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Fundamental rights in the reasoning of Judge Cunha Rodrigues

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ABSTRACT: Based on the writings of Judge Cunha Rodrigues, the author finds that due to the current prevalence of the case law of the Court of Justice on fundamental rights, the primordial establishment of the principles of primacy and direct effect. He draws attention to the functionalist consequences of the case law of the Court of Justice regarding the relationship between the Union and the Member States and the birth of the concept of Union citizenship, contributing to overcome what had once only aspired to be the construction of a common market. Finally, he notes the Union deadlock after the creation of the single currency, divided between developing the political project and the intergovernmental retreat, supported by national electorates.

KEYWORDS: fundamental rights – primacy – direct effect – Union crisis – Cunha Rodrigues.

In addition to expressing my gratitude to Professor Alessandra Silveira, for her kind invitation to speak at this event, I would like to congratulate Judge Cunha Rodrigues, who throughout the years and despite the many duties he has taken upon, has been a beacon of lucidity and rationality against endless prejudice or extremist ideologies thinking. Credit is due to his understanding of the issues at stake but above all, how he succeeded in combining it with the logic, pragmatism and moderation, which have always set the tone of his discourse.

The following text is not a study, let alone an in-depth study, of any subject – but rather, it comprises of a series of reflections raised by the Judge’s reasoning and by some of the case law in which he has been involved.

I

The fundamental rights theme, as well as the underlying principles of the rule of law, take on great significance in modern societies – from it we can draw a balanced solution for conflicts and legal issues, and based thereon are the societies which respect the personality and the personal choices of each citizen, as one among equals.

Amid talks of equality, legality, protection of legitimate expectations, prohibition on going beyond what is necessary and procedural guarantees, we do not merely address formal and heartless topics which must be observed through an innocuous command of authority – we speak of the Sermon on the Mount, from the Book of Psalms, we speak of Luther or Erasmus of Rotterdam, of Kant or Voltaire, of Teilhard de Chardin or John XXIII, of Hannah Arendt, and, in general, of humanity’s subtle path towards the decline of prejudice, moralism, extremism and violence, all in all, towards happiness and well-being. As Steven Pinker mentions in his recognized work,¹ we refer to the ability to put ourselves in the Others’ position, imagining how such position feels like.

The subject made its way – the Court of Justice used to uphold, in earlier times, namely before 1969, that it was not within its role to apply or interpret general principles, relying on the defence or enforcement of such principles by other European or state authorities. The *Internationale Handegellschaft* judgement marked a turning point.

As Judge Cunha Rodrigues already stressed, the establishment of the primacy principle has transformed the previous concept – firstly, because there were actual Community legislative or regulatory measures which could not be repealed or, due to their nature, could not be interpreted by national law; secondly, because fundamental rights effectively fell within the Community’s framework and objectives,² in the sense that

¹ Steven Pinker, *The better angels of our nature*, (New York: Penguin Books, 2011), 693.

² José Narciso Cunha Rodrigues, “The incorporation of fundamental legal rights in the Community legal order”, in Miguel Maduro and Loïc Azulai, *The past and future of EU Law*, (Oxford: Hart Publishing 2010).

primacy cannot disregard the individual rights laid down by the Member States' national constitutions.

Nevertheless, it took some time to arrive at the point where fundamental rights were considered as more than integration tools and were finally taken as subjective, individual rights which should, as such, prevail within the Community. Having as a foundation not only the Member States common constitutional traditions (precedent set in 1969), but also the International Treaties for the protection of human rights to which the Member States were signatories (since 1974, in the *Nold* judgement, the Court of Justice expressly refers to judgements of the European Court of Human Rights, and, since 1990, it includes such rulings in its own precedent).

This did not invalidate the concept that «the objectives pursued by the Community» could constitute a limit to fundamental rights, for the legal precedent needed to make way for the establishment of the principles of primacy and direct effect. However, from very early on, there were two boundary conditions to the interpretation of Community law: the respect for the essence of fundamental rights and for the proportionality principle. In the *Nold* judgement, for instance, it was held that the fundamental right to property and the right to pursue a professional activity are prerogatives which should be limited by their social function, provided that most of their essence remains unaffected.³

Subsequent judgements settled an «equivalent protection» principle and, later on, the «highest level of protection» principle, uniting the Court of Justice to national jurisdictions and establishing a fundamental rights protection and enforcement principle surrounding the then Community legal order, i.e., comprising the known capacity for dialogue between constitutional traditions and the Courts themselves, along the line of the principles established by the Strasbourg Court.

The full consolidation and validity of individual rights in the enforcement of Community law transformed the nature of economic freedoms, as mentioned by Judge

³Takis Tridimas, "Primacy, fundamental rights and the search for legitimacy", in Miguel Maduro, and Loïc Azulai, *The past and future of EU Law*, (Oxford: Hart Publishing, 2010), 99.

Cunha Rodrigues:⁴ on one hand, by enhancing their social impact, and on the other, by deepening the subjective dimension of economic freedoms.

The first practical effect of this case law⁵ was an almost imperceptible, although significant, shift in power between courts, from the higher courts of the Member States to the Court of Justice, strengthening the legitimacy of the latter. The second was found in the functionalistic strengthening of the Community before the Member States, and of the Court of Justice before other Community authorities. At last, the reiterated path for the control of the compatibility of strictly national laws with Community law was found, i.e., without the mediation of an interstate or cross-border dispute on that intervention.

The judicial tradition initiated in the *Internationale Handgesellschaft* and *Nold* judgements then functionally culminated in the creation and development of the Charter of Fundamental Rights of the European Union (adopted in Nice in 7 December 2000). On the other hand, through the constitutionalisation of fundamental rights, this enhanced the primacy principle (for which judgements such as *Factortame*, *Francovich* or *Simmenthal*, among others, were instrumental), paved the way for a principle of weighting of rights and also for the arrival of other fundamental rights of political, social, cultural and economic nature, as well as the deepening of Union law in areas such as consumer or environmental law, and finally in issues related to new technologies, such as bioethics.

As Judge Cunha Rodrigues⁶ correctly points out once again, the legal and institutional establishment of fundamental rights within the Union has made the concept of «citizenship» into the new benchmark and centre of gravity in judicial practice, resulting in what the author called a «constitutional arch», diverting the Community's attention from the mere construction of an «internal market».

⁴ José Narciso Cunha Rodrigues, "The incorporation of fundamental legal rights in the Community legal order", 96-97.

⁵ Takis Tridimas, "Primacy, fundamental rights and the search for legitimacy", 99.

⁶ José Narciso Cunha Rodrigues, "The incorporation of fundamental legal rights in the Community legal order", 97.

Currently, Article 2 of the Treaty on European Union, in the Lisbon wording, expressly recognises that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, rule of law and the respect for Human Rights, including the rights of persons belonging to minorities; values common to the Member States, in a society characterised by pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women.

Followed by the express recognition, in Article 6, of the rights, freedoms and principles laid down in the Charter of Fundamental Rights of the European Union, annexed to the Treaty and with the same legal value as the latter. Article 6 lays down penalties for Member States which depart from the values referred to in Article 2.

As Takis Tridimis alluded to, today it can be said that the Court of Justice and the European Court of Human Rights share the same liberal background topics, a vision of democracy as not merely procedural, i.e., a majority rule through free elections, but, above all, with respect for the individual rights to be different, tolerance, pluralism and open-mindedness, i.e., democracy as a right to be different and unrestricted acceptance of others.

In recent years, the progressive widening of Community responsibilities in the area of internal security and justice, led to the enlargement of the Court of Justice's supervision in issues such as security and justice and, thus making these matters open to the vision permeated by fundamental rights, in such a manner that, within the Court's jurisdiction, it is safe to say that the level of protection will extend to fundamental rights.

II

At a time when the European Union endures a crisis – although that has been the case since its inception, as mentioned by Jean Monnet (*«j'ai toujours pensé que l'Europe se ferait dans la crise et qu'elle serait la solution donnée à ces crises»*)⁷ –, we should ask whether the role of fundamental rights will change, in times whereby the survival of the Euro remains uncertain.

⁷ *Apud* Olivier Blin, «Les crises de la construction Européenne», in *Crises et Droit*, (Toulouse:2010), 247.

Crises lead to migration – raising questions for nationals and non-nationals, which we wish to overcome through the creation of Union spaces. Consequently, the crisis leads to the restriction of emigrants' rights and to the differentiation between nationals and non-nationals, as has been the case in certain national legislations. In the analysis of the Nation-State crisis, as a state exclusively for 'nationals', we can find one of the most exciting parts of the reasoning of one of the great intellectuals of the XX century, the expatriate Hannah Arendt. But let us turn the page.

Obviously, when it comes to fundamental rights, they are better suited for a plastic judicial enforcement regardless of whether, or the manner in which, they bound the legislator.

It is precisely in the judicial effort to soften, to alleviate, the legislative and normative tangle of the Union that we can envisage the need for a deepening of the fundamental rights theme.

The executive bodies of the EU do not escape the general political trend to regulate everything, certainly in response to societies in which the political demand, the demand for a good political performance, has become widespread.

The judicial practice does not intend to foster the complexity of solutions, but rather to achieve the fairest solution for each case, in view of the fundamental principles we share as a civilization – values which even take on a pre-legal dimension.

The deepening of the fundamental rights theme, as they have been judicially enforced, does not favour indiscriminate claims, founded on the exploitation of small rules or successively modified laws, and in favour of manipulated or self-victimized citizens at the altar of the body of legislation. To look from a fundamental rights standpoint is to find acceptance of all and for all, and to enhance the tolerance to the frustrations that life in society has in store for us.

From this standpoint, fundamental rights also have a say in the already mentioned «Euro crisis» – such an abstract matter, mediated by the banking crisis, the states, and the deficits, does not allow us to see the particular citizens hidden behind these major

institutions. A citizen who has suffered unlawful damages does not seem to deserve a different kind of solidarity than the one who is affected by unemployment, either by dismissal or by the lack of opportunities to find employment once again or to carry out a gainful occupation – especially today, when the service sector, to which the majority of graduates is dedicated to, has dwindle so much.

Bearing in mind the unity of the European legal area and fundamental rights, we can currently monitor the frivolous distrust with which Europeans face the validity of what was supposed to be the constitutional treaty, fuelled by the focus on successive enlargements. The enlargements, by weakening the European unity have also, at least temporarily, weakened the functional model of collective evolution, the essential European «*ethos*», and bolstered the intergovernmental model (as was somewhat revealed in the step back materialised in the Lisbon Treaty).

However, there is no alternative to the choices made by the peoples and their representatives.

We live in a time when the moderation quality of the judge calls for soft law, to the right to have rights, as a counterbalance to the insecurity of laws and policies.

At the same time, the reinforcement of the political dimension of the Union will contribute to the defence of the ‘Euro’ and also to the idea that Europe will not be, or does not necessarily have to be, 27 little exporting ‘Germanies’ – quite simply because such an occurrence is fairly unlikely and, for instance, vainly looked for in history.

«*Hélas*», the possibility of a true European ‘step backwards’ must not be ignored, in the sense that the present day Union borders might be reconsidered in order to give way to a ‘new Europe’ or ‘Europes’.

However, a relapse towards a Nation-State is unlikely – primarily because warrior patriotism has become a troublesome relic and tyrannies are hibernating, and at last due to the particular shape of the European Empire (as defined by Ulrich Beck, a freely consented empire, which does not conquer, but instead calls for integration), is a shape

better adapted to the velocity of the future in the contemporary world and, in general, to the present reality marked by globalisation.

Once again, we shall continue to favour the practical vision of Jean Monnet – *«Ai-je assez fait comprendre que la Communauté que nous avons créée n'a pas sa fin en elle-même? La communauté elle-même n'est qu'une étape vers les formes d'organisation du monde de demain»*.⁸

As always, the future remains open and, as in all human endeavour, it depends on the unpredictable – as the wisdom of the ancient Greeks already anticipated, it is not just a question of *«agon»*, but also *«alea»*.

To Judge Cunha Rodrigues and to those present here, many thanks for your generous attention.

⁸ *Apud* Olivier Blin, «Les crises de la construction Européenne», in *Crises et Droit*, (Toulouse:2010), 261.