loos, 1963-2013), p. 16.

infringe the Community law. By this obligation, the legal part of the European integration would be protected on the national level by the direct effect in the long term.

Even this principle is an enforcement mechanism for European integration; federalism cannot be discussed as an issue here since there is no need for transposition of legislation in such systems. The purpose for creating a supranational society remains. For instance, the member states must transpose the instruments of the Community into their national law, except the Regulations, in the defined fields. However, they are not entirely obliged to leave their domestic values or rules. Furthermore, this aim is what member states have been agreed on since the beginning of European integration. Thus, claiming that the concept of direct effect introduced by the ECJ in the *Van Gend en Loos* is opposing the objectives of the Treaty cannot be genuine, recognizing the aim of the founders of the European Community.

If the Founding Treaties are accepted as the social contracts between the Community and the member states, after the *Van Gend en Loos*, the individuals have evolved as the policemen who guard the member states for the fulfillment of this commitment. Moreover, national courts and tribunals become the policemen with the individuals after the decision. Therefore, after the *Van Gend en Loos*, states have become more accountable for complying with the obligations they have accepted since the origin of the Community, and the Community has become one more degree closer to being a supranational community as intended by the founders.

4. Related Cases in the European Union Law

There can be no examination of European Union law without any reference to *Van Gend en Loos*. The importance given to this case is not simply because of the dispute or the facts mentioned. Rather than that, attention must be given to this case because the European Court of Justice attached the qualification of 'new legal order'.[33] The acceptance of the principle of direct effect is the path for this new legal order, and it is created by the jurisprudence of ECJ. Hence, to understand the context the decision was given and to examine the emphasis in subsequent times, the related cases must be considered. There are earlier cases that helped establish the context of Van Gend en Loos and some further cases that are influenced by it.

4.1. Earlier Decisions

Humblet and Bosch decisions of the Court must be considered while investigating what Van Gend en Loos stands for in that period. In the 1960 *Humblet* Judgment (Case 6/60), the dispute was concluded

[33] Robin-Olivier, p. 165.

by stating that the European Coal and Steel Community (EAEC) Treaty attached the Court decisions' only "declaratory effect".[34] Thus, in cases of failure to comply with the Treaties, Article 171 of the EEC Treaty and 143 of the EAEC Treaty gave competence to the Court to make a decision that is binding on the member states to take necessary measures. The Court cannot annul or repeal the legislation that was brought upon. The idea that the Court cannot directly annul an instrument or provision forms the context of what is argued by Benelux countries in *Van Gend en Loos*.

The other earlier case affecting the decision of ECJ in 1963 was the *Bosch* decision of 1962. One of the reasons this case is essential in the Community law history is the first time a national court made a preliminary reference to the ECJ under Article 177 of the EEC Treaty.[35] After the *Bosch* decision, the preliminary ruling procedure was called a new procedure that would "*play a central part in the application of the Treaty*."[36] The case was about Article 85 of the Treaty of Rome and its part in competition rules.[37] The dispute was about whether the provisions regulated under the Treaty had direct application or regulations made by the European institutions were necessary.[38] Dutch government asserted that the provision could not be applied on nation basis until Regulations were adopted. Germany, Belgium, and the Commission cultivated that these were immediately applicable when they came into force. The Court declared Article 85 as directly applicable since coming into force. *Bosch* is important, firstly, because it represents that the Treaties made to establish a Community had different characteristics than a regular international treaty. Moreover, through the *Bosch* decision, the ECJ emphasized that the Treaties have constitutional characteristics in the Community law, leading to a self-executing nature within both scopes of the Community law and the member states' national laws.[39] This self-executing nature would lead to the declaration of direct effect in the *Van Gend en Loos* decision. As a result of this declaration, ECJ would create a way to limit the sovereignty of the member states regarding legislation.

In addition, Article 85 was provided as an example by Advocate General Roemer, "*The EEC Treaty contains in addition provisions which are clearly intended to be incorporated in national law and to modify or supplement it. Examples of such provisions are Articles 85 and 86 relating to competition…*" and argued that Article 12 could not be considered in such a way since there is not any reference to the individuals. The criteria to determine whether a provision is directly effective or

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[34] Jean-E. Humblet v Belgian State, Case 6/60.

[35] Dennis Thompson, *The Bosch Case*, (The International and Comparative Law Quarterly, 11(3), 1962), p. 721.

[36] Daniel Halberstam, *Internal Legitimacy and Europe's Piecemeal Constitution: Reflections on Van Gend at 50*, (50th Anniversary of the Judgment in Van Gend en Loos, 1963-2013), p. 113.

[37] Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn, Case 13-61.

[38] Phelan, p. 37.

[39] Rasmussen, *Revolutionizing European law: A history of the* Van Gend en Loos *judgment*,p. 150-151.

was not established before the *Van Gend en Loos,* but the Court's signals of upcoming doctrine have been given with the earlier decisions like *Humblet* and *Bosch*.

4.2. Further Decisions

As it can be understood, *Van Gend en Loos* is a landmark decision and can be seen as a cornerstone of the creative jurisprudence of ECJ. Yet, the problem with further decisions on this case is that the ECJ has exceeded the established limits even by itself. ECJ is generally criticized by the doctrine that it sometimes puts itself in the shoes of a lawmaker without any restrictions. In the further case, we will examine, it can be observed that the Court does not follow the scope as determined in the first place for direct effectiveness. Yet, attention should be drawn that the Community law is a new legal order, and having the monopoly to interpret will always result in criticism. Even though the ECJ has a monopoly over the interpretation of the treaties, when the matter has come to the application of the Treaties, the cooperation of the member states is required. Hence, this requirement of cooperation constitutes a weakness for the system. This weakness of the new legal order was based on its dependence on the collaboration of the national courts with the ECJ. This cooperation required a certain amount of time for member states to digest the new system. As a result, the cooperation between the ECJ and the courts or tribunals of the member states began in the 1970s and 1980s. Hence, the decisions of ECJ had supremacy which led the Court not to be challenged by the national legislation in contrast with it and shape the constitutional bases of the European law.[40]

In *Van Gend en Loos*, the Court has decided on direct applicability with some conditions that constitute the grounds for this principle. It justified the direct effectiveness of Article 12 by stating that the provision was clear, unconditional, constitutes a negative obligation, and no reservation was made by states that will make the provision conditioned to any national legislative measures. Therefore, it can be understood from *Van Gend en Loos* that a provision can only be directly effective if it meets the criteria mentioned. The scope was determined by the court; however, in the decisions made in the 1960s and 1970s, ECJ ruled that provisions can have direct effect even though they do not fall within the scope of the limitations made.

One of the most critical decisions which have intensified the impact of *Van Gend en Loos* is the *Costa v. ENEL* decision of 1964. In the *Costa* decision, the ECJ has introduced the principle of supremacy, meaning that the legal norms of the Community would prevail over the domestic rules of member states. In essence, the footsteps of the principle of supremacy could have been understood by the introduction of direct effect. The reason is that by giving individuals the authority to claim

[40] *Ibid,* p. 161.

their rights before the national courts, the ECJ also implied that if an instrument adopted by the member states would be in breach of Founding Treaties, the individual can take action against this infringement. In *Van Gend en Loos*, this instrument was an international agreement that had an internal effect that violated the Community rules. In *Costa v. ENEL*, this was the national legislation of Italy.

However, neither *Van Gend en Loos* nor *Costa v. ENEL* are adequate decisions to generate the designed legal order of the Community because both the doctrine of direct effect and principle of supremacy require the cooperation of the member states. Based on these two decisions, the aim to create a new legal order of international law has been and distinguished the Community law from the customary international law.[41] One of them made this distinguishment by expanding the roles of the individuals in the legal system. The other made it by remarking that the Community's legislation would prevail over any norm made by the member states. Therefore, both indicate the increase in the degree of supranationality within the Community. Despite the landmark decisions, there was still a need for a large-scale improvement and enforcement of the case law.

Deviation from the limits established in *Van Gend en Loos* can be firstly observed in *the Lütticke* decision of 1966. The case was about whether Article 95 of the Treaty should have direct application. The provision requires member states to equally tax imported goods and national goods similar to them.[42] This provision also obliged member states to act, which could be enforceable by domestic courts even though the state did not act at the date it should.[43] Thus, the Court has not paid attention either to the negative obligation requirement or to being unconditional in this case.

In the *Molkerei-Zentrale* decision of 1968, ECJ ruled that "the complexity of given situations within a State cannot alter the legal nature of a directly applicable Community provision", which is actually out of the scope of what is required for a provision to be 'clear'. The court found in this case that the national court could resort to the preliminary reference, and not following this procedure cannot be an excuse to alter the nature of a direct provision. Thus, the provision can be complex, and the national court needed to refer to ECJ.

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41 *Ibid*, p. 155.

42 "Article 95: (1) *A Member State shall not impose, directly or indirectly, on the products of other Member States any internal charges of any kind in excess of those applied directly or indirectly to like domestic products.* (2) *Furthermore, a Member State shall not impose on the products of other Member States any internal charges of such a nature as to afford indirect protection to other productions.* (3) *Member States shall, not later than at the beginning of the second stage, abolish or amend any provisions existing at the date of the entry into force of this Treaty which are contrary to the above rules.*"

43 Phelan, p. 38.

Another change in the scope was seen in the *Reyners* decision of 1974. The dispute was about Article 52, which was on freedom of establishment. ECJ held that this Article is not "complete" and "legally perfect" as Article 12.[44] Also, the provision expressly necessitated further action to be taken by legislative organs of the Community and member states. Still, the Court ruled that the provision was directly effective, and hence, it moved away from the conditions established by itself.

The expansion of the conditions provided in the *Van Gend en Loos* throughout the decade starting from 1960 would be highly intense. Therefore, it is enough to say that the doctrine of direct effect has evolved over time that the case established the principle is now appears to be a limited understanding of that.

The importance of *Van Gend en Loos* should be once more mentioned by stating that it was included as a "basic community case" as a "classic of EU law" in both *Rudden and Rossa Phelan* 1997 and *Maduro Azoulai* 2010. Moreover, ECJ has described it as a "source of and a framework for the principles which have shaped the constitutional structure of the European Union."[45]

5. From the Aspects of International Law

The doctrine of direct effect is not an entirely new concept introduced by the European Union law for the first time in international law history. However, the application of the direct effect differentiates states to states and agreements to agreements. Therefore, state exercise varies and is too narrow to determine a single definitive concept of direct effect like in EU law. However, the general tendency in applying the direct effect becomes similar in the perspective of international law. The main criteria here rely on two fundamental questions: the clarity of the provision and whether the provision provides rights for individuals. However, it is also hard to find an agreement that is directly applicable in the national legal system and gives rights to the individuals that can be claimed before the national courts.[46] The problem of the direct effect in international law is based on this difficulty. The states agree upon no standard criteria, and as a result of these various applications, there is no clarity in enforcing the direct effect on a state basis.

On the other hand, after *Van Gend en Loos*, the fundamental logic behind the principle has remained even if the ECJ has changed the criteria. The case law enables the European Union to apply the principles uniformly originated by ECJ. This uniformity is a characteristic of the European legal system after the numerous following decisions of the ECJ, which is absent in international law.

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[44] Jean Reyners v Belgian State, Case 2-74.

[45] *The Court marks the 50th anniversary of the judgment in Van Gend en Loos*, Conference Proceedings, May 15, 2013, http://curia.europa.eu/jcms/jcms/P_95693/.

[46] André Nollkaemper, *The duality of direct effect of international law*, (European Journal of International Law 25(1), 2014), p. 109-110.

Therefore, it is not surprising that the European Union has a uniform application, compared to international legislation, of the direct effect in general. Nevertheless, this does not change that the origins of the direct effect in the European Union still rely on international law, more especially the *Danzig* doctrine. The *Danzig* doctrine is the doctrine that admitted states could conclude a treaty that formulated individual rights that could be enforceable in national courts.[47] Still, the matter is here is the ambiguity of this application because the application foreseen by the *Danzig* courts depends on the consent of the states.[48] These rules have been established by the Permanent Court of International Justice in its opinion on the access of individuals to the *Danzig* courts in 1928.

In 1962, ECJ had opposed the *Danzig* doctrine in the decision of *Confédération Nationale des producteurs de fruits v Council of the EEC*, which limited the individuals' right to stand before the Court.[49] However, in the same year, the same ECJ had decided and also widened the rights of individuals in *Van Gend en Loos* decision, which complied with the *Danzig* doctrine better than the previous decisions. The Court did not decide that individuals hold the right directly enforceable before the ECJ itself. Still, by standing before the national courts, the individuals have indirectly claimed their rights before the ECJ.

In conclusion, the European Union has a uniform application of direct effect after *the Van Gend en Loos* decision. This uniform application and not relying on the parties' consent are actually what is missing in international law. The variation in the application of the direct effect in international law leans on the states' internal political motivations, which is applied accordingly to their national interests. Consequently, it cannot be foreseen from the international law perspective to apply the direct effect as precise and decisive as the European Union due to the different political stakes of the states in various international agreements. [50]

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[47] Nollkaemper, p. 105.

[48] University of Kent. (2016, December 8). Reflections on the European Court of Justice's judgment in Van Gend en Loos Professor Nick Grief. YouTube. Retrieved December 11, 2021, from https://www.youtube.com/watch?v=06U63Is4-wA

[49] Antoine Vauchez, *The transnational politics of judicialization. Van Gend en Loos and the making of EU polity*, (European Law Journal, 16(1), 2010), p. 12.

[50] Nollkaemper, p. 125.

Conclusion

Van Gend en Loos decision constitutes vast importance in European Union Law, and even there can be no examination of European Union law without any reference to it since the European Court of Justice attached the qualification of 'new legal order' and created the direct-effect principle in this case.

The direct effect is the principle providing that Community law can confer rights upon nationals of member states if the provision including these rights meets the criteria established by the European Court of Justice. With this improvement, the monopoly of the states on legislation began to loosen, and their sovereignty became limited in a sense. The criteria for a provision to be considered as directly effective has changed in time and degraded into being clear, unconditional, and precise. The provisions meeting this criterion are decided by the Court as directly effective and can be alleged in domestic courts.

Established conditions for direct effectiveness have changed by ECJ's own decisions since it is the only institution to interpret the European Law. Especially in regards to this principle, the Court has changed its own limitations much, and it deviated from the scope it established in the first place. Yet the idea was to change the idea of international law that the center and the only actor must be the state itself. This idea tried to shift individuals into the center of the new legal order created by European integration. Later this notion became a basis for appreciated Western democracies.

In short, individuals with the cooperation of member states' courts have been put into the heart of the Community law, and therefore a new legal order is argued to be created. Unlike traditional international agreements, the subjects of the European Union Law are not only member states but also their nationals. The legal heritage of the European Union Law, as stated by ECJ, does belong to both the states and the nationals of them. This situation of establishing the Community law supreme, even in a limited area, is an interference to the sovereignty of the states, and it is what makes the European legal system supranational. This characteristic of the system is what makes it 'new' compared to any other legal order, especially to international law.

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