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Fernando Alvarez
Pérez



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Miami - Florida European Union Center

University of Miami
1000 Memorial Drive
101 Ferré Building
Coral Gables, FL 33124-2231
Phone: 305-284-3266 Fax: (305) 284 4406
Web: www.miami.edu/eucenter

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The Caribbean Chicken and Egg: Applying Lessons from the European Court of Justice to the Caribbean Court of Justice

Fernando Alvarez Pérez*

There is much scholarship on the institutional and political problems faced by the Caribbean Court of Justice (CCJ) and CARICOM. Much of it is excellent scholarship, especially the enlightening perspective and analysis offered by Wendy Grenade. However, there is very little analysis that places the CCJ as a case of a much larger phenomenon – legal integration. The following analysis seeks to do just that, by employing the theories of legal analyses and the lessons of the ECJ to the CCJ. However, before beginning, one caveat is needed: the idea that the ECJ is an exceptional model and the only such example of a certain ideal in existence does not imply that Latin America (or the world in general) should try to replicate it. However, there is no more perfect example of *supranational legal integration* in existence. As such, when one does wish to consider this ideal, the ECJ is the only reasonable point of reference. The following analysis assumes a goal of integration (general and legal) within CARICOM. Since the EU and ECJ are the greatest examples of these forms of integration, it also assumes that the model to replicate can be found in the ECJ and the political environment that the ECJ evolved in. If this seems Eurocentric, it is, because it aims to be so.

There is one more point that must be touched on before one can begin examining what makes the ECJ special. There are many theories to explain general regional integration, and the validity of them is not relevant to this discussion. However, explaining *legal* integration has been almost purely the domain of two theories: liberal intergovernmentalism and neofunctionalism. As we will see, liberal intergovernmentalism does not fit well with the realities of legal integration, as the history of legal integration does not share the liberal intergovernmentalists' emphasis on the self-interests of member states. Neofunctionalism is a theory of integration that has much to say about legal integration, and the most important aspect for this discussion is that of functional “spillover.” Most broadly, spillover can be said to occur when an integrative action in one area requires integrative action in another area. The Court’s various rulings have illustrated this concept perfectly.

The European Court of Justice

The European Court of Justice (ECJ) is the judicial arm of the European Union. Its main task is to interpret EU legislation and ensure that EU legislation is uniformly observed throughout the Member States (Skiadas 199). Its legal basis is found in the Treaty establishing the European Community (AKA Treaty of Rome). To relieve some of the burden of the ECJ’s enormous case load, a 1988 Council decision created the Court of First Instance (CFI) (200). The CFI is the front line of the ECJ, and it can refer cases to the ECJ when their outcomes have the ability to seriously affect the nature of Community law. Each EU Member State selects one judge to send to the ECJ. These judges are assisted by advocates general who deliver opinions to the Court. To ensure the judges’ impartiality with regard to their home Member States, the deliberations of the Court are

* **Fernando Alvarez-Pérez** is an undergraduate student at the University of Miami, double-majoring in international studies and economics, and with double-minor in finance and Portuguese. He currently also holds an internship with the Government and Lobbying Team at the international law firm of Becker and Poliakoff in Miami, FL.

secret and there are no publicly available dissenting opinions. The ECJ is a supremely supranational actor. The Court's view of the Treaty as a constitution has been an enormous influence on its interpretation of the relationship between Community law and national law (202).

But what is so special about the ECJ? What makes it different and why is it considered to be “the most effective supranational judicial body in the history of the world” (Sweet 18) and “the only such court in existence” with the supranational power that it has (Stiernstrom 11)? The answer is *supranational legal integration*. This ideal – supranational legal integration – can be defined by two concepts. The first concept is *legal integration*, which is best defined by Burley and Mattli as “the gradual penetration of [supranational] law into the domestic law of member states” (43). Legal integration itself has two dimensions: first is formal penetration, which involves the types of supranational law that take precedence over national law and the range of areas where individuals may invoke Community law in national courts second is substantive penetration, the “spilling over” of the ECJ's competence from purely economic matters into new areas, like health, safety, education, etc. The second concept that defines supranational legal integration is of course, *supranationality*, the power of the institutions above the Member States, and the independence of those institutions from the influence of the Member States.

Legal integration in the EC experience evokes functionalist spillover. The original “integrative action” can be the creation of the single market and the Community in general. Again, it is important to remember the two dimensions of legal integration: formal penetration and substantive penetration. Formal penetration is best exemplified in the cases of *Van Gend en Loos*¹, *Costa-ENEL*², *Internationale Handelsgesellschaft*³, and *Factortame*⁴. In all of these cases, the ECJ's rulings managed to expand the reach of Community law (and therefore the ECJ) on the basis of ensuring the consistency and supremacy of the Community. *Van Gend en Loos* established the doctrine of “direct effect,” wherein the Community can make laws that can be invoked by individuals in national courts (Stiernstrom 3-4). According to Burley and Mattli, direct effect transformed the Treaty of Rome into a constitution, creating a “pro-Community constituency of private individuals” by injecting the supremacy of the Treaty over national law into this constituency's self interest (60-61). If a European company were to object to the import customs in a national court on the grounds that it they violated article 25 of the EC treaty, this would be an example of a group whose self-interest lies in the supremacy of Community law. This is exactly what happened in *Van Gend en Loos*, and the company in the example was a Dutch chemical company called Van Gend en Loos.

Two years later, in the *Costa-ENEL* case, the Court's ruling established the concept of “supremacy” (AKA “primacy”), which establishes the supremacy of the Treaties over national laws (Stiernstrom 4). Thus, no national law could be made which contradicts the Treaties. Later the supremacy of the Treaties over national law was extended to include the supremacy of secondary Community legislation over national law. In 1970 in *Internationale Handelsgesellschaft*, the court ruled that EC law was not only supreme over national secondary law; it is even supreme over national constitutions (6). Finally, in 1989 in the *Factortame* case, the Court ruled that EU citizens have the right to request (and be granted) national courts to ignore national law in favor of Community law when that government has been too slow in passing secondary legislation that is consistent with Community law. One can see how one integrative action necessitates another integrative action. The doctrine of direct effect simply would not have been a complete or consistent doctrine without the doctrine of supremacy. Supremacy (over both constitutions and secondary legislation) could not survive if national

¹ Case 26/62, NV. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR I

² Case 6/64, Flaminio Costa v ENEL [1964] ECR 585.

³ Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125.

⁴ Case C-213/89, R.v. Secretary of State for Transport, ex parte Factortame Ltd. And Others [1990] ECR I-2433.

legislators were given the responsibility of aligning their law with Community law, so the direct substitution of Community law for national law provided for by *Factortame* was a necessary corollary to the doctrine of supremacy.

The previous cases exemplify formal penetration, which involves the types of supranational law that can take precedence over national law and the extent to which individuals can invoke Community law in national courts. The most exemplary case of substantive integration has come from the Court's rulings on the ability of the European Commission to enter into international agreements on behalf of the Member States. These rulings almost beg for a neofunctionalist interpretation because the Court implicitly justified its rulings in terms of functionalist pull. The language of the *AETR*⁵ case is telling:

In Particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries affecting those rules.

As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries which affect those rules." (qtd. in Dashwood and Heliskoski 5).

This means that wherever the Community has internal competence, it is necessary that any external obligations affecting those internal "objectives" be negotiated by a supranational Community body (the Commission). This is an obvious case of one integrative action (internal integration) requiring a further integrative action (integration of external obligations). This also raises another point: the power of a supranational Court to drive not just legal integration, but the integration of the Community. Specifically, it speaks to the power of the Court to empower the supranational institutions of the Community. This leads to the second dimension of supranational legal integration.

The supranational character of the ECJ may seem to be a given, something self-evident to all. However, the liberal inter-governmentalist scholarship of Moravcsik and his followers have offered alternative explanations. This approach no longer plays a substantial role in legal integration studies, but it is important to understand why it fails because it relates to the experience of integration in Latin America. According to this approach, Member States delegate and pool sovereignty in supranational judicial bodies so as to ensure that cooperation with mutual obligations. If defection from obligations were the norm, there would be no gains to cooperation (Laursen 7). It was later research – especially Garrett – that brought the ECJ into this theoretical Framework (see Garrett 1995). The main problem with this approach is that it views the ECJ as an agent of the Member States' preferences. In fact, this is not so. The ECJ has created a legal system that is quite independent of the preferences of Member States. Referring back the "constitutionalization" of the Treaty of Rome, it is important to recognize that this created not just a "pro-Community constituency" of individuals below the state, but a legal system above the state (Burley and Mattli 54). The language of the *Van Gend en Loos* ruling indicates just how seriously the Court took this concept:

[T]he Community constitutes a **new legal order**⁶ 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 Member States but also their nationals. (qtd. in Stiernstrom 3)

Here the Court makes reference to the power below the state ("their nationals"). More importantly though is what is being created above the state. The "new legal order" refers to the

⁵ Case 22/70, *Commission v. Council* [1971] E.C.R. 263.

⁶ emphasis added

Treaty in its role as a truly supranational constitution. Also take note that the Court is not afraid to assert that there is in fact a limitation of state sovereignty required by the Community. This is a bold assertion on a very sensitive area. This new legal order has included not just the constitutionalization of the Treaty of Rome but also the creation of a case law that goes above the state. Sweet conducted a statistical analysis that shows the amount of times that an ECJ preliminary ruling referred to a previous ECJ judgment (33). The rising incidence of such an event indicates the creation of a body of case law independent of the state. By 1995 over 80% of ECJ preliminary rulings were referring to previous cases. Another statistical analysis by Sweet examined a sample of cases before the ECJ that pitted sub-national actors (in this case, import/export firms) against Member States (38-39). In all of the selected cases both the Commission and the relevant Member State submitted official written documentation of their preferences and arguments. Sweet found that the ECJ is no more likely to rule in favor of the State's preferences than against. In fact, the rulings were in accordance with the Commission's preference 85% of the time. The most important and dramatic example of the lack of concern for Member State preferences comes, again, from *Van Gend en Loos*. The opinions of the advocates general are made public, and since they – like the ECJ judges – are elected by their Member States, they are directly accountable to the Member States. Of course the ECJ judges have special protections to ensure their impartiality, as previously mentioned. The opinion of the advocates general in *Van Gend en Loos* was actually against the doctrine of direct effect (Skiadas 199-200). One would be hard pressed to see the Court as a direct agent of Member States' preferences.

The Caribbean Court of Justice

The Caribbean Community (CARICOM) currently has 15 Member States. Its roots can be found in the failed West Indian Federation and the 1968 Caribbean Free Trade Area (CARIFTA) (Grenade "An Overview..." 167-168). In 1973 the Treaty of Chaguaramas established CARICOM, a community with three main objectives: economic integration, functional cooperation and foreign policy coordination. In 1989 the Grand Anse Declaration set out a number of key initiatives, among them the creation of a CARICOM Single Market Economy (CSME) (172). The CCJ can trace its roots through a number of forms all the way back to the 1973 Treaty of Chaguaramas, but its official position stems from the Agreement Establishing the Caribbean Court of Justice, incorporated into the 2001 Revised Treaty of Chaguaramas.

The first point to examine relates to with the CCJ's jurisdiction. The CCJ was scheduled to come into force in 2003, but was postponed several times and finally was implemented in 2003, in a modified form that many have branded, almost pejoratively as a "trade court" (Hinds 192). The "trade court" label is meant to imply that the CCJ will focus purely on economic matters. The reality of the CCJ is not that simple or grim. The CCJ in the Agreement Establishing the Caribbean Court of Justice was meant to be a hybrid court. It would have both appellate jurisdiction and original jurisdiction. In its appellate jurisdiction, the Court considers appeals in civil and criminal law from the (sub)national courts of those that signed onto the CCJ. In its original jurisdiction, the CCJ will mirror the ECJ: interpreting Treaty application and ensuring the consistency of compliance across the Member States (Hamilton 278). To sign onto the appellate jurisdiction of the CCJ, the Member States need anywhere from 2/3rds majority to 3/4ths of national parliament votes to alter their constitution to do so (Grenade "Exploring..." 13). The majority of Member States have yet to do this. The "exclusive" and "compulsory" original jurisdiction, however, applies automatically to all of the signatories of the CCJ (Pollard "closing the circle..." 177-178). If one wished to integrate every single aspect of the law into one supranational body, then the CCJ's role as a "trade court" is a disappointment. However, even the ECJ does not do this. A murder case can not be appealed all the way up to the European Court of Justice. As Hamilton notes, the CCJ and the ECJ have similar mandates: to ensure the consistency of compliance with Community law across the Member States, especially with regards to the

implementation of the single market. Recall that the ECJ made some of the most important steps in integration through its role of ensuring the implementation of the single market. *Van Gend en Loos* and the *AETR* doctrine created integration through the vehicle of the single market. The principles of direct effect and supremacy were not explicitly included in the Treaty of Rome, but were created through the aggressive activism of the Court. Thus, we should disabuse ourselves of the notion that the CCJ is weak because it is a “trade court.”

The problem is not what jurisdiction the CCJ has. The real fundamental problem is what the CCJ has jurisdiction over. Does the Court preside over a Community which has limited its sovereign rights? Barely. As Grenade has said, ~~“unlike the European Union,~~ “[CARICOM] remains a community of sovereign independent states” and it is almost purely intergovernmental (“exploring...” 1,5). The EU is also a community of sovereign independent states, but the expression of that sovereignty takes on supranational forms, which is almost nonexistent in CARICOM. There is no supreme supranational body in CARICOM. Instead of an analogue of the European Commission, CARICOM has the Conference of Heads of Government (like the European Council) and the Community Council of Ministers (like the Council of the European Union) (7-8). Supranationality plays no part in the legislative process of CARICOM. Unanimity reigns supreme. Thus, the independence from the will of the Member States does not exist in CARICOM. The CCJ and Caribbean integration in general are hostage to national partisan politics (Hinds 185). Hinds offers that the reason for this general unwillingness to submit to a supranational authority is that the perceived erosion of national sovereignty that comes with a Community strikes fear into the hearts of Caribbean elites wishing to dispense patronage and control their domestic economies (196). Adding to the list of woes is the fact that not all of this community has even signed onto the CCJ. The Bahamas, Montserrat and Haiti have not signed on (Leathley 143). CARICOM is a community (with a small *c*), not a Community.

Just as serious is the issue of compliance. There is no analogous concept of direct effect in Caribbean Community law. The enforcement of CCJ rulings requires that national legislatures transplant the ruling into national law (Leathley 145). Thus, the Member States have control over their own compliance. Other problems plague the CCJ. The Privy Council case of *Pratt and Morgan v. Attorney General of Jamaica* created the image of the CCJ as a “hanging court” – one that promotes capital punishment (Grenade 9). Arguably, it is worse to be a “hanging court” than a “trade court.” Grenade also mentions that the legitimacy of the Court as a supranational actor is seriously questioned by Caribbean elites (193).

From this analysis of the Caribbean Court of Justice, one can see a sort of “chicken and egg” problem. In the case of Europe, neofunctionalist pull required the ECJ to further general European integration and European integration also led to supranational legal integration. Caribbean Community law does not have direct effect, and the European experience has shown that direct effect was critical to the establishment of the supremacy of Community law and the creation of the “new legal order.” However, it is this supremacy and new legal order that allowed the ECJ to further European integration in later years. However, the CCJ can’t definitively establish direct effect unless it has some sort of Community to preside over. This is *the* fundamental obstacle to legal integration (and regional integration in general) in the Caribbean. There was no original integrative action from which to build upon. National sovereignty precludes any possible benefits to cooperation in the Caribbean. Thus, the Caribbean is faced with a choice: continue on the current path or pool sovereignty as the EU has done. Where exactly the current path leads is beyond the scope of this paper, but it will never lead to a Community.

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