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Direct Effect : Its potential to be created in Caribbean Integration Law and its likely effect in the OECS

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The effectiveness and enforcement of Community Law in the European Union is greatly enhanced by the doctrines of Direct Effect and Direct Applicability . The integration movement in the Caribbean will benefit greatly from adopting these concepts.

The doctrine of Direct effect finds that some provisions of community law can create rights that are directly enforceable by individuals before national courts. These rights arise by virtue of community law and are separate from national law, allowing rights under community law to be enforced in the absence of national legislation on the matter . The supremacy of community law ensures that these rights prevail against contradictory national provisions .

The concept of Direct Applicability speaks to the incorporation of Community law into Domestic law. Direct Applicability aims to ensure that Community law is incorporated without the need for special procedures e.g. An Act of Parliament. Direct Applicability allows Community rules to be fully and uniformly implemented in all Member States of the Community.

Both Direct Effect and Direct Applicability were principles developed by the jurisprudence of the European Court of Justice. The Locus Classicus for Direct effect is the case of Van Gend En Loos.¹ Direct Applicability is seen from the case of Firma Molkerei² .

Following the founding of the concept in case law , direct applicability came to be enshrined both in legislation and subsequent EU treaties. The UK communities Act 1972 recognized the direct applicability of community law by providing for it in Section 2(1) .

Article 288 TFEU provides that regulations are directly applicable in all member states . The founding Treaties , Regulations and Decisions are all directly applicable in Community law.

From the case of Van Gend onward the ECJ has developed the principle of direct effect

¹ Van Gend En Loos v Nederlandse Administratie der Belastingen [1963] 26/62 ECR 1 ECJ

² Firma Molkerei-Zentrale v Hauptzollamt Paderborn. 1968] 28/67 ECR 143

both ‘vertically’ and ‘horizontally’ . Vertically , the principle allows individuals to sue Member States and Community institutions for breach of rights under Community law as seen in the Van Gend case itself. Horizontally private legal persons such as companies may be sued for similar breaches as in Defrenne v Sabena³.

Looking to the origins of Direct Effect in Van Gend we see Teleological interpretation at work. The court proclaimed to look to the ‘spirit’ and ‘general scheme’ of the treaty . Several arguments were outlined .

Firstly, The objectives of the Treaty implied that the treaty was “more than an agreement which created mutual obligations between contracting states” .

The court then confirmed this view by looking to the preamble to the Treaty , which refers not only to States but also to peoples. The establishment of institutions designed to exercise sovereign rights which may affect the citizens of member states also confirms the view that the treaty’s rights could extend to citizens.

Finally the court referred to article 177 (Art. 267 TFEU) ,which provides for the preliminary reference procedure that allows national courts to request from the ECJ a preliminary ruling on the validity of EC law . The court saw this as acknowledgment that “*Community law has an authority which can be invoked by their nationals before those courts and tribunals.*”

From these arguments the ECJ found that Community law ought to have direct effect in the national courts of member states.

Subsequent case law developed Direct Effect ,refining the principle and extending its scope . Direct effect has proven itself invaluable in defending the rights of nationals within the

³ Defrenne v Sabena [1976] 43/75 ECR 455

community . The case of Van Duyn ⁴ illustrates how direct effect can protect the rights of individual persons .

Miss Van Duyn , a Dutch national sought to work in England for the Church of Scientology . The UK refused her leave to enter on the grounds of public policy .

Van Duyn challenged this decision based on Art. 39 of the then treaty , which guaranteed the free movement of workers, and directive 64/221 which further implemented Art. 39. The ECJ held that both the Article and the directive were capable of direct effect .

Direct effect also provides rights as against private individuals who breach community law. This can enable a person to sue their employer for breach of ‘equal pay’ provisions as seen in Defrenne v Sabena .

It was said by a former ECJ judge that the direct effect doctrine was merely an intermediate step on the way to general acceptance of Community law⁵ . Over time , a doctrine of ‘indirect effect’ was developed seen in the Von Colson⁶ case. The doctrine of Indirect effect holds that there is a duty for national courts to interpret all national legislation in accordance with Community law .

EU law has developed powerful methods of ensuring the uniform enforcement of Community Law in all Member states . For CARICOM integration to succeed , stronger mechanisms of enforcement must be created by the CCJ’s jurisprudence. CARICOM has been called a ‘toothless mongoose’⁷ for its lack of enforcement procedures, and this lack of bite will hold back the integration process.

⁴ Van Duyn v Home Office [1974] 41/74 ECR 1337

⁵ Pescatore, ‘The doctrine of “direct effect”- an infant disease of Community law’ (1983) *El Rev* 155

⁶ Von Colson and Kamann v Land Nordrhein-Westfalen [1984] 14/89 ECR 1891

⁷ Karen E. Bravo, ‘CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration’ [2005] 31 *N.C.J. Int’l L. & Com. Reg.* 145

Is there a basis for these principles to be developed within the current framework of CARICOM ? Can a Van Gen Den Loos situation be recreated?

The evolution of direct effect is in large part due to the preliminary reference procedure provided for in Art. 267 of the TFEU . This procedure allows nationals to raise issues of Community Law before domestic courts and tribunals and have them referred to the ECJ . Van Duyn and Van Gen would not have been possible were it not for this procedure.

Under the CARICOM treaty the CCJ has the seeds of developing effective concepts. Art. 211 of the Revised Treaty of Chaguaramas grants the CCJ compulsory and exclusive jurisdiction to hear and determine disputes over the interpretation of the RTC treaty, including applications by persons under Art 222.

Under Article 214 of the RTC where an issue of treaty interpretation arises before a domestic court or tribunal ,the court may refer the question to the CCJ for determination.

Article 222 provides for the locus standi of private entities . Persons ‘both natural and juridical’ may appear before the CCJ with special leave of the court .

Comparing these to Art 267 of the TFEU we see similarities at play. Thus the preliminary reference procedure needed to create CARICOM’s Van Gend is present.

Using Teleological reasoning , the CCJ can derive something similar to Direct Effect from the aforementioned articles of the treaty . This paper will now look to the CCJ’s decided cases to confirm that a non literal approach has been adopted by the court , which may one day produce concepts such as direct effect. One writer has said that the CCJ’s judgments ‘echo’ the ECJ in Van Gen der Loos⁸ , making the adoption a ‘direct effect’ concept possible in the future.

⁸ DR. DAVID S. BERRY ,”Building a Legal Framework for the CSME: The Caribbean Court of Justice’s First Original Jurisdiction Decisions” Faculty of Law Workshop Series 2009 Cavehill ,Barbados Sept 30 2009

In *Trinidad Cement v Guyana*⁹ TCL sought locus standi to appear before the CCJ under Art. 222 of the RTC. Guyana contended that they did not meet the requirements of 222.

In interpreting the treaty the CCJ cited Articles 31 and 32 of the Vienna Convention on the Law of Treaties as reasons for interpreting the RTC ‘ more broadly in light of their context and object and purpose’. The CCJ also looked to the preamble of the RTC , much like in *Van Gen Der Loos* , to make the argument that the Treaty intended the CSME to be private sector driven .

The Court also noted that the RTC accords international legal rights to persons including a right of direct access to the CCJ under Art. 211.

The CCJ went on to reject Guyana’s restrictive interpretation of Art 222 and found that TCL had locus standi to bring the claim. The standard of proof for the satisfaction of an Art.222 application was held to be simply an ‘arguable case’

The court also noted that wherever an obligation under the RTC is imposed on member states collectively , it is capable of yielding rights to the direct benefit of private entities in the community.

We see here strong teleological interpretation at play in this case . While no doctrine equivalent to ‘direct effect’ or ‘direct applicability’ was espoused, the CCJ did hold that individuals had a rights that directly benefited them ,including a right of direct access to the court under Arts 211. And 222. While not as broad or effective as the doctrine of Direct effect or the preliminary reference procedure under the EU treaty these rights are still comparable in the Caribbean context, where the integration process is still in its early years and has not reached the conditions required to produce a Caribbean equivalent to the *Van Gend* case.

⁹ *Trinidad Cement Ltd. and TCL Guyana Inc. v. Guyana*, Judgment (Jurisdiction), [2009] CCJ 1 (OJ)

Looking to the other cases decided by the CCJ , we see a reliance on ECJ jurisprudence and the general principles of international law being invoked.

In the second *TCL v Guyana* case ¹⁰ the court looked to the ECJ case of *Francovich v Italy* ¹¹ and found a similar principle of State Liability to be inherent in the Caribbean Community's legal system despite no express provision in the RTC treaty. The court also held that it had jurisdiction to grant damages for loss caused by breaches of the treaty , though damages were not granted in this case.

In *TCL v Caricom* ¹² The court cited *TCL and TCI v Guyana* as precedent , and extended the principle to hold that CARICOM could be a proper defendant in an individual application and gave leave under Art 222 for the case to proceed

The CCJ also in this case stated that customary international law and the 'principles of law common to the legal systems of the Community' are an applicable source of law .

Doreen Johnson v Caricad ¹³ showed the limits of the CCJ's jurisdiction. This case concerned a host of domestic law problems including breach of contract and violation of labour laws ,and raised one issue regarding CARICAD discriminating against nationals in violation of Art. 7 of the RTC. The CCJ declined to hold that CARICAD was a proper defendant in an original jurisdiction application under Art 222 and in dismissed the case, noted that only breaches of the treaty would be justiciable and not issues of domestic law .

The Johnson case can be contrasted with *Defrenne v Sabena*, showing that the CCJ will not employ 'horizontal' enforcement of rights under the RTC against defendants not envisaged by the treaty . This shows perhaps that if a 'direct effect like ' principle is developed under the

¹⁰ *Trinidad Cement Ltd. and TCL Guyana Inc. v. Guyana*, Judgment, [2009] CCJ 5 (OJ)

¹¹ *Francovich v Italy* [1991] 9/90 ECR I-5357

¹² *Trinidad Cement Ltd. v. Caribbean Community*, Judgment (Jurisdiction), [2009] CCJ 2 (OJ)

¹³ *Doreen Johnson v. CARICAD*, Judgment (Jurisdiction), [2009] CCJ 3

CARICOM framework it may not recognize horizontal enforcement of community law for many years to come.

Since there is no doctrine of Direct Applicability , the rights determined by the CCJ under the treaty remain rights in International law within the dualist systems of the Commonwealth Caribbean.

Lacking ‘Direct applicability’ for the rights under the RTC to be invoked the treaty must be incorporated into domestic law.

However , it was noted in a paper by the late great Ralph Carnegie that despite relying on statutory incorporation for its ‘direct effect’ , the CCJ can be more intrusive , from the standpoint of its original jurisdiction, than the direct effect decisions of the ECJ .

His reason for saying this was that in *TCL v Guyana* (final judgment) , the court held that ,relying on *Francovich*, it had the power to award damages. This was a power that the ECJ itself did not claim to have as the ECJ leaves the quantum of damages up to the national courts .¹⁴

Since the rights under the RTC treaty are not automatically incorporated into domestic law under a ‘direct applicability’ principle and remain rights under international law there are some mechanisms that aid their enforcement inherent to international law obligations.

By implication , the rights under the RTC being those of international law may provide both a doctrine of supremacy and indirect effect .

Under the VCLT articles 26 and 27 , states must comply with their treaty obligations and internal law cannot be invoked as justification of failure to perform a treaty. While not true Supremacy as created by the ECJ in *Costa v Enel*¹⁵ ,this encourages Member states to comply

¹⁴ A.R. Carnegie .” How Exclusive is ‘Exclusive’ in Relation to the Original Jurisdiction of the Caribbean Court of Justice? A

Consideration of Recent Developments” Faculty of law workshop series Cavehill ,Barbados Nov 25 2009

¹⁵ *Flaminio Costa v E.N.E.L* [1964] 6/64 ECR 585

with their treaty obligations.

. Also , in common law jurisdictions Judges are obliged to interpret ambiguous provisions of domestic law in line with treaty obligations ¹⁶ . This is comparable to Indirect effect .

Looking to the RTC treaty and the case law , we have seen that there is possibility for the development of principles similar to Direct Effect as long as the CCJ continues its trend of Teleological interpretation. However it is unlikely that secondary CARICOM community legislation will become directly applicable in the legal systems of Member States , there is no hint at a move in this direction .Direct Applicability would likely require an express treaty provision in future revisions of the Treaty of Chaguaramas.

The position in the OECS under the Revised treaty of Basseterre is markedly different .

Direct effect is expressly provided for in the OECS Economic Union Treaty , Art 5.3 “Acts , Regulations and Orders have direct effect in the laws of the Member State” . This is a broad rule that in some ways surpasses the EU position. Direct Effect in the European Community is a creature of case law and requires the provision to be sufficiently precise and unconditional . Even provisions of the EC treaty must meet the ‘clear ,precise and unconditional’ test as seen in Van Gen thus not every provision has automatic direct effect.

This general clause , if interpreted in a teleological fashion it will likely give rise to more concepts and rights .

A Doctrine of Direct Applicability may be presumed from Art. 5.3 as by implication , for the secondary legislation of the OECS to have effect in the dualist systems of the eastern Caribbean they must be incorporated into the legal systems of each Member state.

Even if domestic legislation providing for direct applicability similar to the 1972 UK

¹⁶ Regina v Lyons [2003] 1 A.C. 976 [HL]

Communities Act is not passed , the Eastern Caribbean Supreme court may be able to presume that a doctrine of direct applicability was implied in the Economic Union treaty ,and the incorporation of the treaty itself is all that is required for direct applicability to have effect.

Under the Annex on Settlement of Disputes , which is attached to the new OECS treaty, the Eastern Caribbean Court of appeal has jurisdiction to give an Advisory opinion on the interpretation of the treaty to any organ of the OECS ¹⁷. The Eastern Caribbean Court of appeal also has jurisdiction to hear appeals from any body established to consider matters of dispute internal to any OECS organ¹⁸.

The treaty jurisdiction of the Eastern Caribbean Supreme court is ‘additional’ to its nominal jurisdiction as the High Court and Court of appeal of the OECS territories¹⁹.

The treaty lacks an express ‘preliminary reference procedure’ for private entities comparable to Art. 222 of the RTC treaty or Art 234 of the TFEU . However an express provision is not necessary as the Eastern Caribbean Supreme Court has been the court of appeal for the OECS member states since the passage of the West Indies Act of 1967.

Private legal persons would in theory be able to make applications to the court for breaches of Treaty provisions as they would any other breach of domestic law since Art 5.3 provides that the secondary legislation of the OECS has direct effect in the laws of Member states.

Direct Effect will aid in the enforcement of the OECS treaty , allowing individuals to apply to the courts for redress when rights under the treaty are breached.

Looking to the Van Duyn case , we can see how direct effect enables individuals to protect the rights guaranteed to them under Community Law . Similar cases may arise in the

¹⁷ Article 7 Annex on Settlement of Disputes

¹⁸ Article 8 Annex on Settlement of Disputes

¹⁹ Article 6.2 Annex Settlement of Disputes

OECS under the free movement provisions guaranteed by Art 12. Of the OECS Economic Union treaty .

Rights created by secondary legislation , such as Acts and Regulations will also be enforceable via direct effect . This will allow the OECS to develop a framework of rights and obligations gradually through legislation and have them effectively enforced .

The added enforceability and effectiveness of the OECs legislative process that is guaranteed by direct effect may allow the creation of a comprehensive framework over time , without the need to revise the Treaty any further.

Thus , direct effect will greatly enhance the integration movement in the OECS.