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OVERVIEWS

NATIONAL IDENTITY AND EUROPEAN INTEGRATION: THE UNBEARABLE LIGHTNESS OF LEGAL TRADITION

TABLE OF CONTENTS: I. Introduction. – II. Legal Traditions and Fundamental Rights. – III. Legal Traditions and National Identity. – IV. Transgression and Response. – V. Legal Traditions ad Authority. – VI. Conclusion.

I. In an article introducing the concept of legal tradition, Patrick Glenn explicitly discusses the notion against the background of law and legal sources moving beyond the nation state. As this phenomenon unfolds, he defends the view that “we appear to need some other large organizing concept [...] providing normative support both for the law of the state [...] and law beyond the state”.¹ Distinguishing the notion of tradition from that of custom, he observes that “[t]radition derives from the Latin *traditio*, to pass over or on, originally indispensable as a means of proof of transfer or property”.² What is understood by the modern notion of tradition? Tradition refers to a specific kind of information: “information that meets the test of what T.S. Eliot called ‘pastness’, an imprecise period of time that converts raw data into something qualitatively different”.³ Importantly, the notion of pastness “implies obligation – not ‘binding’ obligation but persuasive obligation”.⁴ Hence, we think of tradition as representing normative information, and legal traditions as a specific subgenre of this notion.

It seems apt to look at the present state of the European Union, a polity beyond the nation state, through the conceptual glasses of legal traditions. Framed in these terms, the key question is which role to assign to national legal traditions in the EU. What immediately comes to mind is the famous introduction of a reference to the constitutional traditions of the Member States by the CJEU in its case law on fundamental rights. This case law and more specifically the reasoning of the CJEU will be central to the next section of this article.

II. The notion of legal traditions found its way in the vocabulary of EU law not as a theoretical concept coined by an academic but as a notion invoked by the CJEU in what is

¹ H. PATRICK GLENN, *A Concept of Legal Tradition*, in *Queen's Law Journal*, 2008-2009, p. 427 *et seq.*

² *Ivi*, p. 430.

³ *Ivi*, p. 432.

⁴ *Ivi*, p. 436.

generally seen as a crucial line in its case law: the cases on fundamental rights. In the 1970s, the CJEU held that the institutions of the EC were all bound by fundamental rights.⁵ It is in these cases that the notion of legal traditions enters the scene of (then) EC law. The first of these judgments was in the case of *Internationale Handelsgesellschaft*.⁶ In this case, the German judge was asked to leave out of consideration a measure of EC law, since it was in conflict with fundamental rights enshrined in the German constitution. In this famous judgment, the CJEU recognized fundamental rights as part and parcel of the principles of EC law.⁷ Furthermore, the Court held that, in the absence of an EC charter of fundamental rights, it could find inspiration for these rights in “the constitutional traditions common to the Member States”, a phrase that we can now find in Art. 6, para. 3, TEU.⁸

If we take a closer look at the reasoning of the CJEU, we can see that it takes several steps in order to reach this conclusion. The Court, confronted with a case in which the uniformity and efficacy of EC law was at stake, held that such a case could only be decided by taking the perspective of EC law. Then, referring to the *nature* of EC law, as stemming from an independent source, it proceeds to argue that national law cannot set aside EC rules without putting at risk the legal basis of the whole Community. This, importantly, even holds for the highest national rules, those found in the constitutions of the Member States. In other words, taking up the situation of the Community as an independent, and thus autonomous, legal order, the CJEU was able to take the next step by taking its cue from “the constitutional traditions common to the Member States”, yet preserving *for itself* the ultimate decision what these traditions would mean in the case at hand. The danger of this approach is evident, as Craig and de Búrca noted in their comment on this case: “If the ECJ’s interpretation of the requirements of these principles differs significantly from the interpretation of the Member States which also guarantee their protection, the legitimacy of the Court’s adjudication is likely to be called into question”.⁹

Perhaps also for this very reason, the CJEU continued its search for other sources to tap. Some years later, it found another spring that could help feed the general principles of EC law. In the case of *Nold*, the Court argued that “international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the frame-

⁵ As they were decided before the existence of the EU, in this section I will speak of EC (law).

⁶ Court of Justice, judgment of 17 December 1970, case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

⁷ See also Court of Justice, judgment of 12 November 1969, case 29/69, *Stauder v. City of Ulm*.

⁸ “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

⁹ P. CRAIG, G. DE BÚRCA, *EU Law: Text, Cases and Materials*, Oxford: Oxford University Press, 2008, p. 383.

work of Community law [...]”.¹⁰ Notice that the CJEU holds that it should respect the constitutional traditions common to the Member States. The new element in this case is obviously the reference to international treaties signed by the Member States. Just as national constitutions, these may form guidelines for the Court when asked to decide a case concerning fundamental rights. In 1979, the CJEU further elaborated on this approach when it had to take a decision in the case of *Hauer*.¹¹ In a conflict concerning the right to property, the Court clarified its earlier case law, while bringing into the limelight the fundamental issue underlying its case law on human rights. The CJEU starts by reiterating its judgment in the case of *Handelsgesellschaft*. However, it chooses sharper wording to emphasize the risk posed by national courts reviewing EC measures by their own (national) fundamental rights standard. This would damage the “substantive unity and efficacy of EC law” and “destruct the unity” of the market, while putting at risk the “cohesion” of the Community. After referring to the case of *Nold*, the Court returns to these risks for Community law and includes an explicit reference to the European Convention on Human Rights (ECHR).¹² The principles of EC law thus include those fundamental rights that are to be found in the ECHR, and the constitutional traditions common to the Member States.¹³

There is, however, something strange happening here. For, from which perspective are those constitutional traditions to be seen as constituting a “common” heritage, a source shared by the Member States that can subsequently be used by the CJEU as an inspiration for the EC general principles? Surely, only from a particular vantage point do the traditions of the Member States appear as “common”. The CJEU, confronted with a threat to the unity and efficacy of EC law, the unity of the market and the cohesion of the Community, is put in the specific situation of recognizing human rights as a part of the general principles of EC law. It, moreover, does this in a very specific way. While emphasizing the autonomy and independence of these EC principles, at the very same time, the CJEU takes its bearing from the rights found in international agreements, and the constitutional traditions common to the Member States. In other words, while constituting fundamental rights as an integral part of EC legal principles, the CJEU lets itself be guided by what the Member States already hold in common.

And yet, there is more. The answer to the question posed at the beginning of the previous paragraph brings to light a circularity in the reasoning of the Court. Indeed,

¹⁰ Court of Justice, judgment of 14 May 1974, case 4/73, *Nold v. Commission*, para. 13.

¹¹ Court of Justice, judgment of 13 December 1979, case 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, paras 14-15.

¹² See also Court of Justice, judgment of 18 June 1991, case 260/89, *ERT*, para. 41 and Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, paras 283-285, where the CJEU calls respect for fundamental rights one of the “constitutional principles of the EC Treaty”.

¹³ See now Art. 6, para. 2, TEU.

only from the perspective of the CJEU, situated in a field where general principles of EC law are called upon in order to avert possible dangers to the integration process, do the constitutional traditions of the Member States appear as “common”. However, why then should the CJEU be the sole judge authorized to set aside EC law contradicting fundamental rights? What threats do national courts pose to the unity and cohesion of EC law, if they assess the compatibility of EC measures from “*common traditions*”? In what sense do national courts menace the unity of the market with “*special criteria for assessment stemming from the legislation or constitutional law of a particular Member State*”, if fundamental rights are exactly a part of traditions the Member States have *in common*? Here then is the circularity in the reasoning of the Court: the commonness of constitutional traditions is only to be found by the CJEU, if it presupposes a commonness of traditions. The Court’s reasoning is like the act of a magician pulling from its hat a rabbit that it has first put there itself.

III. The topic of national legal traditions in the EU has gained new momentum with the entry into force of the Lisbon Treaty and the new place the concept of national identity has in it. The national identity of a Member State is protected by Art. 4, para. 2, TEU, the so-called identity clause. This provision offers the perfect starting point to investigate the continuing importance of national legal traditions in the EU. Hence, in this section I will make an overview of this case law, trying to find out what role the identity clause plays in the EU and what this tells us about the fate of national legal traditions.

A discussion of the identity clause should begin with the European Convention, more precisely with the Final report of Working Group V on complementary competencies. This group of competences concerns those “national policy areas of significance for the identity of the Member States”.¹⁴ By a better allocation of competences, the Group aims to show the Union’s respect for certain core responsibilities of the Member States. This follows from the fundamental principle, the identity clause, then to be found in Art. 6, para. 3, TEU. Hence, the Group’s “purpose would be to provide added transparency of what constitutes essential elements of national identity, which the EU must respect in the exercise of its competence”.¹⁵ Indeed, by a clarification of the notion of national identity one could both safeguard the role of the Member States in the Treaty and grant them a certain amount of flexibility, without this provision being a general derogation clause.¹⁶ Ultimately, Working Group V arrives at the following recommendation: “The provisions contained in TEU Article 6(3) that the Union respects the national identity of the Member States should be made more transparent by clarifying

¹⁴ European Convention, Final Report of Working Group V of 4 November 2002, CONV 375/1/02 REV 1, p. 1.

¹⁵ *Ivi*, p. 10.

¹⁶ *Ivi*, p. 11.

that the essential elements of the national identity include, among others, fundamental structures and essential functions of the Member States notably their political and constitutional structure, including regional and local self-government; their choices regarding language; national citizenship; territory; legal status of churches and religious societies; national defence and the organisation of armed forces".¹⁷

Looking at the discussion on the identity clause, the first thing that attracts attention is that most commentators submit that national identity should be understood as national *constitutional* identity and that this notion refers to certain aspects of the national constitutions of the Member States which remain unaffected by EU law. This would make the identity clause an answer to the case law of several national constitutional courts.¹⁸ In this case law, constitutional courts have questioned the higher rank of EU law *vis-à-vis* national constitutions.¹⁹ They see the EU as an ordinary international organization and the Member States as Masters of the Treaties.²⁰ Accordingly, they maintain that EU law has no primacy over national constitutions and that they, the national constitutional courts, are the guardians of these constitutions. Yet, this claim contradicts a key doctrine of EU law. According to well-established case law of the CJEU, the EU forms its own, autonomous legal order claiming authority independent of its Member States.²¹ One of the principal consequences of this autonomy is the primacy of EU law, meaning that EU law has precedence over all law of the Member States, even national constitutions.²²

¹⁷ *Ivi*, p. 12.

¹⁸ T. KONSTADINIDES, *Constitutional Identity as a Shield and as a Sword: The European Legal Order within the Framework of National Constitutional Settlement*, in *Cambridge Yearbook of European Legal Studies*, 2011, p. 195 *et seq.*; A. VON BOGDANDY, S. SCHILL, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, in *Common Market Law Review*, 2011, p. 1417 *et seq.*; L. BESSELINK, *National and Constitutional Identity Before and After Lisbon*, in *Utrecht Law Review*, 2010, p. 36 *et seq.*

¹⁹ J.H. REESTMAN, *The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity*, in *European Constitutional Law Review*, 2009, p. 374 *et seq.*; W. SADURSKI, 'Solange, Chapter 3': *Constitutional Courts in Central Europe – Democracy – European Union*, in *European Law Journal*, 2008, p. 1 *et seq.*; M. CLAES, *The European Constitution and the Role of National Constitutional Courts*, in A. ALBI, J. ZILLER (eds), *The European Constitution and National Constitutions. Ratification and Beyond*, The Hague: Kluwer Law International, 2007, p. 235 *et seq.*; M. CLAES, *The National Courts' Mandate in the European Constitution*, Oxford: Hart Publishing, 2006; A.M. SLAUGHTER, A. STONE SWEET, J.H.H. WEILER (eds), *The European Court and the National Courts – Doctrine and Jurisprudence: Legal Change in Its Social Context*, Oxford: Hart Publishing, 1998.

²⁰ P. KIRCHHOF, *The Legal Structure of the European Union as Union of States*, in A. VON BOGDANDY, J. BAST (eds), *Principles of European Constitutional Law*, Oxford: Hart Publishing, 2005, p. 765 *et seq.*

²¹ See, among others: Court of Justice, judgment of 9 March 1978, case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*; *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*; Court of Justice, judgment of 15 July 1964, case 6/64, *Flaminio Costa v. E.N.E.L.*

²² See, among many others: B. DE WITTE, *Direct Effect, Primacy, and the Nature of the Legal Order*, in P. CRAIG, G. DE BÚRCA (eds), *The Evolution of EU law*, Oxford: Oxford University Press, 2011, p. 323 *et seq.*; M. AVBELJ, *Supremacy or Primacy of EU Law – (Why) Does it Matter?*, in *European Law Journal*, 2011, p. 744 *et seq.*

What interests me here is first and foremost the reasoning of the CJEU in the cases on the identity clause. While this case law does not solve the authority problem sketched above, it does show in what way the CJEU deals with national legal traditions in the EU on a day to day basis. At this moment, it is mostly Advocates General who have referred to the identity clause in their Opinions. An important number of these cases was concerned with language. For instance, Advocate General Maduro argued as follows in his Opinion in *Spain v. Eurojust*: “Respect for linguistic diversity is one of the essential aspects of the protection granted to the national identities of the Member States, as is apparent from Article 6(3) EU and Article 149 EC”.²³

In his Opinion in the case of *Michaniki*, Maduro even puts the respect for national identity at the very heart of European integration: “It is true that the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States”.²⁴

Discussing some case law, Maduro identified several functions a reference to national identity might fulfil. First of all, a Member State may invoke national identity as a ground for derogation from the applications of the fundamental freedoms. In this respect, he called to mind that the preservation of national identity “is a legitimate aim respected by the Community legal order”.²⁵ Secondly, national identity may be relied upon by a Member State in order “to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement”.²⁶ This would entail a broad discretion for the Member States to develop its own standards. Thirdly, a Member State may also rely on national identity “to justify its assessment of constitutional measures which must supplement Community legislation in order to ensure observance, on its territory, of the principles and rules laid down by or underlying that legislation”.²⁷ Yet, Maduro also stresses that the preservation of national identity does not constitute the absolute right for a Member State to diverge from EU law. Indeed, national constitutional law and the European legal order should mutually take into account each other’s requirements. Moreover, derogations from a fundamental freedom should be proportionate and are subject to judicial review.

M. KUMM, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, in *European Law Journal*, 2005, p. 262 *et seq.*

²³ Opinion of AG Poiares Maduro delivered on 16 December 2004, case C-160/03, *Kingdom of Spain v. Eurojust*, para. 24.

²⁴ Opinion of AG Poiares Maduro delivered on 8 October 2008, case C-213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias*, para. 31.

²⁵ *Ivi*, para. 35 (referring to Court of Justice, judgment of 2 July 1996, case C-473/93, *Commission v. Luxembourg*).

²⁶ *Ivi*, para. 32.

²⁷ *Ivi*, para. 33.

In its judgment in the case of *Sayn-Wittgenstein*, the CJEU itself stated that the Austrian Law on the abolition of nobility had constitutional status and was meant to foster equal treatment. As such, it could “be taken into consideration when a balance is struck between legitimate interests and the right of free movement of persons recognized under European Union law”.²⁸ The justification of the Austrian government was read by the CJEU as one of public policy. The Court stressed that this notion should be interpreted strictly, only to be allowed as a legitimate interest when “there is a genuine and sufficiently serious threat to a fundamental interest of society”.²⁹ While Member States have a margin of discretion here, any measure should always pass the proportionality test. In this case, the CJEU deemed the restriction not disproportionate.³⁰

In the case of *Runevic*, the Lithuanian government argued for the protection of the Lithuanian language as “a constitutional asset which preserves the nation’s identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities”.³¹

Answering to this plea, the CJEU stressed that the protection of the national language falls under the identity clause.³² However, it reiterated its well-known case law concerning restrictions on one of the fundamental freedoms: these measures can be justified “by objective considerations only if they are necessary for the protection of the interests which they are intended to secure and only in so far as those objectives cannot be attained by less restrictive measures”.³³ It remains, however, the responsibility of the national court to strike a fair balance between the interests involved in the case at hand.³⁴

In the case of *O’Brien*, the CJEU rejected the Latvian Government’s claim that “the application of European Union law to the judiciary has the result that the national identities of the Member States are not respected, contrary to Article 4(2) TEU”.³⁵ In his Opinion in the case of *Las*, Advocate General Jääskinen reiterated the bond between national identity and language. He makes the following distinction in this regard: “The concept of ‘national identity’ therefore concerns the choices made as to the languages

²⁸ Court of Justice, judgment of 22 December 2010, case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, para. 83.

²⁹ *Ivi*, para. 86.

³⁰ *Ivi*, para. 93.

³¹ Court of Justice, judgment of 12 May 2011, case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, para. 84.

³² *Ivi*, para. 86.

³³ *Ivi*, para. 88.

³⁴ *Ivi*, para. 91.

³⁵ Court of Justice, judgment of 1 March 2012, case C-393/10, *Dermod Patrick O’Brien v. Ministry of Justice, formerly Department for Constitutional Affairs*, para. 49. The legislation discussed was Directive 97/81/EC of the Council of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC and the Framework Agreement on part-time work.

used at national or regional level, whereas the concept of ‘linguistic diversity’ relates to the multilingualism existing at EU level”.³⁶ In his Opinion in the case of *Melloni*, Advocate General Bot argued that in this particular case the identity clause played no part, since the national identity of Spain was not affected.³⁷ Yet, Bot stresses that “the taking into account of the distinctive features of the national legal orders is part of the principles which must guide the construction of an area of freedom, security and justice”.³⁸ The joint approach taken by the Member States with regard to the execution of judgments rendered *in absentia* is “compatible with the diversity of the legal traditions and systems of the Member States”.³⁹

IV. What to make of the cases discussed in the last two sections? I submit that what we witness here is a specific kind of reasoning of the CJEU and its Advocates General which may be characterized through the double strategy of transgression and response. It is easiest to start with the latter demand. The reasoning of the CJEU is *responsive* in the sense that it explicitly tries to tie in with national constitutional traditions. Not only is the CJEU handing over something, it also acknowledges that what it is handing over finds its origin in another source than EU law, namely in the constitutions of the Member States. The CJEU is thus responsive because it answers the call of someone else. Yet, this is only one half of the story. The CJEU does not simply respond to a question, or rather, responding it, the Court (or its Advocates General, for that matter) exhausts the question and adds a new element. Indeed, the Court *transgresses* the boundaries of EU law as they were known until then. Before the cases discussed in section 3, it was – to say the least – unclear whether or not the EU was actually bound by fundamental rights. After this case law, the EU is not only bound by rights enshrined in national legal traditions but also by those to be found in the ECHR. The CJEU thus goes beyond the *status quo* as represented in the established interpretation of positive law. The Court does not only interpret national legal traditions, it also adds to them. Something similar may be said about the cases and Opinions on the identity clause. While a reference to national legal traditions is made, these traditions are immediately encapsulated in the context of EU law.

Why would this be paradoxical? This becomes clear when we take into account that transgression and response are two sides of one and the same coin.⁴⁰ This must be understood in the following sense. The CJEU can only be responsive by transgressing: only

³⁶ Opinion of AG Jääskinen delivered on 12 July 2012, case C-202/11, *Anton Las v. PSA Antwerp NV*, para. 59.

³⁷ Opinion of AG Bot delivered on 2 October 2012, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, para. 140.

³⁸ *Ivi*, para. 143.

³⁹ *Ivi*, para. 145.

⁴⁰ For an extensive analysis of this paradox in the case law of the CJEU, see: L. CORRIAS, *The Passivity of Law: Competence and Constitution in the European Court of Justice*, New York: Springer, 2011.

by going beyond a given tradition, the Court can be faithful to it. For a tradition to remain living it needs to be invigorated with new life time and again. The transgression of the CJEU does exactly that: by going further than the established interpretation, the Court breathes new life in a national legal tradition. Yet, the transgression should always remain responsive: as a judge the CJEU is bound by the sources handed over to it. It may only successfully transform them as long as its interpretation remains recognizable as a reinterpretation of what was already there. In other words, no tradition is handed over by acts of pure creation. Hence, there is only transgression through response, only response through transgression. The CJEU, while handing over national legal traditions, founds a tradition of its own, the European legal tradition. This seems to be the paradox of legal traditions in the EU.

V. What to make of this paradox? In order to analyze what is at stake here, in this section I will look into the theoretical foundations of the concept of a legal tradition. A good starting point for a theoretical inquiry into the concept of legal tradition is the question, explicitly posed by Glenn, how traditions operate over time. He distinguishes three stages. The first moment is called the initial capture of information.⁴¹ With this initial capture, a tradition is born. The second moment is one of use or application: "This means there has developed, as the process goes on, a *living* tradition, as opposed to a simple deposit of information that may have become lost, or buried over with sand, or burned, or eaten by moths".⁴² Finally, the third and, according to Glenn, most interesting feature is the excavation of tradition: "revival is always possible, and the concept is vitally important for those struggling to retain identity and entitlement in a hostile world".⁴³

Using the concept of legal tradition, Glenn argues, has huge advantages in terms of inclusiveness. It allows us to understand non-state law as law.⁴⁴ Furthermore, legal traditions are also inclusive of state law: the concept of legal tradition is "not only compatible with state law; it is the only possible justification for it".⁴⁵ There is, moreover, another feature of legal traditions that makes them extremely interesting in the context of the EU. Different from the notion of law, the concept of legal tradition has a highly reconciliatory ability: "If law conceived as system yields facts, silence and conflict, law conceived as tradition (as normative information) must yield normative claims, discussion and dialogue, as well as the possibility of reconciliation".⁴⁶ In one phrase which sounds like heaven on earth for any adherer of (constitutional) pluralism, Glenn tells us that

⁴¹ H. PATRICK GLENN, *A Concept Legal Tradition*, cit., p. 432.

⁴² *Ibidem*.

⁴³ *Ivi*, p. 434.

⁴⁴ *Ivi*, p. 438.

⁴⁵ *Ivi*, p. 440.

⁴⁶ *Ivi*, p. 442.

"[t]he concept of a legal tradition allows for [normative engagement, as opposed to hierarchical dominance".⁴⁷

In order to grasp what is theoretically at play in a discussion of national legal traditions in the EU, I propose to make a distinction between two types of authority associated with legal traditions. I discern the authority *of* legal traditions from the authority *over* legal traditions. The former type designates the authority we usually associate with traditions. In other words, the authority of legal traditions points to the fact that legal traditions are authoritative. One can only call something a legal *tradition* if it actually counts as authoritative in a certain legal order. The other form of authority, the authority over legal traditions, points to the power to create, call into being or initiate a legal tradition, or to change it. I take it that all legal traditions we recognize today were once founded or indeed invented. The notion of an invented tradition points to a moment of invention, or in the vocabulary of Glenn: a moment of capture. Now, the authority over legal traditions is used to grasp this power to invent.

It is important to notice that the relationship between both types of authority is of a paradoxical nature. On the one hand, there is an obvious primacy of the authority over legal traditions *vis-à-vis* the authority of legal traditions. As the authority over legal traditions is the power to found or change a legal tradition, it *precedes* the authoritative character of a tradition in time. Yet, this is only half of the story. The act of founding a tradition does not take place *ex nihilo*. Like any act of initiation, inventing a tradition is done by seizing the initiative. Not only must a *beginning* be made, a beginning must also be *made*. As Hans Lindahl rightly argues, making a beginning in law is always done through acts representing an interested collective: "Whoever seizes the initiative to found a polity must claim to legislate in the name of a collective, attributing her/his act to a group. In this sense, initiatives are never simply *ex nihilo*. Attribution always involves both a *representational* claim, the evocation of a collective ground of acts of setting legal boundaries, and a representational *claim*, the evocation of a collective ground that can be contested, validated or rejected".⁴⁸

This claim needs to be taken up by others in order to be successful. But at the moment that it is made, such a claim can only *anticipate* the authority of the legal tradition initiated. In other words, and this is the full paradox, while the authority of legal traditions refers to the authority over legal traditions, the authority over legal traditions in its turn refers to the authority of a legal tradition.

We can now return to Glenn's claim that the great advantage of legal traditions is that they allow normative engagement, instead of hierarchical dominance. How to assess this claim in the light of what we have written on authority? Glenn seems to think

⁴⁷ *Ivi*, p. 443.

⁴⁸ H. LINDAHL, *Law's 'Uncanniness': A Phenomenology of Legal Decisions*, in *Netherlands Journal of Legal Philosophy*, 2008, p. 141 *et seq.*

of a (legal) tradition as something authoritative of itself. In this way, he is unable to grasp the two different forms of authority involved in legal traditions. Yet, as we have argued, the authority to found a tradition is never simply part of the tradition founded. In other words, the authority over legal traditions can never be reduced to the authority of legal traditions. As a consequence, the concept of legal traditions is valuable as far as it goes. Yet, it cannot be used to bypass the question of authority. This means that this question, and thus the question of sovereignty in the sense of the ultimate authority in a legal order, remains to be answered.

VI. In this article, I have analyzed the language of legal traditions in the context of the EU. While the notion of legal tradition was introduced by the CJEU in its case law on fundamental rights, the concept recently returned in the cases of the Court and the Opinions of the Advocates General on the so-called identity clause. In these cases, the CJEU and the Advocates General time and again argued in a paradoxical way, both responding to the traditions of the Member States and transgressing them in order to build a European legal tradition. This paradoxical way of reasoning can be understood through the categories of the authority *of* legal traditions and the authority *over* legal traditions. More than 20 years after it was first posed, Bruno de Witte's question at the end of his article *Sovereignty and European Integration: The Weight of Legal Tradition* remains all too true: "How should one order the complex web of legal relationships in Europe today without the help of the principle of sovereignty determining where final authority, in the case of conflict, lies?"⁴⁹ The concept of a legal tradition is necessary in the EU to mitigate between EU level and Member States. But with the 'eternal return' of this notion, the question of authority and sovereignty in the EU does not fail to return either. It is this latter question which remains at the very center of any discussion on the boundaries, competences and identity of the European Union – especially in times of Brexit and Disintegration.

Luigi Corrias*

⁴⁹ B. DE WITTE, *Sovereignty and European Integration: The Weight of Legal Tradition*, in *Maastricht Journal of European & Comparative Law*, 1995, p. 173.

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