



## Legal pluralism and creative destruction

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*ABSTRACT: Commencing with an ironic parallel with some concepts of economic sciences, the author calls for an active solidarity of all jurists to safeguard a plural Europe, affected by a severe crisis. Firmly based on the thoughts of the honouree Cunha Rodrigues, the crucial importance of a homogeneous and trustworthy European Judiciary is also emphasized, in order to strengthen advances already provided by European Union Law, especially through the creative and innovative case law from the Court of Justice of the European Union.*

*KEYWORDS: judicial cooperation – principle of mutual trust – judges – Cunha Rodrigues.*

Challenged to reflect on the idea of Europe, George Steiner, employing a serene wisdom that finds greatness in details, described a number of unique features in our continent and its peoples.

Outlining the five axioms that distinguish our continent, Steiner points out the Coffee Shops, from Pessoa's *Martinho da Arcada* to those frequented by Kierkegaard, the philosopher of practical ethics, in Copenhagen; the Landscape on a human scale, experienced by crossing our cities by foot, as opposed to the automobile empire of the American metropolis; the streets' Toponymy articulated with names of different personalities, from scientists to writers or artists revered by our History; the recurrent eschatological apprehension of a final chapter (the permanent awareness of the end of

Europe, currently revisited time and again) and, in an impressive background, the twofold civilizational inheritance, embodied in Athens and Jerusalem.

Framed in these hallmarks, while seeking to define a significance for a common future, the thinker wrote, with aplomb, that it is vital that Europe reaffirms certain beliefs and a particular soul audacity, adding that only in the Old Continent do we find the foundational basis towards the dream of making the common man follow the footsteps of Aristotle and Goethe.

This utopia is scarcely dependent on a Central Bank, on the strength of a single currency or on parliamentary bureaucracies, but it mainly stems from what he refers to as a genius of linguistic, cultural and social diversity, a profuse mosaic.

Zigmunt Bauman converges proclaiming that Europe's future lies entirely on cultural heritage. He explains that the European cultural heritage is the best way out of the crisis, and diversity is the greatest treasure we can offer the world, the art of coexisting, in spite of differences or precisely because of them. Additionally, many more (Eco, Rushdie, Lobo Antunes) concur; Bernard Henri-Lévy even goes further opposing the federalism he supports, to the barbarism he predicts: «we have no choice: federalism or death».

Even if we deter a radical vision, affiliated to this permanent confrontation with said eschatological imprint, there will consistently be lessons to be learned.

The shattered map of Europe is its most fertile land, the origin from which the renewed spirit of a common ideal springs forth. Welcoming the multiplicity as an «ethos» (and not a «pathos») and deepening cooperation mechanisms which enable the affirmation of a unique essence whilst respecting the differences.

But this option, which welcomes in the plural mosaic of European identities, has been equally incorporated by the Law in this era referred to as post-legalist.

As emphasized by Professor António Hespanha, a pluralist («kaleidoscopic») legal perspective is nowadays at the centre of the discussion in the legal community mainly due to the contributions of European Union law specialists.

Indeed, from a legal standpoint, it was understood that the state-wide and legalist parameterization could be surpassed by granting an ontological legitimacy to European Law, emanated, essentially – it is important to mention it –, from the rich and creative case law issued by the Court of Justice of the European Union.

Thus, let us remember the ideas put forth by Judge Cunha Rodrigues when he inquired about the whereabouts of jurists summoned to bring a stronger affirmation of the legal dimension of Europe as a counterpoint to the voracious logic of those notorious «markets», calling for a solidarity that could affirm the defence of the European social model.

This is certainly a fundamental issue for today's meeting; nowadays it is unequivocal that the supra-national case law has led to progress in terms of justice, particularly for disadvantaged groups such as immigrants, refugees or ethnic minorities.

However, I dare to suggest that this substructure can also be a proper «leitmotif» to grapple the topic of Judicial Cooperation.

When we perceive the ultimate reason for the crucial prominence of cooperation mechanisms, particularly in civil matters, we find in the European Union, as experts pointed out, a double factor.

First, the purely economic one, linked to the concept of internal market, entrenched in its European Union roots and omnipresent in the legal framework which always aims to pursue market optimization.

The insistence in the market – naturally perceived as distinct from the overwhelming «Big Brother», expression used by Judge Cunha Rodrigues, in reference to the financial markets and to speculators who illegitimately influence the direction of the economy –

this recurring appeal to the internal market also serves to prevent, over the years, accusations of an imposed federalism, aseptic and erected in a «top-down» logic.

On the other hand, on a distinct path – more crucial to us and definitely affirmed in the Maastricht Treaty – cooperation is an essential prerequisite for the inclusion of the European peoples through citizen engagement, renouncing to a European integration built upon the conquering of the Member States' powers and role.

Hence, the decisive importance of a European area of freedom, security and justice that summons national judiciaries for a combined effort of simplification, flexibility and harmonization of procedures, anchored in the citizens needs and expectations when they demand transnational judicial intervention, building a strategy that correctly focuses on individuals and not on State or international institutions.

Article 67 (4) of the Treaty on the Functioning of the European Union provides that the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. The purpose is to ensure a justice system in which citizens can enjoy a practical effectiveness of judicial protection within the European Union.

In broad terms, the instruments for achieving these aspirations will be the confluence of national legislation, with emphasis on substantive aspects but also in procedural law, and in a different context, the efficiency of mechanisms for mutual recognition, mainly in regards to judicial decisions. This is the reason for the increase of European Union rules in the area of judicial cooperation in civil matters commencing with the Treaty of Amsterdam, which ten years later was defined in the Treaty of Lisbon, in Title V of the Treaty on the Functioning of the Union, a more detailed legal outline, providing an additional step in the pursue of this area of freedom, security and justice, developed in the Stockholm Programme.

However, in the substantiation of this purpose judicial cooperation in civil matters represents one of the most complex challenges due to the internationalization of private relationships. Hence outlining a strengthening path of European legislation, revering the

principles of subsidiarity and proportionality, while pursuing consistency and uniformity.

It must be made clear that no further cooperation can be achieved without attentive judges, knowledgeable on European matters concerning the administration of civil and trade justice, defining, with clarity and determination, the ulterior motives for a supranational intervention.

Today, this intervention is at a persistent crossroads, recalling the question that Judge Cunha Rodrigues has been asking:

After all, where are the jurists?

Because the legal dimension of Europe must be the counterpoint to a rationality that, when faced with the formal profusion of fundamental rights, increasingly ignores them, submerged in a quantitative *acquis*, promoting an uncritical relativisation.

Therefore, in the difficult times that we live today, the defence of the European Union depends greatly on the consolidation of the Rule of Law and the refusal of the inevitabilities, of the *«fait accompli»*. But, moreover, we must claim for the affirmation of a principle of mutual trust, one which provides for reciprocated minimum standards and a cross-cutting ideology for the European judiciary.

Perhaps it is time to imitate the economic concept created by Joseph Schumpeter on «creative destruction».

In this economic process, in which new products replace old business models, innovation is only fostered by the creativity of some entrepreneurs ensuring economic growth by reducing monopolies of power.

Therefore, by applying such «creative destruction» to social phenomena, the present crisis in Europe is inviting us all to a new endeavour, emulating the creative and innovative work carried out by Judge Cunha Rodrigues, as a judge of the Court of Justice of the European Union.

The mutual trust that allows national judiciaries to take their counterparts decisions as their own implies that such recognition translates a European judiciary culture in which the conduct of judges is guided by the development of cooperation mechanisms from a common base founded on judicial independence while actively respecting the comprehensive fundamental rights catalogue.

These are the decisive challenges facing all of us gathered here today moved by a common ideal of solidarity among jurists.