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A promising mistake and a tribute

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*ABSTRACT: This paper examines the construction process of the common European area of Justice designed by the Amsterdam Treaty and launched following the conclusions of the Tampere European Council of 1999; it touches the achievements of the European judicial cooperation in the first decade of this century, particularly materialized in the suppression of the mechanisms for the review and confirmation of judicial decisions and the direct communication between courts; it describes the turning point and genesis of this process – the presentation of Brussels II bis Regulation abolishing the *exequatur* in the field of rights of access to children and child abduction; it points out the importance of the intervention of the honoree, Cunha Rodrigues, in the development and consolidation of the case law of said process; additionally, it examines the recent paradigm shift.*

KEYWORDS: European judicial cooperation – mutual trust – free movement of judicial decisions – abolition of the «exequatur» – building the common European area of Justice.

The prestigious and remarkable performance of Judge Cunha Rodrigues in the Court of Justice of the European Union coincided with a time of development, in Europe, in regards to the crucial notions of mutual trust and direct communication between courts and the objective of progressively achieving a Common Space of Justice. It also coexisted with the creation of fundamental legal tools in civil matters aimed at the improvement of mechanisms of choice of applicable law to cross-border disputes.

To analyse his indelible activity at the highest European Jurisdictional Institution and

his brilliant contribution to its elevation, is also to write the history of a period of extraordinary and surprising flourishing of the European Union Law. This period took place between the birth and the eclipse (or partial disappearance of the "light") of the will to entirely suppress the mechanisms of revision and recognition of foreign decisions – as seen in the new *Brussels I Regulation* and in the Successions Regulation – in order to build trust among the authorities with responsibilities in the area of Justice, *maxime* the courts, putting them at the disposal of EU citizens.

If I had the talents and role of a film director and somebody asked me to make a short movie, with no more than 15 minutes, about the period in which Judge Cunha Rodrigues honoured us with his notable European jurisprudential activity (i.e. 2000 to 2012), I would immediately place the production team – inspired by an apparently strange mental operation – in the city of Lecco, Italy, near the lake with the same name, and would take the action back in time, so that it would take place between October 9 and 11 of 2003. Subsequently, I would install the necessary material in the Hotel Pontevecchio (this has a different name as of today) and, demanding the required dramatization from credible actors, I would recall some parts of the conference entitled, under a plain and unrevealing designation, «Judicial co-operation in cross-border family law matters». The script would be based on the vivid memories and notes which I kept from that peculiar but decisive event. The plainness of such a title – which apparently disregarded the importance of what this event would mean from its very beginning – prophesied the misunderstandings which would arise in the days to come.

During the opening ceremony, that was attended by Mr. António Vitorino – European Justice Commissioner at the time – Mr. Roberto Castelli, Engineer and Justice Minister of the Italian Government of Mr. Berlusconi, with a theatrical tone, amplified by all the media previously called to cover it, made two announcements: Italy had created a Regulation, also European, to be presented during the event, and the referred text was going to definitely put an end to kidnapping in Europe. He did so with the simplicity, security, authority and conviction that the paradoxical combination of his academic background and professional role did not seem to weaken. Unfortunately, none of those announcements corresponded to the reality in question – the Regulation to be shown stood on a French and not on an Italian proposal (Italy was only appointed for the Presidency of the Council of the European Union in that semester) and the text was not

about kidnapping, in general, but on the specific issue of the so called parental child abduction (or the pathological exercise of parental responsibilities), among other matters of Minors and Family Law.

At the backstage and in the media, an English Lord Justice, Judge from the United Kingdom, spoke against the absence of judges from his geographical area in the law creation process and in the European Judicial Network in Civil and Commercial Matters. His comments and interpellations had lasting repercussions on the activities of the Conference and triggered some agitation. Nonetheless, he seemed to ignore that the alleged absence in the Network emerged from an internal option of his own country and not from any position of the EU as his protests would suggest.

Some indignation also came from the academic field due to its apparent exclusion from the European legislative process.

The representative of the Hague Conference on Private International Law reaffirmed how the European Union arrived late to the domains covered by the new legal text and described, in detail, how the Institution he represented had dedicated itself to the study and analysis of family related matters for about one hundred years. Only minor civil servants described, with technical realism, some of the virtues of the document.

The saga illustrated that history can stand on misunderstandings and misguided readings and, eventually, be unfair. The Regulation presented was essentially the most important legal document created as of that time in regards to the area of European Justice, one of the most relevant in absolute terms and an original as well as precursor legal text with a global dimension. This did not happen because of the reasons pointed out by the main speakers but because, by means of such text, the mechanisms of revision and confirmation of foreign judicial decisions and for the granting of «*exequatur*» were suppressed, for the first time worldwide – even if only in the specific sectors of access rights and wrongful removal or retention of the child. This suppression would enlighten the entire law creation process to be developed by the European Union in the following years. Not even within a federal state would it be possible to find out similar automatism, as can be seen with the analyses of the system of «Registration of judgments for enforcement in other districts» contained in the «Code of Laws of the

United States of America» that develops Article IV of the American Constitution.

Despite its challenging origin, this Regulation, numbered 2201/2003 but known, in European legal jargon, as «Brussels II *bis* Regulation», was the most important element on the path to constructing the European Space of Justice established by the Amsterdam Treaty and later consolidated by the Lisbon Treaty. After Lecco, nothing would be the same.

Nonetheless, in order to achieve and keep this paradigm shift and strategy alive, as well as to give a practical dimension to this radical change, it would not be enough to consider the academic works on the matter – which started to be systematically published –, the information spreading initiatives, the thematic meetings, the classroom and virtual courses for the training of legal professionals, particularly judges, or the action of the recently created European Network. It was missing the weight, strength, importance of everyday experience in guiding it, the revealing plasticity, the constructive energy of jurisprudence. This is the domain in which I would like to stress the important role played by Judge Cunha Rodrigues.

At this juncture, I would like to resume the shooting of my earlier mentioned short film at the European Commission's Berlaymont Building, in Brussels, and would like to recall the day when a representative of a Member State (with a kind tone but sounding as though he has just been defeated in a serious competition) said to me: «finally, we have a very important judgement regarding the new philosophy that underlies the Brussels II *bis* Regulation, and the rapporteur was the Portuguese Judge Cunha Rodrigues! Congratulations!». He was referring to the Judgment *Rinau* (C-195/08), that can be highlighted as a noteworthy mark of the contribution of Judge Cunha Rodrigues in the European Court of Justice and, on a subjective level, an element that will always connect, in my view, the distinguished Judge to the dream I keep of building a space of justice without borders, drawn for the benefit of the citizens. This space would involve direct and permanent communication between judicial organs as well as the reciprocal recognition of its decisions and would eventually include, in the future, elements of common codification, at least in procedural areas, legal decision making and the defining of jurisdiction in conflicts with a cross border element.

The limits of this platform do not permit me to provide an analysis of that Case, in which Mrs. Rinau, of Lithuanian origin, was at odds with her German husband, with the same name, in a dispute over the custody of Luisa, their daughter. In the latter, the paradigm shift mentioned above was reflected by the focus of the conflict, that is, the question of the recognition of the cross-border decisions. I would like to take this chance to invite those who are not familiar with this Case to *visit* it bearing in mind the perspective that I tried to convey.

I would also like to highlight the Case of April 2 2009 (C-523/07) given in the context of a preliminary ruling introduced by the *Korkein Hallinto-oikeus* from Finland, in which Judge Cunha Rodrigues brilliantly dealt with the question of the concept of civil matters for the purposes of the indicated Regulation. In doing so, he remarkably contributed to the disclosure of the notion of habitual residence (present in the scope of the Regulation) and strongly framed the provisional and protective measure of placement of children outside the family home, providing an important understanding of the need for direct communication between Courts.

These judicial decisions merit a venerable mention, not only due to their intrinsic relevance but also to the fact that the departure of the distinguished honouree from the Court of Justice of the European Union symbolically coincided with the beginning of a grey period, characterised by a disturbing setback in the European Legislative Process and by an internal crisis with a legal as well as cultural dimensions.

By slowing down the process of suppression of «*exequatur*», the old cooperation logic that stands on mistrust, absence of real involvement and mere reciprocity was restored. That brings us back to a period when a request concerning a simple examination of a witness – made by a Portuguese court to its Parisian homologue – could take more than five years within the lawsuit's duration.

The European Citizen's needs, certainly, do not fit into this reacquired logic.

With this context in mind, please allow me to end this intervention by praising Judge Cunha Rodrigues and saying: “*Thank you for guiding us with reliability, rigour and very high technical and human standards in more hopeful times for Europe!*”