

Editorial note

Stephen Weatherill*

**DISTINCTIVE IDENTITY CLAIMS, ARTICLE 4(2) TEU
(AND A FLEETINGLY SAD NOD TO BREXIT)**

Of all the academic journal articles that I have read in 2016 none has pushed me to think harder about EU law than one which does not mention EU law at all. It is 'Distinctive Identity Claims in Federal Systems: Judicial Policing of Subnational Variance' by Antoni Abat i Ninet and James A. Gardner.¹ The title, focusing on 'distinctive identity claims, captures vividly what the article's main concern is (which is not always the case). Subnational units possess a range of techniques and strategies for asserting their claim to distinctive treatment within the wider federal arrangement. There must, however, be limits to their latitude to go their own way – without such limits, the foundations of the federal system will crumble. The article examines a group of rulings by national constitutional courts which involve refusal to grant distinctive treatment on the terms claimed by a subnational unit. These rulings, the authors claim, reveal *judicial* anxiety to protect the state against attempts to subvert its (national) authority, even if, as they show, the legislature and/or the executive of the State concerned might be noticeably more accommodating to the claims advanced.

Their case studies are five: France / Corsica, Spain / Catalonia, Italy / Sardinia, USA / Texas, and Canada / Quebec. In France, the Conseil constitutionnel in 1991 invalidated a French law expressing the distinctive cultural identity of Corsica on the basis that it represented a threat to national unity; in Spain, the Constitutional Court in 2010 found subtle ways to suppress radical claims to distinctive treatment expressed in a Catalonian Statute of Autonomy; a similar fate met a Sardinian Statute of Autonomy in 2007 when it was tested before the Italian Constitutional Court; in 1868, shortly after the end of the Civil War, the US Supreme Court rejected a claim that Texas could choose to secede from the Union by asserting its distinctive southern identity; much more recently the Supreme Court of Canada ruled against the existence of a unilateral right to secede from the Canadian federation enjoyed by the province of Quebec.

The problem is, broadly, how to address a claim to promote local preferences ahead of the integrity of the wider political unit. The problem in EU law is the same. The answers are different. Of course they are dif-

* University of Oxford, Jacques Delors Professor of European Law.

¹ (2016) 14 International Journal of Constitutional Law 378.

ferent. The EU is not a State. Its judicial and legislative authorities do not and cannot command the same level of obedience that the central authorities in a State can and do. This is the point. It is most of all Article 4(2) TEU that gives room for expression of the EU's unique mission in the light of the types of 'distinctive identity claims' which are from time to time made by or in its Member States.

Article 4(2) TEU directs that 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government ...'. It is a 'beefed up' version of a provision that, prior to the reforms effected by the Treaty of Lisbon in 2009, read more softly that 'The Union shall respect the national identities of its Member States'. This was Article 6(3) TEU.

The Court's case law in which Article 4(2) TEU has been invoked is intriguing. As a general observation, Article 4(2) asserts that *as a matter of EU law* certain values recognised and protected under national law shall be defended from intrusion by the homogenising and centralising potential of the EU. Article 4(2) TEU stands not simply as a means to protect diversity among the Member States in so far as the Member States should aspire to such diversity: it promotes pluralism as an EU value. It seeks to mediate the claims to authority of the EU and those of the Member States in a situation in which, unlike in France or in Spain or in Canada, there really is no single authoritative location of national political power that demands to be defended. The Court of Justice has to perform a structurally similar job to that pressed on its national counterparts when they are asked to adjudicate 'distinctive identity claims' in the context of 'subnational variance', to use the terms favoured by Antoni Abat i Ninet and James A Gardner, but in the EU the context is different and more sensitive, because the variance is usually national, not subnational, and the centralised adjudicating institutions are transnational in character, not national.

Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien offers a splendidly vivid example.² The litigation which provoked the preliminary reference in the case was generated by a difference dating as far back as 1919 between Austria, which forbids use of noble titles, and Germany, which has eliminated associated privileges but still permits parts of the noble title to be retained in a person's surname. The applicant was known in Germany as Ilonka Fürstin von Sayn-Wittgenstein. She was advised that in Austria her name had to be slimmed down to Ilonka Sayn-Wittgenstein. This, the Court agreed, amounted to a serious inconvenience to her commercial activity: which, nobly enough, was the sale of

² Case C-208/09 [2010] ECR I-13693.

castles. So, in line with orthodox EU law, the question was whether the Austrian restriction on Ilonka's freedom could be considered justified. The Court was openly receptive to the virtue of the *Austrian* concern, reflected in its legal system, to abolish noble titles in the service of equality of citizens before the law, but it chose to convert this ambition into an *EU* concern. The Court was anxious to permit national authorities a 'margin of discretion'.³ It referred to Article 20 of the Charter of Fundamental Rights, which concerns equality, and it added that in accordance with Article 4(2) TEU the Union is to respect the national identities of its Member States and that it did not appear disproportionate for a Member State to seek to attain the objective of protecting equal treatment by prohibiting use of titles of nobility.⁴ It was on similar terrain more recently when it decided *Nabiel Peter Bogendorff von Wolffersdorff*.⁵ The applicant was a British/German dual national working as an insolvency advisor in London. His full name, duly registered in the UK, was Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff, although he was originally known as Nabiel Bagadi. The German authorities refused to register the name he chose to use in the UK as a result of the (certainly rather complex) German laws limiting the use of noble titles. It was *Graf* (Earl) and *Freiherr* (Baron) to which the authorities in Germany objected. A preliminary reference was made to Luxembourg. The Court of Justice, interpreting Articles 18 and 21 TFEU, found that the refusal constituted a serious inconvenience to the applicant and so it counted as a 'restriction' within the meaning of EU law. The only justification that is addressed with any degree of seriousness by the Court is that concerned with suppressing use of noble titles in the cause of equality. Variation between Member States and room for discretion is admitted by the Court. Advocate General Wathelet had, however, expressed a clear view that the rules should be treated as unjustified, but the Court chose to be much softer in its treatment of the German practices. The judgment conveys a sense that the German practices could be regarded as disproportionate,⁶ but, 'unlike' in *Sayn-Wittgenstein*,⁷ the Court was content to leave the assessment to the referring national court. It added explicitly that in accordance with Article 4(2) TEU 'the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic'.⁸

³ Para 87.

⁴ Paras 92-93.

⁵ Case C-438/14 *Nabiel Peter Bogendorff von Wolffersdorff*, judgment of 2 June 2016.

⁶ Paras 79-83.

⁷ Para 78.

⁸ Para 73.

Article 4(2) TEU is a highly significant statement of respect for the national identities of the Member States as a value recognised by and embedded in the law of the European Union. It would, however, be an error to suppose that Article 4(2) TEU was radically transformative. Even before the entry into force of the Lisbon Treaty in 2009 one could find examples of how EU economic freedoms might clash with national-level protection of social and political rights, and, even without the concrete direction provided by Article 4(2) TEU, the Court was certainly not imperious to the proper place of such concerns in the development of the law. *Omega Spielhallen* provides the best illustration.⁹ The dispute at stake in *Omega Spielhallen* involved a ban on ‘Laserdrome’, which is a game involving simulated killing. The intervention, driven by the Bonn police authority, was motivated by protection of human dignity, a value that is constitutionally protected in Germany. This was a restriction on the free movement of services (originating in the United Kingdom). The Court had ‘no doubt that the objective of protecting human dignity’ was compatible with EU law and added that it was ‘immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right’.¹⁰ So, on this approach, what was at stake was *not* EU free movement law versus German protection of human dignity, but instead EU free movement law versus EU protection of human dignity. That is, EU law itself respected the concerns motivating the action taken by the Bonn police authority. Today the Court could readily confirm this approach by citing Article 1 of the Charter of Fundamental Rights, which declares human dignity ‘inviolable’, and it could also rely on Article 4(2) TEU to explain the importance of the EU as a site of respect for national identity claims. But the point is that even well in advance of these innovations of the Lisbon Treaty, the Court in *Omega* found a way to ensure that German anxieties about the damaging effect of trade integration on fundamental rights were accommodated as EU anxieties that were apt to mitigate the deregulatory cutting edge of free movement law. So Article 4(2) TEU captures the idea that national constitutional sensitivities form a proper part of the assessment of whether trade-restrictive practices are justified – but not because they are *national* constitutional sensitivities, but rather because they are constitutional sensitivities. They are absorbed at EU level – and even before the entry into force of the Lisbon Treaty in 2009 they were so absorbed.

This is the EU version of protection of ‘distinctive identity claims’. Sometimes those claims are advanced as national in character, as in *Sayn-Wittgenstein* and in *Nabiel Peter Bogendorff von Wolfersdorff*. But Article 4(2) TEU is not so limited. In *Omega Spielhallen* it was the Bonn

⁹ Case C-36/02 [2004] ECR I-9609.

¹⁰ Para 34.

police authority's interpretation of the German constitutional value of human dignity on which the ruling rested, and in Bonn they were a great deal more fastidious about such matters when compared with most of the rest of Germany where 'Laserdrome' was freely available, but the Court did not at all suggest that the relatively localised sensitivity involved should deprive the public authority of its ability to advance a 'distinctive identity claim' recognised by EU law. In fact, national identity may itself – as a national value – be sub-divisible. In *Digibet*, the Court, citing Article 4(2) TEU, agreed that Germany could defend restrictions on gambling as consistent and coherent, even where the Länder in fact apply different rules within Germany across a rather wide spectrum of tolerance.¹¹

Article 4(2) TEU acts as a gateway through which national and sub-national concerns pass and are transformed into specifically EU concerns. It does not of itself provide answers to questions about competing values – it provides a framework within which to seek those answers. It is a way to mediate claims of EU law which tend towards homogeneity and centralisation and claims of national identity that tug towards fragmentation – and to nudge in the direction of a managed resolution that yields pluralism and mutual respect. In this way, EU law itself accommodates space to advance distinctive identity claims. But this cannot and should not mean an automatic subjection to a State's appeal to its constitutional values in circumstances where that State's practices obstruct inter-State trade. Such a radically softened test of justification would fatally undermine the aim of constructing an internal market and, deeper still, it would threaten the EU's own values. Put another way, there must be a limit to the successful invocation of a distinctive identity claim in the EU. A quality check on what defence of national identity entails is required. This is best achieved by linking Article 4(2) TEU, as an EU – not a unilaterally national – understanding of national identity to the EU's own values expressed in Articles 2 and 3 TEU. So, as Siniša Rodin has put it in the pages of this *Yearbook*, a State must not be allowed to rely on Article 4(2) TEU as a basis to protect national identity in circumstances that would in substance contradict the EU's own values.¹² The Court needs to be attentive in weeding out the transformation of feeble economic and social justifications into claimed protection of national identity, while also, as in *Omega* and *Sayn-Wittgenstein*, taking seriously more validly shaped distinctive identity claims. This is the limit but also the dynamic potential that is contributed to EU law by Article 4(2) TEU.

¹¹ Case C-156/13 *Digibet*, judgment of 12 June 2014.

¹² S Rodin, 'National Identity and Market Freedoms after the Treaty of Lisbon' (2011) 7 CYELP 11.

So, in sum, the EU – and not only its Court, but also its political institutions and its Member States too – should not be too reticent about asserting EU values when faced by ‘distinctive identity claims’. I hesitate to mention Brexit, but now I do so. There are many milestones on the road that led to the vote to leave the EU on 23 June 2016, but two in particular stand out as demonstrations of what can go horribly wrong when a State asserts its own exceptionalism and demeans the EU. One is immigration. One of the ways David Cameron made his political career was as a critic of the level of migration to the UK by nationals of other EU Member States. In particular, he periodically claimed that the UK’s generous welfare benefit system acted as a ‘pull’. Not only was there no evidence for this, in fact the evidence base tended in precisely the opposite direction: migrants from other Member States pay more tax than they take in benefits and moreover the pressure they exert on the benefit system is proportionately less heavy than that exerted by British nationals. Yet still Cameron demanded a ‘solution’ to this non-problem: and as part of the ill-fated renegotiation concluded in February 2016 at a meeting of the European Council he got it.¹³ The agreed (and now extinct) deal included a cautiously written section on access of migrants to social benefits, including a commitment to initiate a process leading to revision of particular pieces of secondary legislation. It was, in short, a ‘benefit brake’.¹⁴ Cameron should not have been surprised that this febrile equation of immigration with threat rather than opportunity led to many voters taking the easy route of choosing not to remain in the EU under conditions of cosmetically restricted migration but instead to leave the EU and – in the rhetoric of the referendum campaign – to ‘take back control’ over immigration completely. Cameron had aggressively presented the EU as a threat to national identity: what he should have done, in line with the above-mentioned reading of Article 4(2) TEU, is to present the national interest within the wider context of the EU’s values and its economic framework. So too in the case of the second ghastly mis-step that paved the way for Brexit: the question of the scope of EU activity. It has been common for decades for politicians of Cameron’s party (in particular) to criticise the EU for over-reach. In 2012, under the title *Review of the Balance of Competences*, the UK government announced an objective and in-depth investigation into whether the balance of competences between State and EU level is appropriate. A series of 32 documents covering a wide range of sectors was prepared and published by the British government in 2013 and 2014.¹⁵ The conclusion was clear: the balance

¹³ ‘A New Settlement for the United Kingdom within the European Union’ OJ 2016 CI 69/1.

¹⁴ See C O’Brien, ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) 53 CML Rev 937, 966-973.

¹⁵ The British Government, ‘Review of the Balance of Competences’ <<https://www.gov.uk/review-of-the-balance-of-competences>> accessed 30 October 2016.

of competences between the UK and the EU was broadly correct. Surely, one would think, this detailed myth-slaying would play a serious role in the campaign: for sure it would have done so had the findings been the opposite. Not so. Cameron ignored it. So (therefore) did the print and broadcast media. As a critical report published in March 2015 by the EU Committee of the House of Lords noted with unconcealed exasperation, the government had failed actively to publicise the findings of the *Review of the Balance of Competences*.¹⁶ Ministers had repeatedly informed the Committee ‘that the purpose of the Review is to ground the public debate on the EU on a strong evidence base’, but, as the House of Lords report drily notes, this is ‘an unrealistic aim, as long as the public are unaware of the Review’s existence’.¹⁷ Cameron was more concerned to avoid disturbing the comfortable narrative of the over-mighty EU than to engage with any defence of its virtues. And so the referendum was lost (and with it Cameron’s political career¹⁸). What was needed was to present the EU as (doubtless imperfect) success, not threat, but the chance was missed – the chance was deliberately avoided. For the UK the chance is now probably gone. Of course the UK did not vote to leave the EU because of a mishandling of Article 4(2) TEU, but the debate was corroded by a failure not only to promote national aspiration but also to locate its realisation within a wider transnational context of managed interdependence among European States. That is the spirit of Article 4(2) TEU. Other Member States and the EU institutions should take note. ‘Distinctive identity claims’ have their place in the EU, as they do in any system of power divided between different levels in the polity. But the virtues of the whole, and not only of the parts, need advertising and defending too. The EU’s means of doing so are more brittle than those of France, Spain, Italy, the United States or Canada. I concluded a book written and published shortly before the Brexit earthquake with a gloomy fear that citizens will come to see the EU as the cause of their problems, not a means to solve them, and that this ‘will tilt the momentum back to the apparently safe haven, and certainly better recognised site, of national level politics – and nationalism – but it will not make solving the problems any easier’. Instead it ‘will make blaming and causing harm to other Europeans easier ... a road too often travelled by Europeans through history’.¹⁹ That was (and is) the spirit of Brexit. Be careful. The EU is precious, but it is fragile.

¹⁶ HL Paper 140, 12th Report of Session 2014-2015.

¹⁷ Page 18.

¹⁸ He resigned as Prime Minister and by autumn 2016 he was no longer even a Member of Parliament, having resigned his seat.

¹⁹ S Weatherill, *Law and Values in the European Union* (OUP, Clarendon Law Series 2016) 419.